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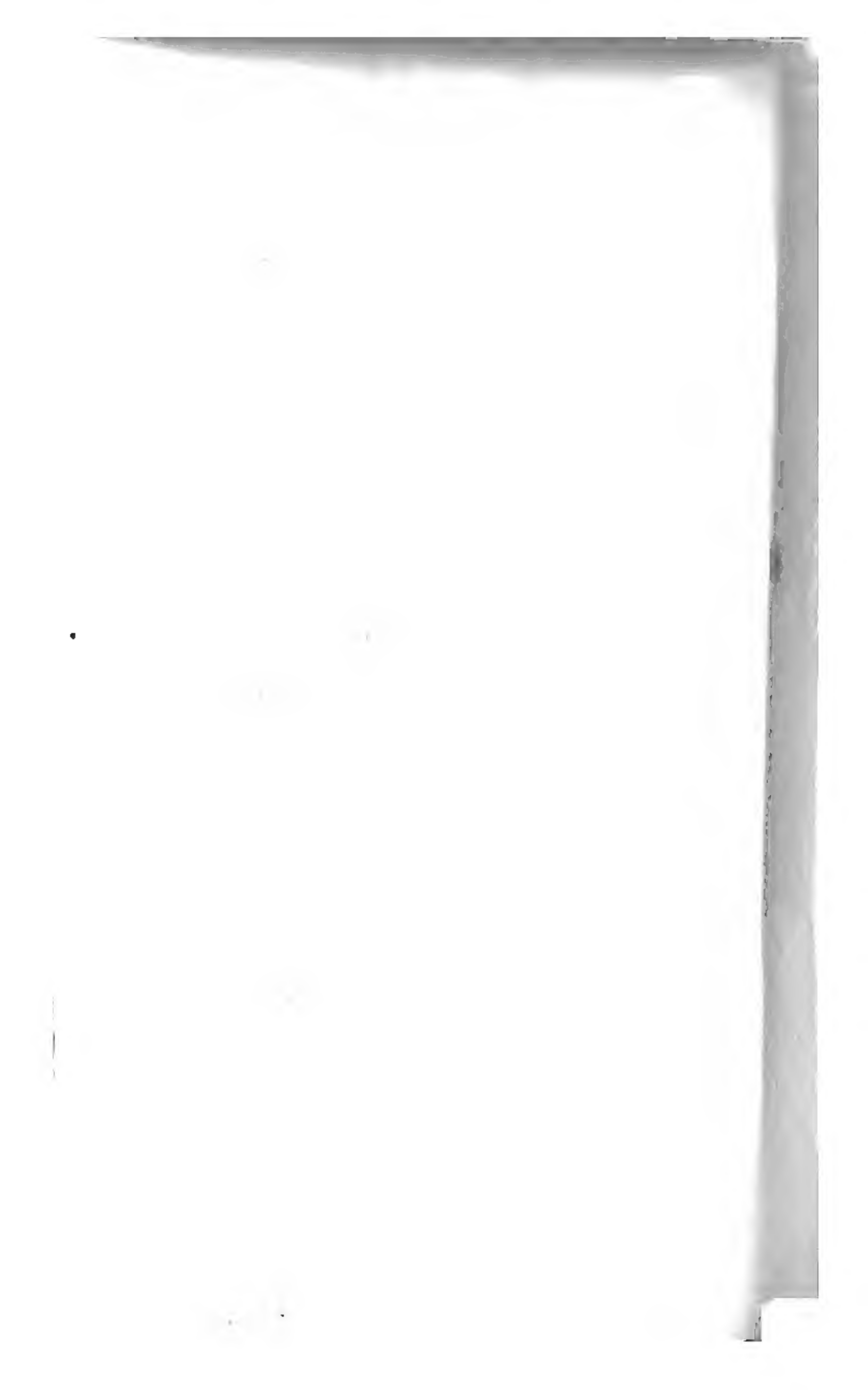
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**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN.

VOLUME 137.

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AMERICAN STATE REPORTS.

VOLUME 137.

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AMERICAN STATE REPORTS.
VOLUME 137.

CASES
IN THE
SUPREME COURT
OF
'ALABAMA.'

BIRMINGHAM RAILWAY, LIGHT AND POWER COMPANY v. GIROD.

[164 Ala. 10, 51 South. 242.]

DAMAGES.—The Measure of a Husband's Damages for personal injuries to his wife is the loss of her services and society. (p. 21.)

CARRIER—Negligence in Riding on Platform.—In an action by a passenger for injuries sustained while alighting from an electric car, a plea that she was guilty of contributory negligence proximately contributing to her injuries, in that she rode on the platform in violation of a rule of the carrier published in the car in such a way that she could have seen it, is insufficient, in that it does not show that she had notice of the rule nor allege causal connection between its violation and the injury. (p. 21.)

DAMAGES—Specific Allegations of Injuries.—In an action for personal injuries it is not necessary for the plaintiff to aver in specific terms each injury or pain suffered. The injury, its character and extent, may be sufficiently averred, without detailing or specifying each separately. (p. 21.)

DAMAGES—Pleading—Loss of Voice.—In an action by a husband for personal injuries to his wife, wherein he alleges that she was caused to fall with violence, received internal injuries, had her nervous system shattered, and was permanently injured, recovery may be had for the loss of her voice, though not specifically alleged. (p. 21.)

DAMAGES.—The Loss of a Wife's Voice through personal injuries is an element of damages suffered by her husband in consequence thereof. (p. 21.)

CARRIER—Passenger Alighting from Moving Car.—It is not negligence, as a matter of law, for a woman in the dark, encumbered with bundles, to step off an electric car in motion. (p. 22.)

DAMAGES—Cost of Treatment for Wife.—The measure of recovery, in an action by a husband for injury to his wife, for nursing and medical treatment, is the reasonable value of the cost thereof, and not what was actually paid. But if the amount paid does not appear unreasonable from the evidence, the court will not so presume it. (p. 23.)

TRIAL—Effect of Admitting Incompetent Evidence.—Parties may try their cases on immaterial evidence if they desire, but they will not be allowed to admit evidence without objection, and then have the court charge the jury that they cannot find a verdict on it because not competent or relevant. (p. 24.)

CARRIER.—A Passenger Riding on the Platform of an electric car, with packages in her hand, and not holding or supporting herself with either hand, is not negligent as a matter of law. (p. 24.)

CARRIER—Passenger Alighting Before Stopping Place.—A carrier is not relieved from liability to a passenger alighting while the car is in motion, because the crew did not know that she intended to alight before reaching the usual stopping place. (p. 24.)

Action by Girod against the Birmingham Railway, Light and Power Company. From a judgment for the plaintiff, the defendant appeals. The complaint alleged damage as follows:

“She was caused to fall with great force and violence, and thereby received internal injuries to her body, and was greatly shaken up, and her nervous system greatly shattered and impaired, and she was for a long time wholly confined to her bed, and permanently injured, and plaintiff was put to great expense for medicine, medical care and treatment, in and about his efforts to heal and cure the wounds and injuries of his said wife, and was deprived of and lost the services and society of his said wife, and suffered great mental and physical pain.”

The following is the second plea: “Defendant for answer to each count of the complaint separately and severally, says that the plaintiff’s wife was herself guilty of negligence which proximately contributed to her injuries, in that she rode on the platform of defendant’s car while it was in motion, in violation of a rule of the defendant published in the car in which the plaintiff was riding as a passenger at the time of her injury in such a way that the plaintiff, by the exercise of reasonable care, could have seen before riding on the platform.”

These instructions were refused to the defendant: (1) “If the jury believe from the evidence that the plaintiff’s wife voluntarily stepped from defendant’s car while it was moving, and before it had reached its regular stopping place, of which fact she was aware, and if the jury further believe that when she so stepped from the car it was dark, and she had a can in one hand and a package in the other, then plaintiff’s wife was guilty of negligence.” (2) “If the jury believe from the evidence that plaintiff’s wife voluntarily stepped from defendant’s car in the dark, and while it was moving, and before it had reached its regular stopping place to discharge passengers, and that she had a can in one hand and a package in the other, plaintiff’s wife was guilty of contributory negligence.” (18) “If the jury believe from the evidence that plaintiff’s wife consciously and purposely stepped from the car she was riding on in the dark, and while it was moving, and that this proximately contributed to her injury, the jury must find for the defendant.” (20) “If the jury believe from the evidence that the plaintiff’s wife voluntarily,

and while encumbered with a can and in the dark, stepped from defendant's car while it was in motion, and that her doing so proximately contributed to her injuries, the jury must find for the defendant." (10) "If the jury believe from the evidence that the plaintiff's wife, at the time of the accident, was on the platform of defendant's car while it was moving, with a can in one hand and a package in the other, and without holding or supporting herself with either hand, the jury must find that she was guilty of negligence." (15) "It was not the duty of the conductor to know before increasing the speed of the car that the plaintiff's wife was not in a position of peril from such increase of speed, if at the time the speed had increased the car had not reached its regular stopping place for the discharge of passengers." (16) "The calling of the name of the station in the car by the conductor would not be an invitation to plaintiff's wife to alight until the car had come to a stop after the name of the station was called." (19) "If the jury believe from the evidence that the conductor called the name of the station as the car approached it, still the plaintiff's wife would not have been justified in alighting from the car while it was in motion, and before it had reached its regular stopping place for discharging passengers." (21) "If the jury believe from the evidence that the defendant's car had not reached the usual place for discharging passengers when plaintiff's wife tried to get off the car, and if the jury further believe from the evidence that the crew of the car did not know that she intended to alight before reaching the usual stopping place until after the accident, the jury must find for the defendant."

Tillman, Grubb, Bradley & Morrow and L. C. Leadbetter, for the appellant.

Stallings & Drennen, for the appellee.

¹⁵ MAYFIELD, J. This is an action by plaintiff, as a husband, for lost services due to a personal injury received by his wife, while a passenger on defendant's electric car, in being thrown from it, while alighting at her destination, by a sudden starting or increase in speed of the car. The complaint originally consisted of three counts. The third was withdrawn by amendment. Each count charged simple negligence only.

Defendant filed six special pleas of contributory negligence. Demurrer was sustained to the second plea, charging plaintiff's wife with negligence in riding on the platform, in violation of defendant's rule published in the car. The rulings on demurrers to the complaint are not insisted on. The remaining special pleas, demurrers to which were overruled, charged contributory negligence in riding on the platform without

properly holding on, and in alighting from the car, in the dark, and encumbered with bundles, while it was in motion.

¹⁶ Plaintiff's evidence tended to show that his wife was a passenger from Birmingham to Ensley on defendant's electric car, and her destination was Nineteenth street and Avenue E, Ensley, which was the terminus of the car line; that when the car approached the terminus the conductor called out, "Ensley," or "All out for Ensley," after the car stopped, and she arose from her seat and went to the rear of the car, together with other passengers, to alight, and was the last one to alight; that while on the platform, in the act of alighting, with a gallon can of milk in her hand, and not holding on, the car started with a sudden jerk and threw her to the ground; that she heard the conductor ring the bell to start, he being on the inside; that she was first taken to the hotel at Ensley, near the terminus, and thence in an ambulance to her home; that on the way to her home in the ambulance she lost her voice, and had since been unable to speak above a whisper; that her vision was also injuriously affected after the accident; that she remained confined to her bed for months; that her hip was fractured, and she could only walk on crutches up to the time of the trial, and that she had broken ribs; that the plaintiff had employed Dr. W. H. Wynne, Dr. B. G. Copeland, Dr. Heacock, and Dr. Manning Brown, of Hopkinsville, Kentucky, where he had sent his wife for treatment, to treat her, and had also paid doctor's bills to each in amounts testified by him, and had paid nurse's wages and his wife's railroad fare from Birmingham to Hopkinsville, Kentucky, and return, when she went there for treatment (record pages 14 and 15); that Dr. Manning Brown had never treated her before the accident; that plaintiff had to hire a cook after the accident, to whom he paid three dollars a week and board; that he paid the nurse wages, and also furnished her with shoes, clothing and medicine as part of her wages, and with board. There was no evidence ¹⁷ introduced as to the reasonableness of the amount paid the doctors, nurse and cook. The evidence is set out in full, except the doctors', and on page 30 of the record is a recital in the bill of exceptions that the testimony of the doctors not set out in extenso related to the plaintiff's wife's condition and the extent of her injuries, "but to no other facts bearing on any of the issues involved, and whose evidence is not for that reason set out in extenso in the bill of exceptions." The evidence of the physicians was of great length, and for that reason, and the additional reason that the extent of plaintiff's wife's injuries is only involved in the exception based on the motion for a new trial because of excessive damages, which is not insisted on, was set out in full.

Defendant's evidence tended to show that the plaintiff's wife attempted to alight before the car reached its usual

stopping place for discharging passengers, and while it was moving; that it was dark, and that she had bundles in one hand and a can in the other; that she stepped off of her own accord and fell, the car not stopping till it reached the usual stopping place for discharging passengers; that the conductor called, "All out for Ensley," while the car was still in motion, and that it did not come to a stop after he announced the name of the station and until after the plaintiff's wife had fallen; that the car plaintiff's wife was riding on was following another car, and would slow up to permit it to get far enough ahead, and then start again forward, but never did come to a stop till it reached the terminus, where passengers were accustomed to get off. The evidence of the defendant also tended to contradict the alleged serious character of the plaintiff's wife's injuries.

The action being that of the husband, the measure of damages was for loss of his wife's services and society.

¹⁸ Plea 2 was insufficient in that it failed to show that the passenger had notice, actual or constructive, of the rule set up as a defense, and it does not sufficiently allege a causal connection between the violation of the rule and the injury alleged in the complaint. It may be there was an attempt to conform the pleas to these requirements. They were insufficient, and the demurrer was therefore properly sustained.

The allegations of the complaint were sufficient, as to the character and extent of the injuries received by the passenger, to allow evidence as to the loss of voice in consequence of the injuries, though the loss of voice is not specifically alleged. It is not required to aver in specific terms each injury or pain suffered. The injury, its character, nature and extent, may be sufficiently averred, without detailing, enumerating or specifying each separately. The loss of voice might well be included in some of the injuries alleged. The loss of the wife's voice was certainly an element of the damages suffered by the husband in consequence thereof. If the complaint was too general in its averments as to the nature, character or extent of the injuries suffered and complained of, the defendant should have had this corrected by a demurrer to the complaint: *City D. Co. v. Henry*, 139 Ala. 161, 34 South. 389, 16 Ency. of Pl. & Pr. 377-383, and notes. See, also, *Curran v. Strange*, 98 Wis. 598, 74 N. W. 377.

If there was error in overruling defendant's objection to the question, "What was the fare to Hopkinsville, Kentucky?" it is not made to appear. We can see no objection to the question itself. The apparent answer to it might or might not be competent or relevant evidence, depending upon other evidence or other facts necessary to make it relevant or irrelevant. The objection to this question was not followed up by objec-

tions ¹⁹ to or motions to exclude the evidence. So far as appears, the defendant may have waived the error, if error it could be, or consented to the answer. The only insistence made is that it was not shown to be necessary: *Sanders v. Knox*, 57 Ala. 80.

Charges 1, 2, 18 and 20, each, as appellant admits, asserted, in varying language the same proposition, that it was, as matter of law, contributory negligence on the part of the passenger in this case to step from the car voluntarily and consciously, encumbered with bundles, in the dark, and while it was moving, and had not reached the regular stopping place for the discharge of passengers. Each of these charges were refused to the defendant, and properly so. It may, or may not, be negligence for a passenger to step from a moving car or train in the dark, encumbered with bundles. This depends upon the kind of car or train, its construction, the speed of the car at the time, the size and character of the bundles, the condition of the passenger, age, health, etc., the place, time and occasion of alighting, etc. While some of these charges hypothesized some of the conditions which would make the passenger liable, no one of them hypothesized all. For example, suppose an ordinary electric car is slowing up to stop and is barely moving, and a passenger step off with some small bundles in his hand; can it be said, as matter of law, that this is contributory negligence? We think not. If so, nearly all who ride in such cars are uniformly guilty of contributory negligence. There may be some who do not. If so, they are the exception and not the rule. If the passenger be encumbered with heavy bundles, the car moving rapidly, he would be guilty of contributory negligence. It is the apparent danger of the act that renders it negligence. In the one case, the danger is apparent; in the other it is not, if ²⁰ it exists at all. True, there are some cases holding that it is, as matter of law, contributory negligence to step off a car in motion, and especially so when encumbered with bundles; but we think the great number and weight of authority hold that such is not negligence as matter of law, but may be as a matter of fact, depending, of course, upon the circumstances of each particular case. There are, no doubt, many cases of the kind where the act can be, and has been, declared negligent as matter of law, but in most cases of the kind it is properly a question for the jury: *Watkin v. Birmingham R. & E. Co.*, 120 Ala. 147, 24 South. 392, 43 L. R. A. 297. Such were the cases of *Rickert v. Birmingham St. Ry. Co.*, 85 Ala. 600, 5 South. 353, and *Hunter v. Louisville & N. R. Co.*, 150 Ala. 594, 43 South. 802, 9 L. R. A., N. S., 848.

We do not think the facts hypothesized brought the charges within the rule announced in any of these two cases, declaring such acts or facts as matter of law are negligent: 4 Elliott on

Railroads, secs. 1628, 1841; 3 Hutchinson on Carriers, sec. 1177 et seq.; Hunter v. Louisville & N. R. Co., 150 Ala. 594, 43 South. 802, 9 L. R. A., N. S., 848. And if it could be said to have been error to refuse any one of these charges, it was without injury. It affirmatively appears that the trial court gave one or more charges requested by defendant which unquestionably instructed the jury correctly upon the identical and only proposition of law involved in each of these charges refused.

It is conceded by appellant that, if the plaintiff was entitled to recover, he was entitled to recover the amounts which were reasonably expended by him in the way of nursing and treatment of his wife, rendered necessary on account of her injuries; but it is insisted that the evidence to establish the various items, the salary of the nurse, the cost of her board, lodging and ²¹ clothing, while nursing the plaintiff's wife, did not show that the amounts expended were reasonable, or that the items were reasonably worth the amounts paid, and, therefore, the court at the request of the defendant should have charged the jury that no recovery could be had as to the various items. It was not error to refuse all such charges requested. True, the measure of the recovery for such items is the reasonable value of the cost thereof, and not what was actually paid or contracted to be paid. It does not appear that the amounts paid, or any one of them, was unreasonable; and can the court presume that it was, in the absence of the proof? If there be any presumption (and we do not say there is), would it not be that the amounts paid were reasonable, rather than that they were unreasonable? The objections as to this matter should have been interposed to the evidence when offered. The competency of it, and relevancy of it, was waived by a failure to object to its introduction. For aught we can know, the defendant did not object, because it was favorable to it. The evidence cannot be wholly eliminated by charges. It was certainly proper for the jury to consider it, in connection with all the other evidence, in determining what was the reasonable cost of such items, which were legitimate and proper charges. Counsel are in error in supposing there was no evidence to show that the amounts were reasonable: 4 Sutherland on Damages, sec. 1250, and notes.

The same is true as to the charges asserting that plaintiff could not recover the amounts paid the doctors for treating and attending his wife on account of the injuries inflicted by defendant, because not shown to be reasonable. Neither the trial court nor this court can know that these amounts were unreasonable. They are as liable to be less than the reasonable value as to ²² be more. The record shows that the evidence of the physicians, who were examined as witnesses, was not set out in the bill of exceptions. For aught we can know,

this evidence may have shown that all the amounts paid were reasonable. We cannot indulge presumptions, in the absence of proof, against the action of the trial court as to these matters. It appears that no objection whatever was made to the evidence as to amounts paid for nursing and treating the patient. A party will not be allowed to speculate on the evidence in this manner. Parties may try their cases on immaterial evidence if they desire; but they will not be allowed to introduce evidence, to admit it, or to consent to it, without protest or objection, and then have the court charge the jury that they cannot find a verdict on it, because not competent or relevant—especially when the charge itself does not point out or call the court's attention to the evidence complained of, but merely requests a verdict as if no evidence had been admitted as to the question.

Suppose A sues B for an assault and battery, and all the evidence shows that B did assault and beat him as alleged, and A testifies that his actual damages were one thousand dollars in consequence thereof. No objection is made to this evidence, and this is all; and B requests the court to charge the jury that A cannot recover any actual damages. Is it possible it would be error to refuse the charge because the evidence was incompetent? Certainly not. If not objected to, it will support a verdict, as if it were both competent and relevant.

Charge 10 was properly refused. It does not assert a correct proposition of law, and, besides, the proposition intended to be asserted by it was embraced in one of the charges, requested by the defendant, which was given.

²³ Charge 15 was properly refused because of its wording. As written it would have tended to mislead or confuse the jury, but aside from this it was properly refused. The court, under the evidence in this case, should not have instructed the jury that it was not the conductor's duty to know of plaintiff's wife's position of peril at the time the speed of the car was increased.

Charges 16 and 19 were each properly refused, because they assumed as true material facts, which were not admitted, conceded nor conclusively proven. Both of these charges find substantial duplication in charges given at the request of the defendant.

Charge 21 did not state a correct proposition of law.

The judgment of the lower court is affirmed.

Dowdell, C. J., and Simpson and Denson, JJ., concur.

For a Passenger to Alight from a Moving Car is not negligence as a matter of law: *Birmingham Ry. etc. Co. v. Landrum*, 153 Ala. 192, 127 Am. St. Rep. 25; *Kruger v. Omaha etc. Ry. Co.*, 80 Neb. 490, 127 Am. St. Rep. 786; *Besecker v. Delaware etc. Ry. Co.*, 220 Pa. 507, 123 Am.

St. Rep. 714; Ober v. Crescent City R. R. Co., 44 La. Ann. 1059, 32 Am. St. Rep. 366; Philadelphia etc. R. R. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483. But see Boulfrois v. United Traction Co., 210 Pa. 263, 105 Am. St. Rep. 809; Neff v. Harrisburg Traction Co., 192 Pa. 501, 73 Am. St. Rep. 825; Werbowlsky v. Fort Wayne etc. Ry. Co., 86 Mich. 236, 24 Am. St. Rep. 120.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. HOLLAND.

[164 Ala. 73, 51 South. 365.]

NEGLIGENCE—Necessity of Specific Allegations.—A complaint in an action for personal injuries need not set out in detail the specific acts constituting negligence. (p. 27.)

RAILROAD—Violation of Ordinance—Injury to Employé.—The running of a train in violation of an ordinance cannot be made the basis of an action by an employé of the railroad for injuries resulting therefrom. The ordinance is for the protection of the public, and not the railway employés. (pp. 27, 28.)

NEGLIGENCE—Sufficiency of Allegations in Complaint.—While a complaint in an action for personal injuries need not specify the particular acts of diligence omitted, yet when simple negligence constitutes the cause of action, it is incumbent upon the plaintiff to bring himself within the protection of negligence averred by such a relationship as will enable him to recover for simple negligence. (p. 28.)

RAILROAD—Trespasser on Track.—Code, Section 5476, does not mean to render the obligations to trespassers on a railroad track any greater nor to permit them to recover for any less degree of negligence than they could have done previous to the adoption of the statute. (p. 28.)

RAILROAD—Lookout for Flagman on Track.—While it may be the duty of an engineer to keep a lookout at the place where a flagman is, the railway company is not liable to the flagman, if struck by a train, for failure to keep a lookout for trains himself. (p. 28.)

RAILROAD.—A Flagman Who Goes to Sleep on the Track is guilty of contributory negligence and in effect a trespasser, and the railroad company owes him no duty other than not to run over him after discovering his peril. (p. 28.)

RAILROAD—Employé on Track.—When a Complaint, in an action against a railroad company for running over a flagman, shows on its face that he was guilty of contributory negligence or was a trespasser, it is defective unless it goes further and avers negligence subsequent to a discovery of his peril. (pp. 28, 29.)

RAILROAD—Flagman Asleep on Track.—Where a flagman who is in good health and has nothing the matter with him falls asleep on the track and is there run over by an engine, the only theory upon which a recovery can be had against the railroad company is that negligence, subsequent to a discovery of his peril, was the proximate cause of his death, that is, that the engineer not only discovered him, but discovered him in a perilous position, and negligently omitted to discharge some duty which, if discharged, would have saved him. (pp. 29, 30.)

RAILROAD—Flagman Asleep on Track.—In an Action against a railroad company for running over a flagman while asleep on the track, wherein the engineer testifies that he was less than two hundred feet from the flagman when he discovered him and did all things to arouse him and stop the train, but another witness gives evidence tending to show that the engineer discovered the flagman in time to have stopped the train before it struck him, the question of the engineer's negligence is for the jury. (p. 30.)

Action by Holland, as administrator, against the Louisville and Nashville Railroad Company. From a judgment for the plaintiff, the defendant appeals.

The following are the counts in the complaint referred to in the opinion:

(1) "The plaintiff, W. T. Holland, as administrator of the estate of Ramsey L. Holland, deceased, claims of the defendant, the Louisville and Nashville Railroad Company, a corporation, the sum of twenty-five thousand dollars as damages, for that, whereas, the said defendant was engaged in the business of operating a railroad between the city of Nashville, Tennessee, and the town of Decatur, Alabama, and which railroad passed through the town of Athens, Limestone county, Alabama; that plaintiff's intestate was, at the time of the injuries resulting in his death, hereinafter complained of, an employé of defendant, engaged in the discharge of his duties as such employé, and whilst plaintiff's intestate was in the employ of said defendant, on, to wit, the sixth day of March, 1908, in the corporate limits of the town of Athens, county of Limestone, plaintiff's intestate was injured, and from such injuries he died; and plaintiff avers that the injuries of his said intestate were caused by the negligence of one T. J. Douglass, an engineer of defendant, who then and there had charge or control of the engine of defendant, and which said engineer was then and there acting in the scope of his employment, and which said engine was then and there upon the railway of said defendant."

(2) Like count 1, except the negligence is alleged in running the engine at a rate of speed greater than permitted by the ordinances of the town of Athens.

(6) "Plaintiff claims of the defendant the sum of twenty-five thousand dollars as damages, for that heretofore, to wit, on the sixth day of March, 1908, defendant's agents or servants were operating an engine or locomotive on the Louisville and Nashville Railroad in the town of Athens, Limestone county, Alabama, to which engine or locomotive cars were attached, and which were being operated by defendant, through its servants or agents, wrongfully or negligently ran said engine, or cars attached to said engine, against or upon plaintiff's intestate, the said Ramsey L. Holland, whereby the death of said intestate was caused, and from which wrongful

or negligent act or acts, and, as a proximate consequence thereof, said intestate died."

(7) "On the sixth day of March, 1908, plaintiff's intestate, Ramsey L. Holland, was in the service or employment of defendant, and in discharge of his duties as flagman or brakeman, to flag trains on defendant's railway, and while flagging in the town of Athens, as his duties required him to do, one of defendant's engineers, T. J. Douglass, who had charge or control of a locomotive or engine, operated on defendant's road or railway, negligently failed to keep a lookout, and negligently ran the locomotive or engine, or cars attached thereto, upon or against the decedent, and as the proximate cause or result thereof killed him."

(11) "On, to wit, the sixth day of March, 1908, plaintiff's intestate was in the employ of said defendant as a brakeman; that a part of said decedent's duties was to flag trains, and in the discharge of his duty said decedent went about seven hundred feet south of the depot in the town of Athens to flag a train; that while waiting for said train plaintiff's intestate fell asleep on or close to the railroad track of defendant in said town of Athens; that one of defendant's engineers, T. J. Douglass, who had charge or control of the locomotive or engine operated then and there on the said railway of said defendant, and to which engine or locomotive cars were attached, wrongfully or negligently ran such engine or locomotive, or cars attached to said locomotive, against or upon plaintiff's intestate, and from said wrongful or negligent act or acts, and as a proximate consequence thereof, the said Ramsey L. Holland died."

The demurrer to count 1 is as follows: "It fails to aver the name of the engineer, or that his name was unknown; it fails to aver how or in what manner the injuries complained of were received; fails to aver how or in what manner said engineer was negligent; fails to set forth the facts constituting the negligence of the engineer; it does not aver that said engineer was acting within the line and scope of his authority."

Sanders & Thatch, for the appellant.

W. R. Walker, for the appellee.

⁷⁹ ANDERSON, J. As was held in the case of Louisville etc. Co. v. Marbury, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620, and repeatedly approved by this court, the complaint need not set out in detail the specific acts constituting negligence. Count 1 was not therefore subject to defendant's demurrer which was properly overruled by the trial court.

The running of the train in violation of a municipal ordinance cannot be made the basis of an action by an employé

for injuries resulting therefrom. A compliance with the statute and municipal ordinances in this respect is intended for the protection of the public and not the employés of the railroad company: *Central of Georgia Ry. Co. v. Martin*, 138 Ala. 531, 36 South. 426; *Lewis v. Southern R. R.*, 143 Ala. 133, 38 South. 1023; *Louisville etc. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21, 15 South. 511. Count 2 showed that the intestate was an employé, and the running of the train in violation of the town ordinance was not the breach of a duty owing him, and the demurrer to this count should have been sustained.

While a complaint need not define the *quo modo*, or specify the particular acts of diligence omitted, yet when simple negligence constitutes the cause of action,⁸⁰ it is incumbent upon the plaintiff to bring himself within the protection of the negligence averred by alleging such a relationship as would enable him to recover for simple negligence: *Gadsden R. R. Co. v. Julian*, 133 Ala. 371, 32 South. 135; *Ensley R. R. Co. v. Chewning*, 93 Ala. 24, 9 South. 458. Count 6 was bad, in that it did not show that the intestate was entitled to redress for simple negligence. Counsel for the appellee concedes that this defect in the count would be fatal, under the previous decisions of this court, but contends that, inasmuch as section 5476 (Code of 1907) changes the burden of proof, the complaint was sufficient in averring that the intestate was killed in the town of Athens, a place covered by section 5473 of the Code of 1907. This statute (section 5476) was construed in the case of *Southern R. R. v. Smith*, 163 Ala. 174, 50 South. 390, and it was there held that, as to persons, the burden of proof was not upon the railroad unless the accident or killing was at a place covered by the three preceding sections. Whether this section applies to this intestate or not, as to the burden of proof, it was not intended to change the degree of negligence or the obligation that a railroad owed to a trespasser. In other words, whether the place of the killing cast the burden on the railroad or not of showing no negligence, it did not mean to render the obligations to trespassers any greater or to permit them to recover for any lesser degree of negligence than they could have done previous to the adoption of the statute.

While it may have been the duty of the engineer to keep a lookout at the point named, it cannot be said that the defendant was liable to the intestate for his failure to keep a lookout for trains himself and flag them. The demurrer should have been sustained to count 7.

⁸¹ Count 11 charges simple negligence, and also avers that the intestate went to sleep on the track. If he was not in the discharge of his duty, but went to sleep on the track, as charged in the complaint, he was guilty of contributory negli-

gence, and was, in effect, a trespasser, and the defendant owed him no duty other than not to run over him after discovering his peril. The count was subject to the demurrer interposed thereto: *Savannah & Western R. R. v. Meadors*, 95 Ala. 137, 10 South. 141; *Gadsden R. R. Co. v. Julian*, 133 Ala. 371, 32 South. 135. We are not unmindful of the rule that subsequent negligence can be shown, under a count which avers negligence generally, and after the defendant has shown contributory negligence; but the counts in those cases did not aver that the plaintiff was guilty of contributory negligence, and the question was raised on the evidence or by charge. The demurrer confesses only the averments of the complaint, and which must be construed most strongly against the pleader, and when a complaint shows on its face that the plaintiff was guilty of contributory negligence or was a trespasser, then it is defective, unless it goes further and avers negligence subsequent to a discovery of his peril.

As this case must be reversed upon the pleading, and as many of the charges, made a basis of assignments of error, relate to counts held defective, we will content ourselves with only such a discussion of the remaining questions as may afford a guide upon the next trial, in disposing of what we consider the chief issue in the case.

Under the undisputed evidence, the intestate was guilty of contributory negligence such as to preclude a recovery for any anterior or initiative negligence of the defendant's servants. The undisputed evidence shows that the intestate went to sleep on the track, and there ⁸² was no evidence, or reasonable inference deducible therefrom, that he was sick or became suddenly stricken, so as to bring him within the influence of the case of *Heltón v. Alabama Mid. R. R.*, 97 Ala. 275, 12 South. 276. All of the witnesses who saw intestate just before he was killed testify that he was asleep. One witness left him a few minutes before and saw nothing the matter with him. It was admitted that he was in good health, and, indeed, counts 11 and 13 aver that he fell asleep. Therefore, the only theory upon which the plaintiff would be entitled to recover is that negligence, subsequent to a discovery of the intestate's peril, was the proximate cause of his death; that is, that the engineer not only discovered him, but discovered him in a perilous position, and negligently omitted to discharge some duty, which, if discharged, would have saved the intestate. The proof showed that Holland was so situated on the track as to impress the observer that he was in a perilous position. Douglass, the engineer, testifies that he was within less than two hundred feet (about one hundred and twenty-five or one hundred and fifty feet) when he discovered him, and that he did all things to arouse him and to stop the train. The undisputed evidence also

shows that this particular train, at the rate of speed it was going, could not have been stopped within the distance as given by the engineer, between him and the intestate when he first saw him, and if it was true that the engineer was not farther from the intestate when he first saw him than he said he was, he was not guilty of proximate, subsequent negligence, as the evidence acquits him of any negligence for failing to blow whistle. On the other hand, the plaintiff offered evidence tending to show that the engineer discovered the intestate in time to have stopped the train before it struck him. Miss "Bettie Sue Griffin" testified that the train first blew for the station at the cattle gap; that ⁸³ later it blew sharp louder blasts; "that right at Hatchett's barn, which is on the east side of the track, . . . the train commenced to give sharp loud blasts of the whistle, blowing for Mr. Holland; it started blowing at Hatchett's barn and blew until it got to him." There was evidence that the distance from Hatchett's barn to where Holland was struck was four hundred and thirty-five and one-half feet, and there was also evidence that this train could have been stopped within that distance. It was therefore for the jury to determine whether or not the engineer discovered Holland in a perilous position; that is, a position that would impress the reasonable mind with the idea that he would not or could not get off the track in time to have stopped the train before striking him, and negligently failed to do so.

It is also insisted by appellant's counsel that the defendant was entitled to the general charge as to count 1 on account of a variance; that the count avers that the intestate was killed while in the discharge of his duty, and the proof does not establish this averment. This count does not aver that the intestate was actually engaged in the discharge of his duty at the time he was struck, and the averment is unlike the one considered in the case of *Alabama G. S. R. R. v. McWhorter*, 156 Ala. 269, 47 South. 84. The complaint in said case averred that the intestate was engaged in the discharge of his duty, flagging one of the defendant's trains, when he was struck, and the proof showed that he was not flagging a train when he was struck, but had stuck his flag in the ground and had gone down the track.

For the errors designated, the judgment of the circuit court is reversed and the cause is remanded.

Dowdell, C. J., and Sayre and Evans, JJ., concur.

A Railroad Company Ordinarily Owes No Duty to a Trespasser until his peril is discovered, and is not liable to him, unless after discovering his peril it could with proper care avoid injury: Louisville etc. R. R. Co. v. McNary, 128 Ky. 408, 129 Am. St. Rep. 308; *Nashville etc. Ry. Co. v. Harris*, 142 Ala. 249, 110 Am. St. Rep. 29; *Becker v. Louisville etc. R. R. Co.*, 110 Ky. 474, 96 Am. St. Rep. 459.

As to the Duty and Liability of a Railway Company to Persons Asleep on its tracks, see Lloyd v. Albemarle etc. R. R. Co., 118 N. C. 1010, 54 Am. St. Rep. 764; Krenzer v. Pittsburg etc. Ry. Co., 151 Ind. 587, 68 Am. St. Rep. 252; Marshall v. St. Louis etc. Ry. Co., 78 Ark. 213, 115 Am. St. Rep. 27.

A Statutory Requirement That Railroad Companies shall keep a constant lookout for persons on their tracks has been held to apply to tracks within their yards as well as elsewhere, and to be for the benefit of their employes as well as others: St. Louis S. W. Ry. Co. v. Graham, 53 Ark. 61, 119 Am. St. Rep. 112.

WHITMORE v. ALABAMA CONSOLIDATED COAL AND IRON COMPANY.

[164 Ala. 125, 51 South. 397.]

MASTER AND SERVANT—Safe Place.—A Complaint in an action for injury to an employé from a defect in the ways, works or plant is subject to demurrer if it does not specify the defect relied upon. (p. 33.)

MASTER AND SERVANT—Statute for Protection of Miners. Code, section 1019, is intended only for the protection of employes engaged at a mine. And a complaint, relying on a failure to keep the supplies specified therein, which merely avers that the plaintiff's intestate was working in the mine, without showing that he was an employé, is subject to demurrer. (p. 33.)

DEATH—Survival of Action for Suffering.—An action for causing pain and suffering does not survive to the administrator under Code, sections 2486 and 3912, and counts in a complaint by an administrator which do not aver that the acts or omissions caused the death of his intestate, but that they merely aggravated or intensified his suffering, are subject to demurrer. (p. 33.)

MASTER AND SERVANT—Duty to Maintain Safe Place.—A master is under the duty of using ordinary care to furnish his employes with place, ways and appliances reasonably safe for use, but this duty may be discharged by committing its performance to agents carefully selected for competency and fitness. (p. 34.)

MASTER AND SERVANT—Duty to Maintain Safe Mine.—Where a mine was reasonably safe when an employé started to work, but a defect arose subsequently and after the control of the mine had been delegated to an agent, recovery cannot be had for the death of an employé for failure to furnish a reasonably safe place. (p. 34.)

MASTER AND SERVANT.—The Placing of Caps of Dynamite in a Mine is not negligence as a matter of law, and recovery cannot be had for the death of an employé resulting from an explosion thereof, in the absence of evidence that they were negligently placed where they were. (p. 34.)

APPEAL—Harmless Error.—If the Plaintiff Fails to establish his complaint, an error in overruling his demurrers to the defendant's pleas is without injury. (p. 34.)

Action by George Whitmore, as administrator, against the Alabama Consolidated Coal and Iron Company, for the death

of his intestate. From a judgment for the defendant, the plaintiff appeals. The following is the complaint:

(1) "Plaintiff claims of defendant the sum of twenty-five thousand dollars damages, to wit, that on and prior to the fifth day of June, 1908, the defendant was engaged in operating an iron mine in Gadsden, Etowah county, Alabama, and that on and before the date aforesaid plaintiff's intestate was in the employment of defendant, and while in the discharge of his duties under his employment a stick of dynamite, dynamite caps, or other explosive exploded, so badly injuring him that on the next day he died as the result of said injury. And plaintiff avers that said injuries and death of plaintiff's intestate were proximately caused by the negligence of defendant in failing to provide him with a reasonably safe place in which to do his work under his employment."

(2) Like 1, down to and including the words "negligence of defendant," then adding: "In placing or allowing dynamite, dynamite caps, or other explosives to be and remain in such close proximity to plaintiff's intestate's place at which he was at work under his employment as to render the same unsafe in which to do his work."

(3) Like 1, down to and including the words "proximately caused," then adding: "By reason of defect in the condition of the ways, works, machinery, or plant connected with or used in said business of defendant, which said defect arose from," etc., according to the usual form.

(4) Same as 1, except that it is alleged that intestate was at work in said mine by invitation, and the defendant failed to provide a safe place to work, etc., under such invitation.

(5) Same as 1, except that negligence is alleged in failing to provide at the mouth of the mine a stretcher properly constructed, a woolen and waterproof blanket, and a failure to keep at the store of said mine linseed oil, or olive oil, bandages, and linen.

(6) Same as 5, except that the failure to keep blankets and stretchers is not alleged.

(7) Same as 5, except that the negligence is alleged in a failure to keep bandages at the mine.

(8) Alleges a failure to keep oil and bandages and linen at said store, and by reason thereof the wounds could not be bandaged and oil applied thereto until some time afterward, and after the intestate had been moved a long distance, whereby his injuries were approximately greatly increased.

(9) Same as 8.

George D. Motley and W. F. Standifer, for the appellant.

Hood & Murphree, for the appellee.

¹²⁸ ANDERSON, J. Count 3 of the complaint failed to specify the defect in the ways, works or plant, and was sub-

ject to the demurrer which was sustained to same: *Whatley v. Zenida Coal Co.*, 122 Ala. 118, 26 South. 124. The case of *Jackson Co. v. Cunningham*, 141 Ala. 206, 37 South. 445, is not in conflict with the present holding. There the court construed the complaint as charging a defect in the track, and which specified or designated the ways, works or plant. Here there is no attempt to specify or designate.

Counts 5, 6, 7, 8 and 9 evidently attempted to state a cause of action under section 1019 of the Code of 1907, for a failure to supply oil, bandages, etc. The mine described in the case at bar is an iron mine, and not a coal mine; but conceding, without deciding, that chapter 30 does not apply exclusively to coal mines, section 1019 is intended for the protection of employes engaged at a mine, and not persons who are not so employed: *Wolf v. Smith*, 149 Ala. 457, 42 South. 824, 9 L. R. A., N. S., 338. Counts 5, 6 and 7 merely aver that the plaintiff's intestate was working in the mine, and do not show that he was an employe, and the trial court did not err in sustaining the demurrers to these counts.

¹²⁹ Counts 8 and 9 aver that the plaintiff's intestate was working in the mine, and while in the discharge of his duty, etc. But if this showed that he was an employe, which we do not decide, these counts failed to state a cause of action. The counts do not aver that the acts or omissions caused the death of the intestate, but that they merely aggravated or intensified his pain and suffering. This cause of action did not survive, and a suit for the matters complained of and the result of same could not be maintained by a personal representative. Sections 2486 and 3912 give the personal representative the right to sue only for acts and omissions causing death, and not for those merely causing pain and suffering. The demurrers to counts 8 and 9 were properly sustained.

This case was tried under counts 1, 2 and 4. Counts 1 and 4 are under the common law, and for a failure to provide the intestate with a reasonably safe place in which to do his work. There is no proof that an unsafe place was provided, as the place was reasonably safe when the intestate commenced to work. On the other hand, if the condition of the air, which made it necessary to snuff the lamps in order to see, could be ascribed as the proximate cause of the explosion, which we do not decide, then this condition arose from a defect occurring after the intestate went to work in the mine, and not from a failure on the part of the master to provide a safe way in which to perform the work. The only evidence tending to show the cause of the explosion, aside from the inference that the intestate did so himself in handling the caps or permitting his lamp to come in contact therewith, was that the caps were ignited by sparks from the lamp wicks of the miners, produced by snuffing the lamps, and that

said snuffing was made necessary in order for them to see, owing to ¹²⁰ the condition of the air, and which said condition of the air was due to a defect in the air-shaft.

The evidence shows that there was an air-shaft, that it was good and sufficient when the intestate started to work, and that it became defective after the intestate had commenced work. The master is under the duty of using ordinary care to furnish the employé with place, ways and appliances reasonably safe for use; but by the law, as it has been recognized by this court, the duty of maintaining such safe conditions may be discharged by committing its performance to agents carefully selected for competency and fitness: *Woodward Iron Co. v. Cook*, 124 Ala. 349, 27 South. 455. The evidence shows that the mine was reasonably safe when the intestate started to work, and that the defect arose afterward, and after the control and supervision of the mine had been delegated to McDuffie. There was, therefore, no proof in support of counts 1 and 4.

Nor was there any proof in support of count 2. It cannot be said, as matter of law, that the placing of caps or dynamite in a mine is negligence, and there was no proof that these were negligently placed where they were. Neither can negligence be imputed to the defendants, under the doctrine of *res ipsa loquitur*, especially when considered with the evidence connected with and surrounding the explosion.

The trial court did not err in giving the general charge for the defendant.

Since the plaintiff failed to establish his complaint, the defendant was not put to a defense of the action, and the action of the court in overruling demurrers to the plea of contributory negligence, if error, and which we do not decide, was error without injury.

The judgment of the city court is affirmed.

McClellan, Sayre and Evans, JJ., concur.

The Duty of a Master to Furnish His Employés a Safe Place to Work cannot be delegated: *Vickers v. Kanawha etc. R. R. Co.*, 64 W. Va. 474, 131 Am. St. Rep. 929; *Bernheimer Bros. v. Bager*, 108 Md. 551, 129 Am. St. Rep. 458, and cases cited in the cross-reference note thereto. Moreover, the duty is a continuing one, and to discharge it in the first instance is not sufficient to exonerate him: See the note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 886; *Columbia Enameling etc. Co. v. Burke*, 37 Ind. App. 518, 117 Am. St. Rep. 337; *Barto v. Iowa Tel. Co.*, 126 Iowa, 241, 106 Am. St. Rep. 347. And the rule which requires the master to furnish a safe place to work applies, although the servant is employed in constantly producing changes and temporary conditions, as in mining, for the time being more or less dangerous, if the servant has no part in producing the condition which leads to his injury: *Superior Coal etc. Co. v. Kaiser*, 229 Ill. 29, 120 Am. St. Rep. 233.

The Duty of Mine Owners to Prevent Injury to Their Employés is the subject of a note to *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 557.

WESTERN UNION TELEGRAPH COMPANY v. SAUNDERS.

[164 Ala. 234, 51 South. 176.]

TELEGRAPH COMPANY—Delayed Delivery of Message.—One may recover damages for undue delay in transmitting and delivering a telegram, caused by the negligence of the company, although the message may, after the damage has been sustained, be delivered. (p. 37.)

TELEGRAPH COMPANY—Delayed Delivery of Message.—The delivery of a telegram after undue delay is not a compliance with the contract or the law requiring prompt delivery. And if the delay is caused by the negligence of the company, and damage to the person, reputation or estate of the party contracting with the company follows as a proximate result thereof, he may recover for such actual injury, and also in a proper case for injury to feelings. (p. 37.)

NEGLIGENCE—Allegation in General Terms.—The duty of exercising due care being shown, the failure to perform that duty, the negligence causing the injuries complained of, may be averred in the most general terms, little if at all short of the mere conclusions of the pleader, since if the defendant has been guilty of negligence he knows as well or better than the plaintiff in what it consists. (p. 38.)

TELEGRAPH COMPANY—Allegation That Plaintiff was Party to Telegram.—Where the complaint in an action against a telegraph company for undue delay in delivering a message does not state whether the telegram was verbal or in writing, but does state that the plaintiff sent it, and the plea states that the message was in writing, the plea must be read in the light of the complaint, and thus the allegations are sufficient to show that the plaintiff was a party to the written telegram. (p. 38.)

TELEGRAPH COMPANY—Notice of Contents of Contract.—Where a message and the contract for sending it are in writing, the sender is charged with notice of what the contract contains. (p. 39.)

PLEADING.—Where a Plea is Double, and One Defense set up is good and the other bad, the plea is not subject to demurrer on account of the bad defense. A motion to strike out the imperfect part is the proper practice. (p. 39.)

PLEADING.—Where a Plea is Double and Each Several Defense set up is imperfect, and the ground of demurrer is directed to only one of the defenses, it is proper to sustain the demurrer. (p. 39.)

TELEGRAPH COMPANY.—A Negligent Delay in the Transmission and delivery of a telegram for two hours may work damages for which the company is liable, and a plea, in an action for delayed delivery, is insufficient if it simply alleges that the telegram was delivered in less than two hours after receipted for transmission. (p. 39.)

TELEGRAPH COMPANY—Delay Delivered.—A Plea in an Action for negligent delay in the delivery of a telegram, averring that the message was not ordered repeated and was not insured within the meaning of provisions therefor in the written contract, is insufficient in failing to negative negligence of the defendant alleged in the complaint. (p. 40.)

TELEGRAPH COMPANY—Evidence of Telephone Conversation.—In an action against a telegraph company by the sender of a message for its negligent delay, the plaintiff may testify that at his

request a third person took up the receiver of a telephone, called a certain number which the plaintiff did not know was the office number of the defendant, and spoke into the telephone the message to be transmitted, if evidence has already been introduced of the delivery to the sendee of a similar message. (p. 41.)

EVIDENCE—Judicial Notice of Telegraph Charges.—A court in Alabama takes judicial knowledge of the fact that telegraph companies in that state make twenty-five cents a minimum charge for transmitting and delivering messages the distance from Birmingham to Fort Payne. (p. 41.)

TELEGRAPH COMPANY—Mental Pain.—Where a Child is Ill and the father telegraphs to his wife's mother of the illness and for her to come, the relation between the sender, the sendee, and the child is such as to entitle the sender to damages for mental anguish in case the delivery of the message is negligently delayed. (pp. 41, 42.)

Action by K. D. Saunders against the Western Union Telegraph Company. From a judgment for the plaintiff the defendant appeals. The following is the complaint:

"Plaintiff claims of defendant nineteen hundred and ninety-nine dollars and ninety-nine cents as damages, for that heretofore, to wit, on the twelfth day of September, 1905, defendant was in the business of transmitting by wire from Birmingham, Alabama, to Ft. Payne, Alabama, and there delivering, telegraphic messages; that on said date plaintiff delivered to the defendant, at said Birmingham, a message addressed to Mrs. G. B. Cross, which message defendant received at said Birmingham, and for hire and reward paid by plaintiff agreed to use due diligence to promptly transmit and deliver said telegraphic message to Mrs. Cross at Ft. Payne, Alabama, which message read as follows: 'Baby worse, come at once'; that it became and was the duty of defendant to use due diligence to promptly transmit and deliver said message to said Mrs. Cross, but notwithstanding said duty, defendant so negligently conducted itself in that regard that the said message was not delivered for a long time, to wit, for several hours, and as a proximate consequence thereof said Mrs. Cross, who was the mother of plaintiff's wife, and the grandmother of plaintiff's baby mentioned in said message, failed to come to Birmingham for a long time thereafter, and failed to be with plaintiff and his family for a long time during the serious sickness of said baby, and plaintiff's said baby being very sick, and himself and wife greatly worried and anxious about said baby, plaintiff suffered great mental pain and anxiety on account of the absence of said Mrs. Cross, and lost the sum of money, to wit, twenty-five cents, paid to the defendant for the transmission and delivery of said telegram, all to plaintiff's damage," etc.

The following demurrers to the complaint were filed: "(1) It does not appear that the plaintiff suffered in person or estate by the alleged failure to deliver the telegram. (2) It does not appear that the child referred to in the complaint

died, or that there was any real necessity for the appearance of Mrs. Cross. (3) It does not appear that the defendant was guilty of negligence in failing to deliver the message for several hours after it was filed for transmission. (4) It is not averred or shown that the defendant, in the exercise of reasonable diligence, could have delivered the message sooner. (5) For that it is not averred when the message was delivered."

The following is the third plea: "Defendant avers that the message sued on was in writing, written upon a regular form or blank of defendant immediately following the words, 'Send the following message subject to the terms on the back hereof, which are hereby agreed to.' And defendant avers that on the back of said message, and as part of the alleged contract of transmission and delivery, were the following provisions: [Here follow the printed stipulations and conditions as they appear on the back of the Western Union Telegraph Company's blank for sending messages.] And defendant avers that said message was not ordered to be repeated, nor was same insured, within the meaning of said provision; and defendant further avers that said message sued on was in fact delivered to said sendee in less than two hours after its receipt for transmission."

Campbell & Johnson, for the appellant.

Bowman, Harsh & Beddow, for the appellee.

239 EVANS, J. There are fifty-two assignments of error in this record. The first assignment is to the overruling of defendant's demurrer to the complaint. The appellant contends in his brief, in arguing this proposition, first, that "the averment that the plaintiff lost the amount paid for the transmission and delivery of the message is contradicted on the face of the complaint." We do not think that the complaint is subject to this criticism. A person may recover damages for undue delay in transmitting and delivering a telegram, caused by the negligence of the company undertaking the transmission and delivery of the message for hire and reward paid by him, although the message may, after damage has been sustained, be delivered. In other words, the defendant cannot be allowed to say, after undue delay in transmitting and delivering, caused by its negligence, from which damage resulted, "I did finally deliver the message, and therefore you have not lost the consideration paid." If the contract was to deliver promptly, or if the law imposed the duty of delivering promptly, a delivery after undue delay is not a compliance; and if the undue delay is caused by the negligence of the company undertaking the transmission and delivery, and damage to the person, reputation or estate of

the party contracting with such company results as a proximate result thereof, such party may recover for such actual injury, and also in a proper case for injury to feelings: *Western Union Tel. Co. v. Westmoreland*, 150 Ala. 654, 43 South. 790; *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23, 9 South. 414.

The second contention of appellant with reference to the demurrer to complaint is that the facts averred are insufficient to establish negligence which could proximately result in the damages claimed. As said by McClellan, C. J., in the case of *Postal Tel. Co. v. Jones*, ²⁴⁰ 133 Ala. 217, 32 South. 500: "There is no merit in the contention for appellant that the complaint did not aver the negligence counted on with sufficient particularity. The rule is that the duty to exercise due care being shown, the failure to perform that duty, the negligence causing the injuries complained of, may well be averred in the most general terms, little, if at all, short of the mere conclusions of the pleader; and this upon the entirely sufficient consideration, among others, that if the defendant has been guilty of negligence he knows, as well as or better than the plaintiff can, in what that negligence consisted"—citing numerous authorities.

The second assignment of error by appellant is to the ruling of the court in sustaining demurrer to the third plea. There are eight grounds of demurrer. The first three grounds are clearly not good, for the reason that the plea must be read in the light of the complaint, and, so reading it, the allegations are sufficient to show that plaintiff was a party to the written telegram. In other words, the complaint does not state whether the telegram was verbal or in writing, but does state that the plaintiff sent it. The plea states that the message sued on was in writing, etc. The message sued on was a message alleged in the complaint to have been sent by plaintiff, and said plea must be construed as confessing that it was. That the plea is not subject to the fourth ground of demurrer needs no argument, as it is clearly not a conclusion of the pleader, but sets up facts. Ground 4a is probably not what the plaintiff intended to say, but, as it is, it is clearly not a good ground of demurrer, as the matters therein alleged could not have been a consequence of defendant's failure to deliver said telegram, and it would be immaterial if they were. Ground 4b is not good, for the reason that the message ²⁴¹ and the contract for sending same are alleged in the plea to be in writing. If this is so, the plaintiff was charged with notice of what the contract contained. The fifth ground was a general demurrer, and could not be considered.

In considering the sixth ground of demurrer, it is proper to state the said plea sets up three several defenses, as fol-

lows, after first setting up, by way of inducement, the terms of the written contract upon which defendant undertook to send said message: (1) That said message was not ordered to be repeated; (2) that said message was not insured, within the meaning of the provisions of the written contract; (3) that said message was in fact delivered to the said sendee in less than two hours after its receipt for transmission. The sixth ground of demurrer was directed to the last defense set up, and was as follows: "For that the fact set up in said plea, 'that said message was in fact delivered in less than two hours,' does not necessarily, as matter of law, show due diligence." This plea at common law would have been subject to special demurrer, but not so under our system: *Cannon v. Lindsey*, 85 Ala. 198, 7 Am. St. Rep. 38, 3 South. 676; *Ewing v. Shaw*, 83 Ala. 333, 3 South. 692. Where the plea is double, and one defense set up is good and the other is bad, the plea is not subject to demurrer on account of the bad defense attempted to be set up. A motion to strike out the imperfect part is the proper practice: *Bolling v. McKenzie*, 89 Ala. 470, 7 South. 658. But where the plea is double, and each several defense attempted to be set up therein is imperfect, and the ground of demurrer is directed to only one defense set up in the plea, can the court properly sustain the demurrer? The entire court, with the exception of Justice Anderson and the writer of this opinion, are of opinion that in ²⁴² such a case it is proper to sustain the demurrer; and therefore this court holds that the lower court was without error in sustaining the demurrer to plea 3, on the sixth ground thereof. It needs no argument to show that a negligent delay in the transmission and delivery of a telegram for two hours might work great damage, for which the company undertaking to transmit and deliver same might be held liable. It is equally true that the other two defenses set up could not stand the test of a proper demurrer, for they fail to negative the negligence of the defendant alleged in the complaint: *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844.

The third assignment of error, not being argued in appellant's brief, is treated as waived.

So far as insisted on in the brief of appellant, the other forty-eight assignments of error relate to three propositions: 1. The time and manner of the delivery of the message to the defendant for transmission and delivery; 2. The payment by plaintiff of the sum of twenty-five cents to the defendant for transmission and delivery of said message; 3. As to whether or not relation of the sender, the sendee, and the person about whom the message was sent was such as would sustain damages for mental anguish. We shall undertake to dispose of these assignments of error by a statement and discussion of

the evidence as it relates to these three propositions, all of which, and every part of which, was offered by plaintiff, and every part of which was objected to by defendant, and exceptions to the adverse ruling of the court were duly reserved. Motion was made to rule out each part of said testimony, and exception was reserved to the refusal of the court to grant such motion. Motion was made to rule out all of the testimony of the plaintiff as to what Mr. Stillwell spoke into the receiver of the telephone, ²⁴³ and exception was duly reserved by defendant to the refusal of the court to grant such motion.

The evidence tended to show that K. D. Saunders, the plaintiff in the case, was on the twelfth day of September, 1905, and had been for some time prior thereto, living in the city of Birmingham, Alabama. At said date, and for some time prior thereto, his mother in law, Mrs. G. T. Cross, was living in Ft. Payne, Alabama. At said date the said Saunders had a child about ten months old, who for some time had been sick with typhoid pneumonia. The said Saunders was the father of the child, and the said Mrs. Cross was its grandmother. At some time prior to said 12th of September, plaintiff had communicated with his said mother in law by letter about coming to see the baby on receipt of a telegraphic message, if one was sent. On said morning of September 12th the said Mrs. Cross, in anticipation of such a message, had closed up her house and was sitting on the doorsteps ready to go at a moment's notice. At 6:10 A. M., on September 12th, the baby having grown suddenly worse, the plaintiff went into the office of the paymaster of the Birmingham Pipe and Casting Company, of the city of Birmingham, and paid Mr. Stillwell, the paymaster in said office, the sum of twenty-five cents, and asked him to telephone to the defendant, the Western Union Telegraph Company, the following message, to be transmitted and delivered to the said Mrs. G. T. Cross at Ft. Payne, Alabama: "Baby is worse; come at once." The said Mr. Stillwell thereupon picked up the receiver of the telephone, and called a certain number, which witness, the plaintiff, did not know was the office number of defendant, and spoke into the phone the message to be transmitted to Mrs. G. T. Cross at Ft. Payne, Alabama: "Baby is worse; come at once." At 8:30 o'clock on the morning of September 12, 1905, the agent at Ft. Payne, ²⁴⁴ Alabama, received a message for Mrs. G. T. Cross and delivered the same to her son, who came for it, somewhere from 9:03 to 9:30 o'clock of said morning. The evidence further tended to show that by reason of the delay in transmitting and delivering said telegram Mrs. Cross missed the train on said morning, and was delayed fourteen or sixteen hours in reaching the bedside of her grandchild. This tele-

gram was introduced in evidence, but the bill of exceptions fails to state its contents. We will therefore presume that it was identical as to the verbiage with the words spoken by Mr. Stillwell into the phone. It was shown that said telegram had the following written upon it: "1 B. M."; also, "Sent by K."; also, "received by R. A."; also, "5 pd." These were explained by witness as follows: "'1 B. M.' was the call of office. 'Sent by K.,' that was a fellow by the name of Whitfield. 'Received by R. A.,' Mr. Rippy, defendant's agent at Ft. Payne, signs 'R. A.' He is now sitting in the courtroom with defendant's counsel. '5 pd' means that the message contained five words and was paid—not to be collected for at the Ft. Payne office of defendant."

The first question to be considered is, Should the plaintiff, against the objection of defendant, have been allowed to testify, in his own behalf, as to what Mr. Stillwell did about telephoning for plaintiff; and should not that part of the evidence of plaintiff have been ruled out on motion of defendant? After a careful consideration of the proposition, a majority of the court are of opinion, and so decide, that the subsequent evidence of the delivery to the sendee of a message like the one said to have been spoken into the telephone by Mr. Stillwell made the said evidence of plaintiff admissible, and that the court below did not err in admitting the same, or refusing to rule it out.

²⁴⁵ As to the second proposition, viz., the payment by plaintiff of the sum of twenty-five cents for the transmission and delivery of the telegram, the court is of the opinion that the evidence of plaintiff that he paid Mr. Stillwell twenty-five cents to pay to defendant for transmitting and delivering said telegram, when taken in connection with the evidence which tended to show that the message when delivered to the sendee was marked "Paid," was admissible to show that the message was paid for by plaintiff. The court takes judicial knowledge of the fact that telegraph companies in this state make twenty-five cents a minimum charge for transmitting and delivering messages the distance from Birmingham, Alabama, to Ft. Payne, Alabama.

The third proposition before mentioned was whether the relation of the sender, the sendee, and the person about whom the message was sent was such as to entitle the plaintiff to recover damages for mental anguish. Was the relation such as to raise the presumption of law that the sender suffered mental pain and anguish by reason of the absence of the sendee from the bedside of his child, who was very ill? In the well-considered case of *Western Union Tel. Co. v. Crocker*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398, where the relation of the parties, so far as kinship is concerned, was exactly the same as in this case, in rendering the opinion of the

court, Justice Dowdell—now Chief Justice—said in speaking of the relationship of mother in law and son in law: “It is the closest of all relationship by affinity, and from which, if love and affection do not naturally spring, it is on account of some exceptional reason or cause; a love, too, that is strengthened in the birth of a grandchild. The tender and doting love of the grandmother for her grandchild, and the reciprocal confiding love of the little child, is a matter of common knowledge. . . . We are of opinion that the relationship between ²⁴⁶ the sender and sendee, and the person named in the message, is such as to warrant the recovery for mental suffering and anguish.” It would seem from the above matter in quotation marks that mental pain and anguish of the father, under the kinship relations, was to be inferred as matter of law, and if there was “some exceptional reason or cause” in any case why the father, under such circumstances, would not be comforted by the presence of the child’s grandmother, his mother in law, or subjected to mental pain and anguish by her absence, it was matter of defense.

It was entirely proper for the plaintiff to prove the meaning of the indorsements made on the telegram by the receiving agent in the regular course of his business as agent for the company.

Affirmed.

Dowdell, C. J., and Anderson, McClellan and Mayfield, JJ., concur.

Simpson, Sayre and Evans, JJ., dissent.

“**Evans, J., Dissenting.** From the foregoing opinion, written by myself in accordance with the views of a majority of the court, Justice Anderson and myself dissent from conclusion reached by the other members of the court in sustaining the sixth ground of demurrer to the third plea; while Justices Simpson and Sayre and myself dissent from the view taken by the other members of the court in sustaining the action of the lower court in admitting, and refusing to rule out, that part of the testimony of plaintiff wherein he testified to what Mr. Stillwell spoke into the telephone in his office at 6:10 A. M. on September 12, 1905. I shall respectfully undertake to set forth my reasons for dissent upon both of these propositions.

“1. Should the sixth ground of demurrer to the third plea have been sustained? The plea, after setting up, by way of inducement, the alleged contract in writing, upon which the message was alleged to have been sent, then sets up three several defenses: 1. That said message was not ordered to be repeated; 2. That said message was not insured, within the meaning of the written contract; 3. That said message was in fact delivered to the said sendee in less than two hours after its receipt for transmission. The sixth ground of demurrer only challenges the sufficiency of the third defense set up by said plea.

“At common law this plea would have been subject to special demurrer for duplicity; but under our system two or more defenses may

be set up in the same plea, and when so set up and issue is joined thereon, all must be proved, whether they be good or bad: *Walter v. Alabama Great Southern R. R.*, 142 Ala. 474, 39 South. 87. Where two defenses are set up in the same plea, one of which is good and the other bad, the bad defense cannot be eliminated by a demurrer directed thereto, but only by motion to strike out the imperfect part: *Bolling v. McKenzie*, 89 Ala. 470, 7 South. 658. If a defendant sets up in his plea two defenses, and the plaintiff's demurrer fails to point out any defect in one of the defenses, or even to challenge its sufficiency in any way, does he not thereby admit its sufficiency, and can the court *ex mero motu* declare that the other defense is bad? Can the court declare any defense bad which is not objected to by the plaintiff? Not only the court cannot *ex mero motu* so declare it, but the particular defect of the defense must be pointed out. It is evident to my mind that a demurrer to a double plea, pointing out defects in each defense set up would be a good demurrer, and should be sustained. If a demurrer to a double plea went to only one defense set up, it should not be sustained, for the reason that it does not go to the whole plea, but leaves one defense unchallenged. As long as a defense is unchallenged by demurrer pointing out the defect, the court should treat it as a good defense, unless it is stricken, in proper case, upon motion of plaintiff. For the foregoing reason, we do not think the court below was without error in sustaining demurrer to third plea.

"2. Should the evidence of plaintiff, testifying as a witness for himself, as to the telephoning by Mr. Stillwell, have been admitted to show the time and manner of the delivery of the telegram to the defendant, or should it not have been ruled out on motion of plaintiff, when, as defendant contends, it was not by any subsequent evidence made legal?

"Telephone conversations, in so far as concerns their admissibility in evidence, are in the main governed by the rules of evidence which govern the admission in evidence of oral statements made in an ordinary conversation, except, of course, the necessity of identification of the party against whom the conversation is sought to be used.' The above quotation, taken from *Encyclopedia of Evidence*, volume 12, page 477, refers to cases where one of the parties to the conversation is testifying. 'A telephone conversation, being shown by other competent evidence to have been between the parties to the action and upon the subject matter of the litigation, may be testified to by a bystander so far as he heard it': 12 *Ency. of Ev.*, p. 478. The last matter in quotation marks states the law that is applicable to the case *sub judice*. The witness here was a bystander, and there is no 'other evidence' at all to show that, at the time Mr. Stillwell was speaking into the receiver of his phone, his phone was connected with the office of defendant, or that he was speaking to anyone. The fact that a like message was received at defendant's Ft. Payne office some hours afterward cannot supply the necessary evidence which must be produced in order to make the evidence of the telephone transaction admissible, because no inferences arise therefrom which could in any manner tend to show that the message was received by defendant for transmission and delivery at that time and in that manner. What presumption of fact arose from the receipt of the message at the Ft. Payne office of defendant as to the time and manner of its receipt at the Birmingham office for transmission and delivery? Certainly

there is no other evidence in the case to support the admissibility of the evidence of the telephone transaction, except the legal inferences and presumptions arising from the receipt of the message at the Ft. Payne office. We think that the only presumption or inference that the law could indulge would be in defendant's favor on these points, to wit, that the message was delivered to the Birmingham office by plaintiff, or someone by him duly authorized, and was promptly transmitted to the Ft. Payne office, as was defendant's duty to do. Suppose that its receipt at the Ft. Payne office and the presumptions arising therefrom was all the evidence as to the time and delivery of the message to defendant for transmission; what would it tend to prove? Would it tend, in the slightest degree, to prove that defendant had had, several hours before, a telephone communication from plaintiff or his agent by which the message was delivered to plaintiff for transmission? The question answers itself. Suppose we take the other end of the propositions. What presumptions or inferences of fact arise against defendant from the fact that plaintiff asked Mr. Stillwell to telephone to defendant and that the said Stillwell picked up the receiver of the telephone, called a number not shown to be defendant's number and spoke into the telephone certain words? There is no presumption or inference of law arising from such facts that said message even went further than into the receiver of Mr. Stillwell's phone. The presumptions and inferences arising from the two matters proven in no way connect the one with the other, but, on the contrary, tend to disprove, rather than prove, any such connection.

"For the foregoing reasons, we think the evidence as to the telephone transaction should have been ruled out, when plaintiff failed to introduce evidence tending to show that, at the time Mr. Stillwell was talking into his phone, it was connected with the office of defendant, and that he was speaking to someone in that office.

"The authority (*Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73), which counsel for appellant relies upon . . . is in no sense an authority for the ruling in this case."

The Law of the Telephone as Applied to Evidence and contracts is the subject of a note to *Barrett v. Magner*, 127 Am. St. Rep. 538.

The Right to Recover Against a Telegraph Company for Mental Anguish due to the negligent delay in the transmission or delivery of a message is discussed in the note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 305. Mental anguish and wounded feelings, alone and unaccompanied by personal injury, which naturally and proximately arise from the breach of a contract to deliver a telegraphic message, furnish ground for the recovery of damages, limited, however, to certain degrees of relationship. Brothers fall within the degree recognized by the rule: *Western Union Tel. Co. v. McMorris*, 158 Ala. 563, 132 Am. St. Rep. 46; *Western Union Tel. Co. v. Northcutt*, 158 Ala. 539, 132 Am. St. Rep. 38. But mental anguish for distress suffered by a father by reason of his failure to reach his sick daughter in law, caused by the delay in the delivery of a telegraphic message, cannot be recovered for anguish, unless the company had notice of the affectionate relations existing between such father and his daughter in law, and such relations must be alleged in the complaint: *Amos v. Western Union Tel. Co.*, 79 S. C. 259, 128 Am. St. Rep. 845. And there is no presumption of mental anguish arising from delay in a telegram depriving one of an opportunity to attend his cousin's funeral: *Johnson v. Western Union Tel. Co.*, 81 S. C. 235, 128 Am. St. Rep. 905.

LACEY v. HENDRICKS.

[164 Ala. 280, 51 South. 157.]

JUSTICE OF THE PEACE—Civil Liability.—No Action can be supported against a justice of the peace, acting judicially, who has not exceeded his jurisdiction, however erroneous his decision or malicious his motive. (p. 45.)

JUSTICE OF THE PEACE—Civil Liability—Pleading.—Where it cannot be determined from the complaint, in an action against a justice of the peace for malicious prosecution and false imprisonment, that he was not acting judicially and that the act complained of was not within his jurisdiction, the complaint is open to demurrer. (p. 45.)

JUSTICE OF THE PEACE—Jurisdiction After Appeal.—After an appeal has been perfected from a judgment of a justice of the peace in a criminal case, he has no power to take any further steps than to certify the papers to the criminal court. His issuance of a mittimus on the sentence is without his jurisdiction. (p. 46.)

JUSTICE OF THE PEACE—Power to Impose Sentence.—A justice of the peace is without jurisdiction to sentence a person to hard labor because in default in payment of a fine assessed against him two months before upon his conviction. (p. 46.)

EVIDENCE—Lost Appeal Bond.—Although It is Conceded that if an appeal bond in a case was given it has been lost, it is not competent for a witness to state as a conclusion that an appeal bond was given. But he may be allowed to state the contents of the paper, leaving it to the court to determine whether they constitute such a bond. (p. 46.)

Action for malicious prosecution and false imprisonment by William Hendricks against C. M. Lacey and another. From a judgment for the plaintiff, the defendant appeals.

Bush & Bush, for the appellant.

C. B. Powell, for the appellee.

286 EVANS, J. It is settled law in this jurisdiction that no action can be supported against a justice of the peace, acting judicially, and who has not exceeded his jurisdiction, however erroneous his decision or malicious his motive: *Irion v. Lewis*, 56 Ala. 190; *Heard v. Harris*, 68 Ala. 43; *Coleman v. Roberts*, 113 Ala. 323, 59 Am. St. Rep. 111, 21 South. 449, 36 L. R. A. 84; *Crosthwait v. Pitts*, 139 Ala. 421, 36 South. 83. It cannot be determined, upon the averments of counts 5, 6, 7, 8, 9 and 10, that the justice was not acting judicially, and that the act complained of was not within his jurisdiction. Therefore, without further noticing other defects in them, the court holds that those counts are open to the demurrer filed to them.

The eleventh count of the complaint shows that plaintiff was tried and convicted of an assault and battery before de-

fendant Lacey in August, 1907. It also shows that, notwithstanding an appeal was perfected on the day of the conviction by the plaintiff in this cause to the criminal court, yet on October 7, 1907, the justice (Lacey) sentenced plaintiff to hard labor for failure to pay the fine, and issued a mittimus to the sheriff commanding him to take the plaintiff into his custody and ²⁸⁷ hold him until discharged by law. Now, after the appeal was perfected, the cause was removed from the justice's jurisdiction absolutely, and he had no power or authority to take any further steps in that case than to certify or send the papers to the criminal court. Moreover, even if no appeal had been taken, the justice was, on the 7th of October, without jurisdiction to sentence plaintiff to hard labor, because he was in default of the payment of a fine assessed against him upon his conviction at a trial in the month of August: *In re Newton*, 94 Ala. 431, 10 South. 549. Therefore, the issuance of the mittimus based upon that sentence was an act without the power or jurisdiction of the justice, and without support or authority of the law. Whilst count 11 may be, and doubtless is, subject to demurrer, yet the demurrer leveled at it is inapt.

If objection had been timely and properly made to the testimony of witness Powell, that Judge Greene remarked that "somebody was liable for false imprisonment," such objection should, and doubtless would, have been sustained by the trial court. But the manner in which this matter is presented by the bill of exceptions prevents this court from reviewing it.

The court committed reversible error in allowing the question to witness Collins Johnson, "Did or did not plaintiff give an appeal bond?" etc. Whether or not an appeal bond had been given was a contested issue, and while it was conceded that, if such bond was given, the original was lost, it was not competent for a witness to state as a conclusion that an appeal bond was given. He might very properly have been allowed to state the contents of the paper, and then it would have been for the court's determination as to whether such contents as the witness testified to constituted an appeal bond.

²⁸⁸ For the errors pointed out, the judgment of the circuit court must be reversed and the cause will be remanded.

Dowdell, C. J., and Anderson and Sayre, JJ., concur.

The foregoing opinion was prepared by Justice Denson before his retirement as associate justice, and, having been adopted in consultation, is now announced as the opinion of the court.

PERSONAL LIABILITY OF JUDGES AND JUDICIAL OFFICERS.

- I. Judges in General, 47.**
- II. Justices of the Peace, 49.**
- III. Quasi-judicial Officers, 50.**
- IV. Ministerial Acts, 52.**
- V. Malice or Corrupt Motive, 52.**
- VI. Jurisdiction.**
 - a. Lack of, 53.**
 - b. In Excess of, 53.**

I. Judges in General.

The law in the United States and of England in reference to the personal liability of judges and other judicial officers depends, for the most part, upon the question of jurisdiction. Upon the existence or nonexistence of jurisdiction rests the question of immunity from, or liability for, acts done by a person while acting in a judicial capacity. If the jurisdiction is complete and attaches to both the person and the subject matter, then no matter how erroneous his judgment may be, so long as he acts within the scope of his jurisdiction and in a judicial capacity, no personal liability attaches to either a judge, or simply an officer in the discharge of a judicial function, in a judicial capacity. As to this principle there is no conflict among the authorities. But as to the effect of malice or corrupt motives, on the part of such officer, as to the question of his personal liability, there is a difference of opinion. But for the best of public reasons, the great weight of authorities hold to the rule that such an officer is immune from civil liability, even though the act complained of is done *mala fide*, if the act is a judicial one, done *pendente lite*, with jurisdiction of the parties and of the subject matter of the suit: *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Woodruff v. Stewart*, 63 Ala. 206; *Grider v. Tully*, 77 Ala. 422, 54 Am. Rep. 65; *Lacey v. Hendricks*, 164 Ala. 280, ante, p. 45, 51 South. 157; *Going v. Dinwiddie*, 86 Cal. 633, 25 Pac. 129; *Hughes v. McCoy*, 11 Colo. 591, 19 Pac. 674; *State v. Wolever*, 127 Ind. 306, 26 N. E. 762; *Alexander v. Gill*, 130 Ind. 485, 36 N. E. 525; *Jones v. Brown*, 54 Iowa, 74, 37 Am. Rep. 185, 6 N. W. 140; *Harrison v. Redden*, 53 Kan. 265, 36 Pac. 325; *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 652; *Pike v. Megoun*, 44 Mo. 491; *Atwood v. Atwater*, 45 Neb. 147, 61 N. W. 574; *Evans v. Foster*, 1 N. H. 374; *Burnham v. Stevens*, 33 N. H. 247; *Loftus v. Fraz*, 43 N. J. L. 667; *Cunningham v. Dillard*, 20 N. C. 485; *Root v. Rose*, 6 N. D. 575, 72 N. W. 1022; *Cunningham v. Buchlin*, 8 Cow. 178, 18 Am. Dec. 432; *Lange v. Benedict*, 73 N. Y. 72, 29 Am. Dec. 80; *Brodie v. Rutledge*, 2 Bay (S. C.), 69; *Hoggatt v. Bigley*, 6 Humph. 236; *Webb v. Fisher*, 109 Tenn. 701, 97 Am. St. Rep. 863, 72 S. W. 110, 60 L. R. A. 791; *Gaines v. Newbrough*, 12 Tex. Civ. App. 466, 34 S. W. 1048; *Taylor v. Goodrich*, 25 Tex. Civ. App. 109, 40 S. W. 515; *Rains v. Simpson*, 50 Tex. 495, 32 Am. Rep. 609; *Barrister v. Wakeman*, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201; *Johnston v. Moorman*, 80 Va. 131; *Kruegel v. Cobb* (Tex.), 124 S. W. 723; *Funsler v. Parsons*, 6 W. Va. 486, 20 Am. Rep. 431; *Anderson v. Gorrie* (1895), 1 Q. B. 668, 14 R. 79, 71 L. T. 382-C. A.; *Word v. Freeman*, 2 Ir. C. L. R. 460-Ex. Ch.; *Mostyn v. Fabrigas*, Comp. 172; *Fray v. Blackburn*, 3 Best & S. 576; *Dicas v. Brougham* (Lord), 6 Car. & P. 249-Ex. Ch.; *Johnson v. Cooke*, 17 S. J. 30; *Scott v. Stansfield*, 37 L. J. Ex. 155, L. R. 3 Ex. 220, 18 L. T. 572, 16 W. R. 911; *Taafe v. Downes*,

3 Moore P. C. 36n.; *Kempt v. Neville*, 10 Com. B., N. S., 523, 31 L. J. C. P. 158, 7 Jur., N. S., 913, 4 L. T. 640, 10 W. R. 6; *Garrett v. Farrand*, 6 Barn. & C. 611, 9 D. & R. 657, 5 L. J. (O. S.) K. B. 221; *Thomas v. Churton*, 2 Best & S. 475, 31 L. J. Q. B. 139, 8 Jur., N. S., 795, 6 L. T. 320. And where the statute provides that judgments of the commissioners of appeal are final, they cannot be questioned in an action for trespass: *Radnor (Earl) v. Reeve*, 2 Bos. & P. 391, 5 R. R. 630. Nor is a steward of a court baron responsible for the misfeasance of a bailiff of his court: *Bradley v. Carr*, 3 Man. & G. 221, 3 Scott N. R. 528; *Holroyd v. Breave*, 2 Barn. & Ald. 473, 21 R. R. 361; *Tinsley v. Massom*, M. & M. 52, 2 Car. & P. 582.

In *Hamilton v. Williams*, 26 Ala. 527, being a case on the official bond of a county court judge, upon the question of requiring a guardian to renew his bond, under a statute and the provisions of such bond, which, among other requirements, provides that such bond "shall be filed with the Secretary of State, subject to be sued on by any person or persons, for any injury, waste, or damage sustained in any estate, in consequence of any neglect or omission of taking good and sufficient security from the guardian, executor or administrators," the court determined that if the judge, upon appointing a guardian, fails to take such bond and security as the statute indicates, for injury resulting by reason of such omission or neglect he may be sued on his bond. But no liability attaches for not requiring a guardian to renew his bond, that not coming within the statute, and for the further reason that such act involves the exercise of a judicial, not a ministerial, function. In deciding the case the court said: "It is not the neglect or omission of taking good and sufficient security merely which is the burden of the complaint, but the failure of the judge to order the guardian to give such security, which order must be made and decided upon proof of the insufficiency of the sureties already on the bond, and thus involves a judicial investigation. The statute not embracing such omission of the judge, and the failure to take good security being dependent on it, no action lies for the failure to take such security. If the order had been made, and the judicial function involved in its adoption had been discharged, we are not prepared to hold that the judge would not be liable on his bond for failing to take good security upon such order, equally as if he were taking security in the first instance. It would certainly fall within the mischief intended to be remedied by the statute; but until then the breach contemplated by the statute does not accrue, and cannot. If the judge erroneously refuse to act, upon complaint for further security, there is a remedy by mandamus; if he corruptly refuse, or is guilty of malversation in office, the constitution and the statute (Code, section 685) point out the remedy; but neither the common law nor the statute makes him liable to a civil suit for his acts or omissions done as a judge."

And in *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, Mr. Justice Field said: "The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts, existing when there is jurisdiction of the subject matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the

motive had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

This law was adhered to in all the above-cited cases, down to the late case of *Wyatt v. Arnot*, 7 Cal. App. 221, 94 Pac. 86, reiterating the rule laid down in *Downer v. Lent*, 6 Cal. 94, 65 Am. Dec. 489, *Turpen v. Booth*, 56 Cal. 65, 38 Am. Rep. 48, *Pickett v. Wallace*, 57 Cal. 555, and *Bradley v. Fisher*, 13 Wall. 335, 2 L. ed. 646, all of which cases hold officials in the exercise of judicial functions in a judicial or quasi-judicial capacity absolutely immune from civil liability for their acts, even though done maliciously or corruptly.

The court said: "The principle upon which the rule as laid down in this state rests is fully and clearly explained in *Weaver v. Devendorf*, 3 Denio, 120, as follows: 'But I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally; but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges, from the highest to the lowest, to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power. It of course applies only when the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of this authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations, the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law itself.'"

II. Justices of the Peace.

The same protection is accorded justices of the peace in the discharge of their judicial functions as that of judges of courts of record. And in the exercise of his judicial duties, in a judicial capacity, with jurisdiction of the person, the offense or subject matter, a justice of the peace is not liable in a civil action, to anyone, for any act of his while thus acting within the scope of his authority. And as in the case of judges, there is a slight difference of opinion on the elements of malice or corruption; but the weight of authorities seems to be that he is not liable, even though he acts maliciously or corruptly, if acting within the bounds of his jurisdiction. So, a justice of the peace is liable only for his acts in an official capacity when they are ministerial, and then only in case of intentional or gross negligence. But not for judicial acts, even though he may be actuated with malicious intent or corrupt motives: *Stallings v. Gilbreath*, 146 Ala. 483, 41 South. 423; *Burgin v. Sullivan*, 151 Ala. 416, 44 South. 202; *Earley v. Fitzpatrick*, 161 Ala. 171, 135 Am. St. Rep. 133, 49 South. 686; *Lacey v. Hendricks*, 164 Ala. 280, ante, p. 45, 51 South. 157; *Mitchell v. Galen*, 1 Alaska, 339; *Prince v. Thomas*, 11 Conn. 472; *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec.

652; *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438; *Kelley v. Dresser*, 11 Allen, 31; *Cornow v. Kessler*, 110 Mich. 10, 67 N. W. 982; *Lenox v. Grant*, 8 Mo. 254; *Wertheimer v. Howard*, 30 Mo. 420, 77 Am. Dec. 623; *Jordan v. Honson*, 49 N. H. 199, 6 Am. Rep. 508; *Governor v. McAfee*, 13 N. C. 15; *Cunningham v. Dillard*, 20 N. C. 485; *Burns v. Norton*, 59 Hun, 616, 15 N. Y. Supp. 75; *Reid v. Hood*, 2 Nott & McC. 168, 10 Am. Dec. 582.

In *Lund v. Hennessey*, 67 Ill. App. 233, in passing upon the case, the court said: "No judicial person, whether a chancellor sitting in a court of equity, a judge of a common-law court of record, a justice of the peace, or other inferior magistrate, member of a court martial, or juror, who is a part of the court, is, for any judicial act within his jurisdiction, however erroneous or mistaken, answerable in a civil suit to a party aggrieved." This case was followed in *People v. Suhre*, 97 Ill. App. 231.

III. Quasi-judicial Officers.

There is conflict among the authorities as to whether a quasi-judicial officer is liable in a civil action, even where his acts are malicious or corrupt; but there is no conflict as to his immunity from personal liability to the same extent as judges of courts, while he acts in good faith, and within the limits of the authority expressly granted to him. But the question is pretty well settled that a quasi-judicial officer acting in a judicial capacity, with jurisdiction, is protected in the discharge of his duties to the same extent as judges, and that while acting within the bounds of his authority the fact that he acts maliciously or corruptly will not affect his right to immunity from civil liability: *Van Deusen v. Newcomer*, 40 Mich. 90; *Fawcett v. Dole*, 67 N. H. 168, 29 Atl. 693; *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557; *Gains v. Newbrough*, 12 Tex. Civ. App. 466, 34 S. W. 1048; *First Universalist Soc. v. Leach*, 35 Vt. 108; *Hoggard v. Pelicier*, 61 L. J. P. C. 19, A. C. 61, 65 L. T. 769-P. C.; *Hamilton v. Anderson*, 3 Macq. H. L. 363; *Ackerley v. Parkinson*, 3 M. & S. 411, 16 R. R. 317. These English cases deal with officers having special duties in the nature of quasi-judicial, such as a judge of a consular court having jurisdiction of all civil matters in which British subjects are parties, and a sheriff substitute, or a vicar-general, while acting in a judicial capacity.

In *Garff v. Smith*, 31 Utah, 102, 120 Am. St. Rep. 924, 86 Pac. 772, being an action against a quasi-judicial officer, a sheep inspector, who by law is required to quarantine diseased sheep, to define the place and the limits of the quarantine, such exercise of judgment and discretion were held to be judicial, not ministerial. He was therefore held not liable in a civil action, the question of whether malice or corruption, if charged and proven as to the acts complained of, would make him liable, not passed upon by the court, which said: "It is quite apparent that the doing of the acts complained of involves such discretionary powers as to make their exercise judicial in their nature, and that the officer performing them is not liable in a civil action, in the absence of averments and proof that he acted with malice or through fraud or corruption: *Fath v. Koepfel*, 72 Wis. 289, 7 Am. St. Rep. 867, 39 N. W. 539; *Spalding v. Vilas*, 161 U. S. 483, 16 Sup. Ct. Rep. 631, 40 L. ed. 780; *Chamberlain v. Clayton*, 56 Iowa, 331, 41 Am. Rep. 101, 9 N. W. 237; *Wall v. Trumbull*, 16 Mich. 228; *Bailey v. Berkey* (C. C.), 81 Fed. 737; *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530;

Pike v. Magoun, 44 Mo. 491; State v. Thomas, 88 Tenn. 491, 12 S. W. 1034; Schooler v. Arrington, 106 Mo. App. 607, 81 S. W. 469; State v. Hastings, 37 Neb. 96, 55 N. W. 774; Kendall v. Stokes, 3 How. (U. S.) 87, 11 L. ed. 506, 833; Daniels v. Hathaway, 65 Vt. 247, 26 Atl. 970, 21 L. R. A. 377. Whether there be such liability against an officer exercising quasi-judicial functions, even where he acts maliciously or corruptly, a principle of law concerning which the authorities widely differ, we need not determine in this case."

In Steele v. Dunham, 26 Wis. 393, the court said: "The complaint is, not that the defendants have willfully neglected to perform their duties, whereby the plaintiff has been injured, but that, in the discharge of the duties imposed upon them as a board of review, they acted 'without authority, wrongfully and with intent to injure and oppress' the plaintiff by increasing the value of his property on the assessment-roll above its true value, and to a greater amount than that placed upon it by the assessor." Such acts are not ministerial, but judicial, "and hence there are the strongest considerations, on grounds of public policy, for holding that these officers, while performing the duties imposed upon them by this law as a board of review, and while acting within their jurisdiction, are not liable to a civil action in any case. The authorities are not in harmony upon this question; but it is believed that the better rule is that stated so clearly by Beardsley, J., in Weaver v. Devendorf, 3 Denio, 120."

In Fath v. Koeppel, 72 Wis. 289, 7 Am. St. Rep. 867, 39 N. W. 539, being a case against a fish inspector for personal damages, the court said: "The powers conferred on the defendant by law, according to the complaint, are plainly and clearly judicial, and of great importance. He is vested with power to determine the quality and healthfulness of fish in market, and if unwholesome or unfit to be eaten, to condemn and destroy them. This is a high and responsible judicial power, as it concerns the public health, and as it may affect the rights of property; and the officer exercising such a power is within the protection of that principle, that a judicial officer is not responsible in an action for damages to anyone for any judgment he may render, however erroneously, negligently, ignorantly, corruptly or maliciously he may act in rendering it, if he act within his jurisdiction. This principle is stated and given force in Steele v. Dunham, 26 Wis. 393, by the present chief justice, to shield from liability members of an equalizing board, or board of review of assessments, who are charged with liability for damages to the plaintiff for corruptly and oppressively increasing the valuation of certain property without proof. Much more should this principle protect from actions for private damages an inspector of fruits and meats, acting in the interest of the public health. This principle protects all officers exercising judicial powers, whatever they may be called. It is a judicial 'privilege,' and has 'a deep root in the common law,' and found 'asserted in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions': Yates v. Lansing, 5 Johns. 282. It is a discretionary authority, where the determination partakes of the character of a judicial decision: Druecker v. Solomon, 21 Wis. 621, 94 Am. Dec. 471; Salem v. Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650. It has application to a board of health: Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; and to an inspector of provisions: Seamon v. Patten, 2 Caines, 312; and to a board of pilot commissioners: Downer v. Lent, 6 Cal. 94, 65 Am. Dec. 489. . . . The complaint

most clearly ranks the defendant as a judicial officer, and places him under the protection of this principle, and it therefore fails to state a course of action against him."

IV. Ministerial Acts.

Judges and judicial officers, while protected against civil liability for their judicial acts, or acts done in the discharge of their judicial functions, are not so protected in the discharge of their ministerial duties, and may be responsible for the manner of doing or for not doing an act or duty required of them in a ministerial capacity. Liability attaches in either event if the commission or omission results in damage to anyone interested in the transaction: *Wood v. Farrell*, 50 Ala. 546; *Grider v. Tully*, 77 Ala. 422, 54 Am. Rep. 65; *State v. Lazarus*, 39 La. Ann. 142, 1 South. 361; *Stone v. City of Augusta*, 46 Me. 127; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131; *People v. Faulkner*, 31 Hun, 317; *People v. Faulkner*, 55 Hun, 603, 8 N. Y. Supp. 376; *White v. Hislop*, 4 Mees. & W. 73, 6 D. P. C. 693, 7 L. J. Ex. 204, 2 Jur. 470.

In *Grider v. Tully*, 77 Ala. 422, 54 Am. Rep. 65, above cited, the question of whether the signing of a liquor license, by the county judge, was a judicial or ministerial act was involved. The fact that by statute this was a prescribed duty imposed upon the judge to be by him performed in the event of the claimant having otherwise complied with the law, so with the time fixed and manner of performance set forth with such certainty that nothing remained for the exercise of judgments or discretion, it was considered a purely ministerial act, and for refusing to act, in the face of all the other requirements of the statute having been complied with, the judge was liable on his official bond.

V. Malice or Corrupt Motive.

There seem to be a few cases holding that malice or corruption may be sufficient to make a judicial officer, while acting within his jurisdiction, liable for errors of judgment, but such are limited as applied to a judge: *Gault v. Wallis*, 53 Ga. 675; *Morgan v. Dudley*, 18 B. Mon. 693, 68 Am. Dec. 735. And other cases intimate that judges are not liable when acting in good faith: *Downing v. Herrick*, 47 Me. 462; *Bevard v. Hoffman*, 18 Md. 479, 81 Am. Dec. 618; *Kibling v. Clerk*, 53 Vt. 379; *Banister v. Wakeman*, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201.

But in *Rains v. Simpson*, 50 Tex. 495, 32 Am. Rep. 609, the rule asserted is, that even where a judge acts willfully, maliciously and corruptly in reference to performing an act which he is authorized to do, but that requires discretion, he is not liable because it is a judicial act. And in *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, as applied to courts of record having general jurisdiction, it was laid down that judges of such courts are not answerable in a civil action, even when they act without jurisdiction, except perhaps when without jurisdiction such acts are done maliciously and corruptly.

For strong exceptions to the relenting immunity, for wanton conduct, accorded the judiciary, and the expression of a patriotic fear that an unqualified protection against civil liability for their acts would tend to make of judges tyrants, the case of *Yates v. Lansing*,

9 Johns. 395, 6 Am. Dec. 290, in connection with this subject, is worth reading.

VI. Jurisdiction.

a. Lack of.—Where there is a total lack of jurisdiction, of either the person or of the subject matter, the judge's office is no protection to him, and though he exercises judicial functions, his acts are absolutely void. Not only is he liable, but all persons connected in executing his judgment are trespassers: *Upshaw v. Oliver*, Dud. (Ga.) 241; *Morrison v. McDonald*, 21 Me. 550; *Inhabitants of Waterville v. Barton*, 64 Me. 321; *Clarke v. May*, 2 Gray, 410, 61 Am. Dec. 470; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131; *Lenox v. Grant*, 8 Mo. 254; *Douthitt v. Bailey*, 14 N. M. 530, 99 Pac. 342; *Selby v. Platts*, 3 Chand. (Wis.) 183, 3 Pinn. 170; *Calder v. Halket*, 3 Moore P. C. 28; *Houlden v. Smith*, 14 Q. B. 841, 19 L. J. Q. B. 170, 14 Jur. 598; *Beauvrain v. Scott*, 3 Camp. 388, 14 R. R. 759.

And after all, the lack of jurisdiction is largely the question that determines liability, as such seems to only exist for errors committed in the arbitrary, corrupt and malicious exercise of an assumed judicial authority, without regard to the question of jurisdiction: *Cope v. Ramsey*, 2 Heisk. 197.

In *Taylor v. Doremus*, 16 N. J. L. 473, as to the lack of jurisdiction, the court said: "Nevertheless, there are cases in which a justice of the peace and other judicial officers may be sued for acts done by them in their official character; and whether an action will lie in such cases or not does not depend upon the *quo animo* with which the act was done, but upon the right and authority of the officer to do the act at all. My opinion is that where the act is a judicial one, done *pendente lite*, no action lies, however wrong and injurious to the party, whether the act was done *mala fides* or with the most honest intentions, provided the justice had jurisdiction of the parties and of the subject matter of the suit. But, on the other hand, if he had not, and could not, have jurisdiction of the cause, that is, of the subject matter, or where he has jurisdiction of the subject matter, but proceeds without having obtained jurisdiction over the party, by having him in court, by process or otherwise, actually or constructively, his acts, though strictly of a judicial character, are *coram non judice* and void, and he and all persons concerned in executing his judgment or award would be trespassers. So, too, where a ministerial duty or authority is annexed to a judicial office, if the officer executes that ministerial duty wrongfully, whether by mistake or fraud, he is answerable to the injured party in a suit at law."

b. In Excess of.—But the courts make a distinction between lack of jurisdiction and excess of jurisdiction. As where a judge or other officer acting in a judicial capacity has jurisdiction of a matter before him, but goes beyond or exceeds his authority, in such case he is not liable, his act being only a reversible error: *Calhoun v. Little*, 106 Ga. 336, 71 Am. St. Rep. 254, 32 S. E. 86, 43 L. R. A. 630; *Fausler v. Parsons*, 6 W. Va. 486, 20 Am. Rep. 431; *Randall v. Bringham*, 7 Wall. 523, 19 L. ed. 285. And a full discussion of this subject may be found in *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, in which Mr. Justice Field, who rendered the opinion, said in part: "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the sub-

ject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to a civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration whenever his general jurisdiction over the subject matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principles of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons. The distinction here made between acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject matter exists was taken by the court of king's bench, in *Ack-erley v. Parkinson*, 3 M. & S. 411, 16 R. R. 317."

Calder v. Halket, decided by the judicial committee of the privy council (3 Moore P. C. 28), went to the extent of deciding that an action will not lie, even against a judge of an inferior court of limited jurisdiction, for his judicial acts, when acting without jurisdiction, unless he knew of the defect, and that it is incumbent upon the plaintiff in every such case to prove that fact.

HUDSON v. WRIGHT.

[164 Ala. 298, 51 South. 389.]

CONSTITUTIONAL LAW.—Upon Questions of Due Process the decisions of the supreme court of the United States are conclusive. (p. 57.)

ATTACHMENT OF CROP—Necessity of Notice to Subtenant. Under Code, sections 2932 and 4741, although they do not expressly provide therefor, it is necessary that a subtenant should have notice of a levy upon his crop of an attachment against the tenant for the enforcement of the landlord's lien. And if the record does not disclose that he was given notice and opportunity to defend, a judgment therein rendered is not even prima facie evidence against him. (pp. 57, 58.)

JUDGMENT—Res Judicata—Who Treated as Parties.—A court, upon proper invocation, will look beyond the record and treat as parties all who in fact are found to have acted a part, and this whether their interference was irregular or not. (p. 58.)

JUDGMENT—Conclusiveness.—A Judgment is the Law's Last Word in a judicial controversy, and if valid, no issue of fact can be tendered thereon. (p. 58.)

JUDGMENT—Admission of Validity.—Where, in an Action of Trover for the conversion of a subtenant's crops, the defense set up is a judgment in attachment to enforce the landlord's lien, under which the subtenant's crop was levied upon and sold, a replication alleging that the defendant waived his lien as against the subtenant's part of the crop admits the validity of the judgment. (p. 58.)

JUDGMENT—Admission of Validity in Pleading.—Where the replication in trover admits the validity of a judgment against a subtenant in an action to enforce the landlord's lien, allegations of a waiver of the lien are not a defense against the judgment. (p. 58.)

Trover by Harvey Wright against F. N. Hudson. The defendant in his pleading set up that he owned a farm, a part of which he leased to J. T. Wright, and the latter subleased a part of his lease holding to Harvey Wright for the same year; that defendant sued out an attachment against J. T. Wright to enforce his landlord's lien, and had it levied upon said Wright's crop. The judgment is set out. It is then alleged that the crops grown by J. T. Wright were insufficient to satisfy defendant's demand for rent and advances, so that the attachment was levied on a part of plaintiff's crops sufficient to supply the deficiency, and a sale thereof made by the sheriff. To these pleas replications were filed, which set up in effect that defendant waived his landlord's lien for rent as against plaintiff's part of the crop. Demurrers to the replications were overruled. There was judgment for the plaintiff, from which the defendant appeals.

Goodhue & Blackwood, for the appellant.

George D. Motley, for the appellee.

²⁹⁹ SAYRE, J. It is not to be doubted that the plaintiff in this suit might have intervened for the assertion ³⁰⁰ of his

rights in the attachment suit. But on the face of the record the plaintiff was not a party to the attachment suit, nor was he brought in by process or notice of any kind whatever. He is to be bound, if at all, for the sole reason that his property was taken and condemned to the payment of another's debt under the form of judicial process. Unless he is to be so bound as a party or privy to the judgment in the attachment suit, he lost no right by failing or refusing to interpose his defense in that suit. It is supposed that the effect of the statute is to make the subtenant a privy to the judgment, is to make the judgment conclusive against the subtenant of every question involved and decided, and that without any notice or monition save only the bare fact of a levy upon his property.

In *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914, said by some text-writers to be the greatest judicial deliverance on the subject, the supreme court of the United States quoted the language of Judge Story in the case of *Bradstreet v. Neptune Ins. Co.*, 3 Sum. 600, Fed. Cas. No. 1793, as follows: "It is a rule, founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that the charges on which condemnation is sought shall be specific, determinate and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offense, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defense, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its ³⁰¹ justice or its truth, by any foreign tribunal. It amounts to little more in common sense and common honesty than the sentence of the tribunal which first punishes and then hears the party. 'Castigatque, auditque.' It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law, and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding." The court added: "This language, it is true, is used with respect to proceedings in rem of a foreign court; but it is equally applicable and pertinent to proceedings in rem of a domestic court, when they are taken without any monition or public notice to the parties.

"In *Woodruff v. Taylor*, 20 Vt. 65, the subject of proceedings in rem in our courts is elaborately considered by the supreme court of Vermont. And after stating that in such

cases notice is given to the whole world, but that from its nature it is to the greater part of the world constructive only, and mentioning the manner in which such notice is given in cases of seizure for violation of the revenue laws, by publication of the substance of the libel with the order of the court thereon specifying the time and place of trial, and by proclamation for all persons interested to appear and contest the forfeiture claimed, the court observed that, in every court and in all counties where judgments were respected, notice of some kind was given, and that it was just as material to the validity of a judgment in rem that constructive notice at least should appear to have been given as that actual notice should appear upon the record of a judgment in personam. 'A proceeding,' continued the court, 'professing to determine the ³⁰² right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court.' "

A statute of Texas gave a lien for wages to mechanics and laborers on a railroad, prior to all other liens, and authorized its enforcement by a judgment for the sale of the railroad, and provided that it should not be necessary to make lienholders parties defendant, but that they might intervene and become parties. It did not provide for any notice by publication. The supreme court of the United States refused to sustain a proceeding under the statute as a proceeding in rem, following *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914, in holding that it was essential to such a proceeding that there should at least be constructive notice, by some form of publication or advertisement, to adverse claimants to appear and maintain their rights before a judgment in such a proceeding could operate even as prima facie evidence. The question involved being a question of due process, the decisions of that court are conclusive.

The statute provides that attachments to enforce the landlord's lien must be tried in the same manner and upon the same notice as other attachments: Code 1907, sec. 4741. Section 2932 provides for notice in other attachments. Such notice is adapted to inform the parties to be affected of the pendency of the proceedings, gives them opportunity to appear and defend, and so satisfies the constitutional requirement of notice, and relieves the judgment or decree rendered of the odium attaching to a proceeding purely ex parte: *Betancourt v. Eberlin*, 71 Ala. 461; *Bledsoe v. Gary*, 95 Ala. 70, 10 South. 502. The statute makes no express ³⁰³ provision for notice to the subtenant in a case in which his crop is levied on to satisfy the superior landlord's lien. But the language is broad enough to cover such a case, and rather

than destroy the statute on one hand, or permit the condemnation of the subtenant's crop without opportunity to be heard on the other, we think, and so hold, that its reasonable interpretation calls for notice to the subtenant in the event of a levy upon his crop.

In *Pullman Co. v. Harrison*, 122 Ala. 149, 82 Am. St. Rep. 68, 25 South. 697, it was said that, on account of the harshness and extraordinary character of the remedy by attachment, courts incline to construe the statutory provisions creating it strictly in favor of those against whom it may be employed, and this court placed the jurisdiction of courts invoked to enforce the remedy upon the same footing with courts of special and limited jurisdiction, with no presumption in their favor. And in *Wilmerding v. Corbin Banking Co.*, 126 Ala. 268, 28 South. 640, where it appeared on the face of the record that the defendant in attachment was brought in by publication alone, and it further appeared that the notice given was not the notice required by statute, this court felt constrained to hold that the judgment of condemnation was without due process of law and wholly void on its face.

The validity of the judgment of condemnation in this case depends upon notice. The record of the proceeding in the attachment suit must show that as against him the court had jurisdiction to render the judgment. It must show that the subtenant was brought into court by the statutory notice and given an opportunity to defend. This it fails to do, and as against the subtenant it is not even *prima facie* evidence. Nothing we have said will be taken as in derogation of the ³⁰⁴ principle, recognized by this and other courts, that a court, upon proper invocation, will look beyond the record and treat as parties all who in fact are found to have acted a part, and this, whether their interference was irregular or not.

But the cause must be reversed nevertheless. The void judgment was set up as an answer to the complaint. Plaintiff admitted the validity of the judgment by replication in confession and avoidance. But the matter alleged could not avoid a valid judgment. A judgment is the law's last word in a judicial controversy. If the judgment is valid, no sufficient issue of fact can be tendered. If void, its nullity appears on its face, and the issue made upon it must be an issue of law. Otherwise, relief must be sought in equity. The appellee should have taken his point by demurrer to the plea; but the ruling which sustained the replication was error.

Reversed and remanded.

Dowdell, C. J., and Simpson, Anderson and Evans, JJ., concur.

ANDERSON, J. While I concur in the reversal of this case, I do not wish to hold that mere notice to Harvey Wright, the subtenant, would be binding on him, unless he could have intervened and shown a waiver by the landlord, Hudson, of the lien on his part of the crop, and which I think is very questionable. Nor am I satisfied that a party whose property is improperly levied on is required to intervene or interpose a claim suit, but think this would be a cumulative remedy, which he may abandon and subsequently sue for the taking or conversion, without being estopped by the judgment in the attachment case.

The Provisions of an Attachment Statute must be Followed Strictly, or no rights will be acquired thereunder: Ireland v. Adair, 12 N. D. 29, 102 Am. St. Rep. 561; Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 113 Am. St. Rep. 253. Courts are inclined to construe such a statute strictly in favor of those against whom it may be employed: Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 82 Am. St. Rep. 68.

Notice and Opportunity to be Heard are Essential Requisites to the Jurisdiction of all courts, even in proceedings in rem, and a judgment without jurisdiction is a nullity: Dorr v. Rohr, 82 Va. 359, 3 Am. St. Rep. 106. See, also, Furgeson v. Jones, 17 Or. 204, 11 Am. St. Rep. 808; Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204; Hobby v. Bunch, 83 Ga. 1, 20 Am. St. Rep. 301. The sentence of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to any respect in any other tribunal: Evans v. Johnson, 39 W. Va. 299, 45 Am. St. Rep. 912. It is not res judicata: Nichells v. Nichells, 5 N. D. 125, 57 Am. St. Rep. 540.

BURROUGHS v. BURROUGHS.

[164 Ala. 329, 50 South. 1025.]

VENDOR'S LIEN—Necessity of Definite Debt.—One essential condition to the creation of a vendor's lien is a definite, ascertained debt owing for the purchase price of the land. (p. 60.)

VENDOR'S LIEN—Agreement to Support Grantor.—A grantor has no lien upon the subject of conveyance when the sole consideration therefor is an agreement by the grantees to support him during life. There is no ascertained and definite debt. (p. 60.)

Oliver, Verner & Rice, for the appellant.

Daniel Collier and R. H. Scrivener, for the appellee.

³²⁹ McCLELLAN, J. The decree appealed from declared, and directed the enforcement of, a vendor's lien as ³³⁰ prayed in complainant's (appellee's) bill. The bill, in paragraph 4, expressly alleges that the consideration for the conveyance

of her land, by complainant to J. B. Burroughs, "was that Burroughs should support and maintain the complainant for the balance of her life; that the support and maintenance of the complainant for the period of her natural life was and is the agreed purchase price for the said lands"; or that the consideration was that Burroughs should furnish a reasonable amount necessary to her support during her life. The bill, in the cited paragraph, pointedly alleges that the sum recited in the deed exhibited with the bill, viz., one hundred and fifty dollars, was not the consideration for the conveyance and that it never was paid. Following the first stated averments, the true consideration for the conveyance is alleged as quoted above. Accordingly, the cause must be considered without reference to the argued inquiry, based on one of the principles treated in *Hooper v. Savannah & M. R. R. Co.*, 69 Ala. 529, whether a vendor's lien arises where the promise or covenant of the grantee has, by agreement of the parties, a fixed, certain, monetary substitute, to be effective upon the contingency of a failure of the grantee to perform as he covenanted or agreed to do. There being no allegations in the bill on which to predicate the application of the principle mentioned, a decree rested on the principle cannot be sustained. Much of the argument of the solicitors in the cause becomes inapt on the state of the pleading here.

The question then is: Has a grantor a lien upon the subject of the sale and conveyance, when the sole consideration therefor is the agreement of the grantee to care for and support the grantor during life? We think there can be no doubt that one essential condition to the creation of a vendor's lien is that there is a definite, "ascertained, absolute debt, owing alone for ³³¹ the purchase price of the land conveyed"; on the contrary, that no such lien arises where the consideration for the conveyance is an uncertain, indefinite, contingent demand: 3 Pomeroy's Equity, secs. 1250, 1251, and authorities cited in notes thereto. Under this doctrine, the complainant, as upon the averments of the bill, neither had nor has a vendor's lien. No debt, ascertained and definite, was created by the agreement between the parties as for the sale and conveyance of the land. Her remedy was "on the undertaking," as *Gardner v. Knight*, 124 Ala. 273, 27 South. 298, adjudges.

The decree is reversed, and a decree will be here rendered dismissing the bill.

Reversed and remanded.

Dowdell, C. J., and Simpson and Mayfield, JJ., concur.

Conveyances in Consideration of the Support of the Grantor by the grantee are considered in the note to *Davis v. Davis*, 130 Am. St. Rep. 1039. That a covenant in a deed which charges the grantee with the

support of a third person as part of the consideration creates a lien on the land for such support, see *Webster v. Cadwallader*, 133 Ky. 500, 134 Am. St. Rep. 470.

A Vendor of Land is not Entitled to an Implied Equitable Lien to secure the performance of the consideration, when that is of such a nature that the court cannot accurately ascertain and define the amount of the charge to be imposed upon the land and enforced out of it, as where the consideration is an agreement to support the grantor during life: *Peters and Wife v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252.

NELSON v. BROWN.

[164 Ala. 397, 51 South. 360.]

MARRIAGE—Deed in Fraud of Intended Wife.—A conveyance executed by a man in contemplation of marriage, without the knowledge of the prospective wife, and intended to prevent her rights of dower and homestead from attaching to the land, is a fraud upon her rights against which a court of equity will grant relief. (p. 62.)

DEED—Evidence as to Date of Execution.—When there are no indications of falsity on the face of a deed, the presumption of law is that it was executed upon the day of its date. And while the presumption is controllable by evidence aliunde, the mere suggestion of fraud or falsity does not put upon the party producing the deed the burden of proving that it was actually made upon the day of its date. (p. 63.)

MARRIAGE—How Far a Valuable Consideration.—While marriage is a valuable consideration, it is such in ways differentiated from that valuable consideration which will support a contract, in that ordinarily the word "valuable" signifies that the consideration so described is pecuniary or convertible into money. (p. 65.)

MARRIAGE—Wife as Purchaser Under Registry Act.—Persons entering into a contract of marriage cannot claim the protection of the statute of registration. Hence a deed made by a man prior to his agreement to marry is not invalid as against his wife because not recorded until after their marriage. (p. 67.)

MARRIAGE—Deed in Fraud of Intended Wife.—A conveyance made by a man prior to his agreement to marry, and without reference to any anticipated rights of the prospective wife, is valid at that time, and its subsequent withholding from record, and the fact that it is voluntary, do not impair its validity. (p. 67.)

GIFT—Confidential Relations.—The Law Presumes the exercise of undue influence in transactions where confidential relations exist between the parties, and puts upon the donee, when shown to be the dominant party, the burden of repelling the presumption. The burden is usually discharged by showing that the donor had the benefit of competent and independent advice. (p. 67.)

VOLUNTARY CONVEYANCE—Confidential Relations.—The burden of proving the existence of a confidential relation between the parties to a voluntary conveyance rests upon the party who asserts it. (p. 68.)

VOLUNTARY CONVEYANCE—Confidential Relations.—Although the relation of stepson and stepmother is not one of those technical relations from which trust and confidence are presumed by

law to arise, it may in fact be a relation of that character in which he is the dominant party, so that in case of a voluntary conveyance by her to him he will have the burden to show her independence at the time of the transaction. (p. 68.)

Bill by Mary E. Nelson against Joe D. Brown to annul a deed and have dower and homestead allotted to her. From a decree for the complainant granting insufficient relief, she appeals.

Henry Fitts, for the appellant and cross-appellee.

Ormond Somerville, for the appellee and cross-appellant.

⁴⁰⁰ SAYRE, J. Appellant, now married a second time, and Squire D. Brown, now deceased, intermarried on February 23, 1894. Appellee is the son of deceased by a former marriage. Prior to his second marriage Squire D., by a deed bearing date December 1, 1892, on a recited consideration of six thousand dollars, conveyed to appellee substantially all of his property, consisting of about two thousand acres of land in the county of Tuscaloosa. Squire D. died in March, 1905. In June, 1906, appellant, on the recited consideration of one hundred dollars and love and affection, executed to Joe D. a quitclaim of all her interest in the lands of her deceased husband, including some pieces which had been omitted from the conveyance by her husband or had been since acquired. The bill was filed in March, 1908, and prayed that the deed from Squire D. be vacated and annulled and held for naught as in fraud of her marital rights; that dower be assigned and homestead set apart; that the quitclaim be set aside as procured by undue influence, and for an accounting of the personal estate of the complainant's deceased husband. The chancellor wrote a decree sustaining the deed by the deceased husband, but annulling the later quitclaim, and granting other relief. From that decree by appeal and cross-appeal the cause is brought here for review.

⁴⁰¹ In respect to the deed executed by the deceased, the appellant's first proposition is that it was secretly made pending the treaty of marriage between deceased and herself, and in fraud of her subsequently acquired marital rights. The subject of the rights of a wife under the circumstances here affirmed by the appellant had careful and repeated consideration by this court in *Kelly v. McGrath*, 70 Ala. 75, 45 Am. Rep. 75. It was there determined that a conveyance of his lands by the husband, executed in contemplation of marriage, without the knowledge of his intended wife, and intended to prevent her rights of dower and homestead from attaching to the lands, is a fraud upon the rights of the wife on marriage, against which a court of equity will grant relief. The general principle so announced is not now drawn into

question, but the parties are in irreconcilable conflict over the facts which would bring appellant's case under the influence of the principle stated. The proof as to the time from which the engagement of marriage must be dated not unnaturally rests upon the sole testimony of the appellant, and is subject only to such discredit as may arise from interest, some evident errors into which she has fallen in respect to other matters, and the alleged general lack of verisimilitude in her story. She fixes the date when Squire D. Brown began to visit her in May, 1893, and of the engagement to marry in July of the same year. The marriage was solemnized seven months later. The deed complained of bears date, as we have seen, December 1, 1892. Appellant's contention is that it was, in fact, executed and delivered in the fall of 1893, and antedated so as to carry into effect the purpose common to her intended husband and his son by a former marriage, then a man of about the same age with the appellant. Appellee's contention is that the evidence ⁴⁰² affords no sufficient justification for a decree which would fix the date of the execution of the deed at a time different from that shown on its face. When there are no indications of falsity on the face of a deed, the presumption of law is that it has been executed upon the day of its date. The presumption is controllable, of course, by evidence aliunde, but the mere suggestion of fraud or falsity does not put upon the party producing it the burden of proving that the deed was actually made upon the day of its date: *Smith v. Porter*, 10 Gray, 66; *Pullen v. Hutchinson*, 25 Me. 249; *Costigan v. Gould*, 5 Denio, 290; *McFarlane v. Loudon*, 99 Wis. 620, 67 Am. St. Rep. 883, 75 N. W. 394; *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460; *Aldridge v. Branch Bank at Decatur*, 17 Ala. 47; *Hauerwas v. Goodloe*, 101 Ala. 162, 13 South. 167. It would serve no useful purpose to enter upon a discussion in detail of the voluminous testimony and the widely variant estimates put upon it by opposing counsel, nor is it permissible that this opinion be spread over the pages necessary to contain such a discussion.

The testimony has had careful consideration, and with this, and some observations on its broadest phases, the parties must be content. It appears that months before Squire D. Brown began to visit appellant an occasion arose upon which men frequently hunt cover for their property. He was surety on the official bond of King, the sheriff of Tuscaloosa county, against whom a summary motion was pending and other suits threatened as he knew. In the fall of 1892 King was approaching the end of his term as sheriff, and had been elected for clerk of the circuit court. Squire D. Brown consulted an attorney as to how he might evade liability. Being informed that no evasion was possible, he announced

his expectation that he would be requested ⁴⁰³ to sign King's bond as circuit clerk, his inability to refuse him, and his determination to evade the risk by conveying his property to his son Joe, so that it would be safe from such liability, and to this attorney he announced at a time prior to his second marriage that he had conveyed his property. In April, 1903, Brown signed the bond of King as circuit clerk. In the spring of that year the grand jury was investigating the solvency of King's bond, and at that time Brown stated to the witness Kyle, who has since then served a term as sheriff of the county, that he had given his property to his son Joe. There does not appear to be the slightest reason for doubting the perfect candor of Judge Foster or Sheriff Kyle, the two witnesses who established the foregoing facts. If the occasion arose which would reasonably account for the grantor's conveyance of his property at the time it purports to have been made, on a theory totally different from that propounded by the appellant, and he then announced his desire to have it made for the purpose of meeting that occasion, and subsequently declared that his purpose had been carried into effect, and all this transpired before the time when, so far as the evidence shows, he may have conceived the notion of marrying appellant—certainly before the agreement to marry—it would seem to require some cogent countervailing evidence to induce the conclusion that the grantor had not accomplished so easily attainable a purpose when and as he desired. The general conclusion that Squire D. Brown conveyed his property to his son, the appellee, in the fall of 1892 or the winter of 1892-93, is also borne out by the testimony of the appellee, and that of the witnesses Collins, Anna Brown, Riley, Duren, and Keene, who establish the fact as clearly as might in reason be expected after the lapse of sixteen years, during which the ⁴⁰⁴ matter had not been brought into question. We do not mean to suggest that the testimony to sustain appellee's case is without discrepancies. Appellant, indeed, plants her case as to this deed in large part upon the lapses of the witnesses Collins and Anna Brown. But in our opinion the appellant's argument just here is too critical. It requires too much of the appellee. It concedes too little of honest purpose to appellee's witnesses. It leaves out of account that appellee and his witnesses cannot be expected to testify to an old transaction with as accurate recollection as might be expected of Squire D. Brown if he were able to testify in his own behalf. To us there does not seem to be any serious reason for doubting that the general effect of the testimony of the other witnesses is to sustain the inference necessarily following the testimony of Foster and Kyle. In this connection we considered also (1) the fact that the lands in question were assessed to Squire D. Brown for

taxation during the year 1893; (2) that Squire D. Brown took a deed of forty acres from one Sellers on December 6, 1892, which land was not included in the deed in controversy; and (3) that the deed in controversy included two hundred acres of land, a deed for which Squire D. took from H. B. Foster on May 1, 1893. There is probative force in these facts, but it is by no means overwhelming, and is weakened to some degree by the following considerations: (1) The date of the assessment does not appear, nor does it appear by whom it was made, nor would the fact that it had been made by Squire D. Brown himself be insuperable, if it so appeared. (2) The Sellers deed was of land worth the comparatively trifling sum of one hundred dollars, and, if a question may answer a doubt, it may be asked why the deed to appellee, if made in the latter part of 1893, as appellant contends, did not contain the land bought from ⁴⁰⁵ Sellers. (3) Foster's deed conveys his interest in two hundred acres of land for the sum of ten dollars. We perhaps might infer that Squire D. acquired his real title from some other source and at another time. On consideration of the whole evidence touching this question, we conclude that the deed dated December 1, 1892, must be taken as executed and delivered on that day, and, in consequence, that the appellant's attack upon it, made the subject of what has heretofore been said, must fail.

Appellant further insists that she must have relief against the deed for the reason that, though made on the day of its date, it was not recorded until after her marriage to the grantor. In other words, she claims protection under the statute of registration against the unrecorded conveyance as a bona fide purchaser for value. Counsel concede that this proposition goes somewhat further than any decided case, but insists that it is sound upon principle. As between the immediate parties, marriage is in law a civil contract, and is everywhere held to be a valuable consideration. But it is valuable in ways differentiated from that valuable consideration which will support a contract, in that ordinarily the word "valuable" signifies that the consideration so described is pecuniary, or convertible into money. To this marriage is an exception: 1 Parsons on Contracts, 468. Marriage has hardly yet been reduced to the level of a contract or bargain and sale, nor do we find that it has ever been held that the statute of registration is intended to advise persons contemplating matrimony of the property and contract status of the other party to the contemplated engagement. It is reprehensible for either party to conceal the fact that he or she does not own large properties upon the faith of the reputed ownership of which, in part, at least, the other may properly enter into an agreement of marriage, ⁴⁰⁶ but the statute for the registration of conveyances, while intended to protect purchasers for

valuable considerations, mortgagees, and judgment creditors, without notice, cannot be given that enlarged construction which would include persons entering into a contract of marriage. As was observed by Judge Stone in *Wood v. Lake*, 62 Ala. 489: "We should endanger, if not impair, the usefulness of a very salutary statute enacted to prevent fraud if we were to travel out in search of an intention in policy not expressed or implied in the words of the statute." In *Derry v. Derry*, 74 Ind. 560, cited by appellant in support of her contention that her asserted dower right is within the protection of the statute, it was said that marriage is a valuable consideration, and a married woman is regarded as a purchaser for a valuable consideration of all property, which accrues to her by virtue of the marriage, or by virtue of any valid antenuptial agreement. In that case the husband had taken title in himself to land purchased with his first wife's money, and it was held that the second wife took by descent, and not by purchase, and was bound by the trust, whether she had any notice of it or not. The other case cited by appellant (*Brooks v. McMeekin*, 37 S. C. 285, 15 S. E. 1019) falls squarely within the contention herein first considered; that is to say, the conveyance there was made in fraud of the rights of the prospective wife after the agreement to marry had been entered into. So that neither case directly or analogically supports the contention to which it is cited.

In *Richardson v. Skolfield*, 45 Me. 386, the widow demanded her dower against an unrecorded mortgage. The court said: "The demandant had no right in the land which could be affected by the matter of the registry of the mortgage. Her inchoate right of dower was ⁴⁰⁷ no more a right of dower in the land than is an acorn an oak. It was immaterial to her, so far as her legal rights were concerned, whether the mortgage was recorded or not." To the same effect is *Blood v. Blood*, 23 Pick. 80. See, also, *Champlin v. Champlin*, 16 R. I. 314, 15 Atl. 85.

In this state, at a time when marriage vested the wife's personal property in the husband, it was held by this court that the fact of marriage without more did not constitute the husband a purchaser within the contemplation of that clause of the statute of frauds which then declared that "when any loan of goods and chattels shall be pretended to have been made to any person with whom, or those claiming under them, possession shall have remained for the space of three years, without demand made and pursued by due course of law, on the part of the pretended lender, etc., the same shall be taken, as to the creditors and purchasers of the person aforesaid so remaining in possession, to be fraudulent within this act, and the absolute property is with the possession, unless such loan, etc., be declared by will or deed in writing,

proved and recorded." It was readily conceded that marriage is a valuable consideration to support a contract, and that the husband became by his marriage in a certain technical sense a purchaser, or came by his wife's property by purchase, but it was said to be clear that the word "purchaser" in the statute was used in its popular sense, and meant one who acquired property by bargain and sale for a valuable consideration: *Perry v. Graham*, 18 Ala. 822. And in an earlier case this court said that the wife could not with any propriety be regarded as the purchaser of her husband's estate by the simple act of marriage: *Gibson v. Carson's Admr.*, 3 Ala. 421. We think, therefore, that this alternative contention can be of no avail to the appellant.

⁴⁰⁸ The conveyance, then, having been made prior to the agreement to marry, and without reference to any anticipated rights of the prospective wife, it was valid at the time, and its subsequent withholding from record, and the fact that it was voluntary, had not the effect to impair its validity, and the chancellor correctly so ruled.

The attack upon the quitclaim of June 11, 1906, which attack was sustained by the chancellor, proceeded upon two theories: (1) That it was procured by actual fraud; and (2) that it was constructively fraudulent because affected by the confidential relation then existing between the parties. If the parties to this deed stood to each other in the ordinary relation of grantor and grantee, the testimony of the witness Squires and Burchfield, not to mention the testimony of the grantee, would be effective to disprove the charge of actual fraud. These witnesses established to our reasonable satisfaction that Mrs. Nelson well understood the nature and effect of the quitclaim generally, and that if she did not understand that it conveyed her interest in more land than her husband had conveyed to his son, that defect in her understanding of the transaction must be attributed to her lack of due diligence as a free agent. We cannot in the evidence find that she was induced to the execution of the deed by any actually fraudulent misrepresentations or devices of the grantee therein. The charge of fraud constructive merely must, however, be disposed of on different principles with a different result.

The law presumes the exercise of undue influence in transactions inter vivos where confidential relations exist between the parties, and puts upon the donee, when shown to be the dominant party in the relation, the burden of repelling the presumption by competent ⁴⁰⁹ and satisfactory evidence: *Hutcheson v. Bibb*, 142 Ala. 586, 38 South. 754. This burden is usually discharged, as is noted in the case just cited, by showing that the grantor had the benefit of competent and independent advice. True enough, the relation of stepson

and stepmother is not one of those technical relations from which trust and confidence are presumed by law to arise. But it may have been, in fact, a relation of that character, for the principle invoked extends to all persons who occupy a position of trust and confidence, of influence and independence in fact, although not perhaps in law: *Cannon v. Gilmer*, 135 Ala. 302, 33 South. 659; 2 Pomeroy's Equity Jurisprudence, sec. 963. The burden of proving the relation rests in this case upon the grantor who asserts its existence. The facts may be outlined as follows: Joe D. Brown, the grantee, and his stepmother, were of about the same age. He was an active man of considerable estate, most of which had been given to him by his father previous to the latter's second marriage. She, of humble origin and meanly educated, though the widow of a man of good estate, for considerable time accepted a position of dependence upon her stepson as a matter of course. During the life of her husband, her stepson had treated her with affection and consideration. Her husband on his deathbed had committed her to the care of his son. The latter supplied her needs, and at times offered her money in excess of what she cared to accept. The management of the affairs of the estate of her deceased husband was committed by her without any sort of reserve to his son, while his widow depended upon the son for current necessities as though a member of his immediate family. His conduct, by strong implication, at least, asserted his beneficial ownership of the entire estate left by his father, and that his contributions to his stepmother's support and maintenance were of grace, and not demandable as of right. ⁴¹⁰ In this situation she acquiesced. It does not detract from this impression of her dependence to note that the deed here in question was grossly improvident, conveying her interest in several hundred acres of land, over and above that which her husband had deeded to his son, on a nominal pecuniary consideration and for love and affection. Cross-appellant is able to point out some expressions falling from the cross-appellee when testifying as witness in her own behalf which indicate a lively appreciation of her situation and her rights. But this was after another influence had intervened, was after her rights were being asserted, and speaks her mind at a later time and at the time of her deposition rather than at the time of the execution of the deed. At any rate, upon a survey of the situation, we are of opinion that relations of confidence and trust in which the cross-appellant was the dominant party existed at the time of the execution of the quitclaim. This condition established, it becomes the office of the court to consider with a jealous regard for the rights of the defendant party, and the burden devolved upon the grantee to show that the independence of the grantor had

been established at the time of the transaction. In this the cross-appellant has failed, and, in consequence, the deed here spoken of was properly avoided by the chancellor's decree.

This, by necessary conclusion, disposes of the subsidiary questions discussed, and must result in an affirmance of the decree of the chancery court on both appeals.

Let each party be taxed with one-half the costs of this appeal.

Affirmed on both appeals.

Dowdell, C. J., and Anderson and Evans, JJ., concur.

Antenuptial Conveyances in Fraud of the Prospective Husband or Wife of the grantor are discussed in the note to Collins v. Collins, 103 Am. St. Rep. 418. Ordinarily, a voluntary conveyance, made to defeat the marital rights of the future wife of the grantor, is fraudulent as to her, although she has not yet been selected: Beechley v. Beechley, 134 Iowa, 75, 120 Am. St. Rep. 412; Higgins v. Higgins, 219 Ill. 146, 109 Am. St. Rep. 316.

Where a Confidential Relation Exists, a Gift Made to the person in whom the confidence is reposed by reason of the relation is prima facie voidable; the law presumes, from the mere existence of the relation, that the gift was obtained by undue influence or improper means, and the burden of proof rests upon the donee to show that it was the free and voluntary act of the donor: Gilmore v. Lee, 237 Ill. 402, 127 Am. St. Rep. 330, and cases cited in the cross-reference note thereto.

A Fiduciary Relation Exists in All Cases Where There is a Special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. The rule embraces both technical and fiduciary relations, and those informal relations exist wherever one man trusts and relies on another. The origin of the confidence is immaterial: Dick v. Albers, 243 Ill. 231, 134 Am. St. Rep. 369.

STATE EX REL. FERGUSON v. BIRMINGHAM WATER- WORKS COMPANY.

[164 Ala. 586, 51 South. 354.]

WATER COMPANIES—Service Without Discrimination.—The business of a water company, invested with the power of eminent domain, is affected with a public use, and it must serve all with equal facilities and without discrimination. (p. 71.)

WATER COMPANIES—Discrimination in Rates.—When a water company grants to one or more consumers a rate less than the legally fixed maximum, and less also than the reasonable rate which it might exact, all other consumers are not entitled to the rate as of right. (pp. 71, 72.)

WATER COMPANIES—Discrimination in Rates.—A water company, whenever it makes a concession to a consumer, does not thereby fix a new schedule of rates for all its consumers to be observed in all cases. (p. 72.)

Mandamus by the state on the relation of C. W. Ferguson to the Birmingham Waterworks Company to cease discrimination in its charges. From a judgment for the respondent, the relator appeals.

A. G. & E. D. Smith, for the appellant.

London & Fitts, for the appellee.

⁵⁸⁸ SAYRE, J. The Birmingham Waterworks Company, a corporation chartered by special act of the legislature of date February 13, 1885 (Local Acts 1884-85, p. 415), is furnishing water for the use of the city of Birmingham and its inhabitants and for manufacturing purposes under an ordinance contract of May 31, 1888, which provides that the rates therein fixed shall never be exceeded. The company has entered into contracts with some consumers similarly situated with the relator, by which it has undertaken to furnish to them water at a rate less than the maximum charges allowed by the ordinance. Relator does not complain that he is charged more than the maximum rate, nor even that he is charged more than a reasonable price for the water he uses, but his contention is that he is entitled to receive water at the most favorable rate furnished to any others similarly situated. And he seeks ⁵⁸⁹ the aid of the court to give effect to his contention by its writ of mandamus. Respondent, for this occasion, assumes this court to have held that it is forbidden to furnish water to any of its customers, or even to all of them, at a rate less than the maximum fixed by the ordinance contract. In *Smith v. Birmingham Waterworks Co.*, 104 Ala. 315, 16 South. 123, it was said that "the rates for all purposes was the subject of contract between the city and the respondent, and regulated by it," and it was held that for water furnished for domestic purposes certain flat rates, as they are called, were fixed, and that for water furnished for other purposes to the inhabitants and for manufacturing purposes the respondent was entitled to charge by measurement. In *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379, 30 South. 445, it appeared that the city and water company were operating competing water supply systems. The city also maintained a sewerage system for the operation of which water was necessary. By the device of refusing to fix a rate for water used for sewerage purposes, and charging the same price for the use of both its water and sewers as for its water alone, the city discriminated against the water company. The court declared this practice to be an abuse, and required the city to fix a rate for its sewer service. In *Birmingham v. Waterworks*, a case decided by Honorable D. M. Powell, appointed by the governor upon the inability of the court to reach a con-

clusion concurred in by a majority, and reported in only 42 South., at page 10, the question was whether the water company was entitled to charge meter rates for water for sprinkling lawns and pleasure gardens. In the course of the opinion some expressions are used to the effect that water companies are without power to make a contract for unreasonable rates or rates not uniform to consumers. But no question⁵⁹⁰ was involved of discrimination in the way of fixing for some customers a rate less than a reasonable charge for the service rendered. The maximum rates provided for in the ordinance contract in the instant case were fixed for the protection of the public against the exaction of unreasonable charges. The competency of the parties to so contract is not questioned, nor is it doubted that under the law and the facts the municipality in the exercise of the police power had the right to fix the rates as the maximum reasonable rates chargeable. There is no indication of a legislative purpose to declare that the maximum should also be the minimum rates. Nor does any reason suggest itself why the water company may not establish a uniform rate less than the maximum fixed by the ordinance contract, or a rate less than reasonable, if such a thing be imaginable. The acceptance of such a rate uniformly applied by the public will be conclusively presumed.

So, then, the question is whether when the water company grants to one or more consumers a rate less than the legally fixed maximum, and less also than the reasonable rate which it might exact, all other consumers are entitled as of right to receive the most favorable rate granted to any consumer. The business of water companies incorporated to furnish water to the public is naturally monopolistic. Such companies are given the power of eminent domain—a power granted by the public in order that the needs and purposes of the public may be served more effectually. Such a business is, therefore, affected with a public use: *Mobile v. Bienville Water Co.*, 130 Ala. 379, 30 South. 445; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Haugen v. Albina Light & Water Co.*, 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424; *American Waterworks v. State*, 46 Neb. 194, 50 Am. St. Rep. 610, 64 N. W. 711, 30 L. R. A. 447; ⁵⁹¹ *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240. And it must serve all with equal facilities and without discrimination. In this case no complaint is made that the relator is discriminated against in respect to facilities furnished in the way of getting a supply of water, but only in respect to the price charged. It would seem that, if the rate granted to favored customers is less than the reasonable rate the company may lawfully demand from all consumers on a basis of uniformity, as on the allegations of the petition we must

assume to be the case, the consequent discrimination is enjoyed by those having the favored rate at the expense of the company, and does not impinge upon any right of consumers generally, for they are receiving all they are entitled to have in any event: *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240. The granting of a rate to any considerable number of consumers more favorable to them than the rate fixed for consumers generally, in the absence of possible peculiar circumstances of justification, would be evidential that the general rate is unreasonably high, which would call for municipal or legislative revision to be enacted in a due observance of constitutional limitations. But we do not see our way clear to a holding that whenever a water company makes a concession to a consumer, it thereby fixes a new schedule of rates for all its consumers. If, within the limit of the rates fixed by the ordinance contract and by its right to a reasonable compensation, the water company capriciously and oppressively, and for ulterior and unlawful purposes, discriminates between its consumers in a manner to work wrong and injury—as conceivably it may, though confining its action within the limits predicated—that would be a plain abuse of its franchise, and the inquiry in that event would be whether it might not be punished ⁵⁹² by indictment or process to revoke and annul its franchise: *Haugen v. Albina L. & W. Co.*, 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424. But that is a question not now to be determined.

In the nature of the case there must be data from which the reasonableness of charges for water furnished may be estimated with an approximation sufficiently close for every practical purpose; the case differing in that respect materially from the case of a common carrier of goods and passengers. In the last-named case many elements of uncertainty enter. But even in the case of carriers it has never been held that every special concession established a new rate to be observed in all cases, and the evil growing out of the lack of uniformity in charges has been met by statutes punishing the granting of special rates, rebates and passes.

On the facts shown, the relator was not entitled to the relief sought, and the judgment of the trial court must be affirmed.

Dowdell, C. J., and Anderson and Evans, JJ., concur.

For Authorities upon the Decision in the Principal Case, see Twitchell v. Spokane, 55 Wash. 86, 133 Am. St. Rep. 1021; *Poole v. Paris Mt. Water Co.*, 81 S. C. 438, 128 Am. St. Rep. 923; *State v. Board of Water etc. Commrs.*, 105 Minn. 472, 127 Am. St. Rep. 581; *Linne v. Bredes*, 43 Wash. 540, 117 Am. St. Rep. 1068; *Burke v. City of Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

**ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAIL-
WAY COMPANY v. RHODEN.**

[93 Ark. 29, 123 S. W. 798.]

DOGS—Liability for Killing.—Dogs are Personal Property, for the negligent killing of which a railway company is liable. (p. 76.)

DOGS.—The Killing of a Dog by the Running of a Train is prima facie evidence of negligence on the part of the railroad company. (p. 76.)

DOGS—Right to Protection from Negligence.—There is no distinction between dogs and other property in respect to the right of the owner to recover for negligent injuries. He is entitled to have this species of property receive the care due to other species. (p. 76.)

DOGS.—A Railroad Company Owes to the Owner of Dogs on its tracks the duty to keep a constant lookout for the protection of that character of property, which is required by section 6607 of Kirby's Digest. (p. 76.)

DOGS—Negligent Killing by Railway.—Where the engineer of a locomotive testifies that he first discovered a dog on the track when it was only one hundred feet in front of his engine, and that he could not stop the train in time to avoid killing the animal, but other witnesses testify that the dog ran in front of the engine for half a mile before being struck, there is sufficient testimony upon which to submit to the jury the question whether the engineer was keeping a constant lookout. (pp. 76, 77.)

DOGS.—It is the Duty of a Railroad Company to give a dog on the track the same care that is due to other species of property under similar circumstances. In this respect there is no distinction between a dog and other animals. (p. 77.)

DOGS.—The Same Care That Would be Used by an ordinarily prudent man under similar circumstances in regard to other animals should be used in regard to a dog. (p. 77.)

DOGS—Duty of Railroad.—The Fact That a Dog may be more alert and intelligent than other animals does not absolve a railroad company from using that care for its protection that an ordinarily prudent man would use in regard to other animals. (p. 77.)

Kinsworthy & Rhoton and J. H. Stevenson, for the appellant.

J. C. Ross, for the appellee.

³⁰ FRAUENTHAL, J. This was an action brought by the plaintiff below, R. C. Rhoden, against the St. Louis, Iron Mountain and Southern Railway Company for the recovery of damages for the alleged negligent killing of a fine-blooded bird dog. The dog was killed about 12 o'clock on October 22, 1907, by one of defendant's fast mail trains. The testimony on the part of the plaintiff tended to prove that just after the train had passed Perla, a station on defendant's line of railroad, the dog was seen upon the railroad track a short distance in front of the train and trotting or running down the track in the same direction in which the train was moving. The dog continued to run in this manner in front of the running train for a distance of about one-half a mile, when it was overtaken by the train and killed. For this entire distance the track was straight, and the dog could readily have been seen by the employes in the cab of the engine. The employes did not give any alarm by whistle, and did not ring the bell, and did not open the cylinder cocks; and as one of the witnesses expressed it, the train "just came right on and hit the dog without doing anything."

The engineer testified that when he first noticed the dog it was running along by the side of the track, and then got on the track at a point about one hundred feet in front of the engine; that the train was running at the rate of fifty miles an hour, and that he could not have stopped the train in time to have avoided striking the dog. He stated that when he observed the dog he kicked open the cylinder cocks in order to frighten it from the track; that he did not blow the whistle or ring the bell because he thought that the opening of the cylinder cocks was the best method to frighten the animal from the track; that he did ³¹ not attempt to slacken the speed of the train because at the rate of speed that the train was moving he could not have prevented striking the dog.

On the part of the plaintiff, the court in effect instructed the jury that it was the duty of the defendant to keep a constant lookout for persons and property upon its tracks, and that if the dog was killed by reason of the failure to keep such constant lookout, the defendant would be liable. The following instruction was also given at the request of the plaintiff: "The court instructs the jury that it was the duty of the servants and agents of defendant in charge of the engine of said train to use ordinary care to avoid killing plaintiff's animal by resorting to the usual means of sounding the stock alarm, ringing the bell or opening the cylinder cocks to scare said animal off the track; and if you find that said servants failed to use ordinary care to frighten said animal off the track, and that such failure resulted in the killing of plaintiff's dog, then your verdict must be for the plaintiff."

At the request of the defendant the court in effect instructed the jury that the engineer in charge of the train was under no obligation to try to stop the train until he saw that the dog was in a place of danger and would be injured unless he did stop; and, after discovering the peril of the dog, if he did everything reasonably within his power to frighten the dog from the track, the plaintiff could not recover. It also gave to the jury at the request of the defendant the following instruction:

"5. If you believe from the evidence that the engineer in charge of defendant's train which struck plaintiff's dog was keeping a constant lookout for persons and property on the railroad track, and that, after he saw plaintiff's dog and became aware of its perilous situation, he did everything reasonably within his power to frighten it from the track, and that it was impossible for him to stop his train by the use of reasonable diligence in time to avoid striking said dog, then your verdict should be for the defendant."

The defendant asked the court to give to the jury the following instructions, which were refused:

"1. Under the pleadings and the proof in this case you will return a verdict for the defendant."

³² "3. You are instructed that when the engineer in charge of defendant's train saw plaintiff's dog running along beside the railroad track, he had a right to presume that the dog would leave the track before being struck, and he was warranted in acting upon that belief. If you believe from the evidence that after he became aware of the dog's peril he did what he reasonably could to avoid striking it, he was not negligent, and your verdict should be for the defendant.

"4. You are instructed that the same rule does not apply in the case of dogs as in the case of livestock. A dog is an animal of superior intelligence, and possesses greater ability to avert injury; and the presumption is that he has the instinct and ability to get out of the way of danger, unless his freedom of action is interfered with by other circumstances at the time and place. On this account, the diligence and care which locomotive engineers owe to the owners of dogs is placed on the same footing with that of a man walking upon or near a railroad track apparently in possession of all his faculties, and the engineer would be warranted in acting upon the belief that the dog would be aware of the approaching danger, and would get out of the way in time to avoid injury."

"6. There is no presumption of negligence on the part of the defendant from the fact of killing a dog.

"7. If you believe from the evidence that plaintiff's dog was killed while on defendant's track, you are instructed that plaintiff is not entitled to recover therefor, unless you further

find that defendant's engineer discovered the dog's peril, and thereafter injured her willfully, wantonly and recklessly."

The jury returned a verdict in favor of the plaintiff for fifty dollars, and the defendant prosecutes this appeal from the judgment entered thereon.

This court has held that dogs are personal property, for the negligent killing of which a railway company is liable. And, under the statute making all railroads responsible for all damages to persons and property done or caused by the running of trains (Kirby's Digest, sec. 6773), this court has declared that the killing of a dog by the running of a train was prima facie evidence of negligence on the part of the railroad company: *St. Louis etc. Ry. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659; *St. Louis etc. Ry. Co. v. Philpot*, 72 Ark. 23, 77 S. W. 901; *El Dorado & B. Ry. Co. v. Knox*, 90 Ark. 1, 134 Am. St. Rep. 17, 117 S. W. 779.

It will thus be seen that the right of property in dogs is fully recognized, and that for a wrongful injury to that species of property a right of recovery is given to the owner. In this regard there is no distinction made between dogs and other property, and therefore the owner thereof is entitled to have this species of property receive the same care that is due to other species of property. The railroad company owes to the owner of a dog the duty to keep the constant lookout for the protection of that character of property which is required by section 6607 of Kirby's Digest, and is liable to such owner for any injury to such property caused by a negligent failure so to do. The court did not, therefore, commit error in instructing the jury to that effect. But the defendant urges that in this case there was no testimony showing that there was any neglect of any of its employes to keep such constant lookout. We think that there was testimony upon which to base such an instruction. The engineer testified that when he first observed the dog on the track it was only about one hundred feet in front of the engine, and that he did not see the dog on the track until then. But two witnesses on the part of plaintiff testified that the dog was running down the track in front of the engine for a distance of probably one-half a mile. If the dog was on the track for that distance in front of the train and the engineer did not see it, then this was sufficient testimony upon which to submit to the jury the question as to whether or not the engineer was keeping a constant lookout.

It is claimed by the defendant that the dog is a very sagacious animal, exceedingly alert and active, and possesses greater ability to avoid injury than almost any other animal. It is urged, therefore, that the court should have instructed the jury to this effect, and should have given the above in-

struction No. 4, asked for by the defendant. But we think that this instruction invades the province of the jury to determine for themselves questions of fact, and that it does not correctly state the degree of care that should be exercised to avoid injuring this character of property. The defendant was only responsible ³⁴ for the negligent killing of the dog, and that negligence would arise from the omission to do something which a reasonably prudent man would have done under all the circumstances of the case, or the doing of something which under such circumstances such a man would not have done. The idea of negligence presupposes the existence of a duty to protect from injury and the failure to perform that duty, from which an injury results: *Hot Springs R. R. Co. v. Newman*, 36 Ark. 607; *Fort Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106.

This court has held that the killing of a dog by the running of a train is *prima facie* evidence of negligence on the part of the railroad company. This in effect makes it the duty of the railroad company to give to the dog the same care that is due to other species of property under similar circumstances. In this respect there is no distinction made between the dog and other animals. The same care that would be used by an ordinarily prudent man under similar circumstances in regard to other animals should be used in regard to the dog. The mere fact that the dog may be thought by many people to be more intelligent than other animals, and is also alert, would not absolve the railroad company from using that care in the protection of the dog. It owes the same duty to use the same character of care in protecting the dog from injury that it owes to other animals.

In the case of *St. Louis etc. Ry. Co. v. Hauks*, 78 Tex. 300, 14 S. W. 691, 11 L. R. A. 383, it is held that a railroad company is liable in damages for the killing by its engine of a dog which is trespassing on the railroad track if the exercise of ordinary prudence and care on the part of the engineer would have prevented the injury. In the case of *Meisch v. Rochester Electric Ry. Co.*, 72 Hun, 604, 25 N. Y. Supp. 244, it was held that the employé of the company was not justified in running down a dog trespassing on the track if by reasonable diligence he could have discovered and averted the injury.

In the case of *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754, 45 S. W. 790, 40 L. R. A. 518, it was held that the employé of the company could not rely upon the quickness and celerity of a dog in order to absolve it from the duty and care to prevent running over the dog; and that the company was liable for the killing of the ³⁵ dog caused by the negligence of its servant in charge of the train.

We do not think the court erred in refusing to give said instruction No. 4, asked for by the defendant. Nor do we think that any prejudicial error was committed by the court in refusing to give the above instruction No. 3, asked for by the defendant. In the first portion of the instruction it assumes as a fact that the dog was running along the side of the track, when this question of fact was controverted; and the latter part of the instruction is fully covered by other instructions that were given by the court.

And the court was right in its rulings upon the other instructions which were asked for by the defendant, and which it refused to give. There is no complaint made of the amount of the recovery. We find no prejudicial error in any of the rulings of the court upon the instructions, and we find that there is substantial evidence in the record to sustain the verdict.

The judgment is accordingly affirmed.

That a Railway Company is Liable for the Negligent Killing of a Dog, see *El Dorado & Bastrop Ry. Co. v. Knox*, 90 Ark. 1, 134 Am. St. Rep. 17, and cases cited in the cross-reference note thereto. When dogs are fighting on a street railway track, apparently oblivious to an approaching car, the motorman, upon discovering their peril, should take reasonable precautions, by giving signals or checking the speed of the car, to avoid injury to them. If he fails to exercise such care, the railway company is answerable for injuries sustained by the animals: *Harper v. St. Paul City Ry. Co.*, 99 Minn. 253, 116 Am. St. Rep. 415. And where an electric car follows a dog running down hill in the center of the track for one hundred and fifty yards, the men in charge ringing the bell but doing nothing to get the car under control until it is too late to save the animal, the railway company is liable for his killing: *Jackson Elec. Ry. etc. Co. v. Waycaster*, 92 Miss. 816, 131 Am. St. Rep. 554. But it has been held that a street-car company is not required to stop its cars, when running at a reasonable speed to avoid collision with dogs, and that the motorman is entitled to act on the presumption that ordinarily a dog on the track will get out of the way: *Henry v. St. Paul City Ry. Co.*, 109 Minn. 503, 134 Am. St. Rep. 794.

GRUBBS v. NIXON.

[93 Ark. 79, 123 S. W. 785.]

LIMITATION OF ACTIONS—Extinction of Cross-demands.—

A mutual agreement between two persons that cross-demands shall extinguish each other is valid, although one of them is barred by the statute of limitations. The agreement constitutes a waiver of the statute. (p. 80.)

Joseph W. Phillips and Joseph M. Stayton, for the appellant.

S. M. Stuckey, for the appellee.

⁷⁹ HART, J. On the first day of July, 1908, Jane Nixon brought suit before a justice of the peace against John M. Grubbs for \$89.90 for merchandise alleged to have been sold to him during the years 1906 and 1907. Before the day of trial John M. Grubbs departed this life, and the suit was revived against J. W. Grubbs ⁸⁰ as executor under the will of said John M. Grubbs, deceased, and he entered his appearance to the suit.

The justice of the peace rendered judgment in favor of the plaintiff for \$75.55. The case was appealed to the circuit court.

On a trial de novo in the circuit court, the plaintiff, Jane Nixon, introduced R. W. Anderson, who testified substantially as follows: That he was manager of the mercantile business of Jane Nixon. That John M. Grubbs had traded with them for several years, and had paid his account promptly until the year 1906 and 1907. That he owes \$75.55, the last item of which was purchased on November 8, 1907.

The defendant introduced J. W. Grubbs, who testified substantially as follows: That Jane Nixon, through her agent, R. W. Anderson, had purchased a bill of goods from the Newport Grocery Company, the last item of which was dated April 1, 1899, and that the account was transferred to John M. Grubbs in February, 1902. That he was present with his brother John M. Grubbs, now deceased, when R. W. Anderson, general manager of the mercantile business of Jane Nixon, demanded payment of the account his brother owed her. That his brother told Anderson that he had purchased the account for \$114.66, which Jane Nixon owed the Newport Grocery Company. That Anderson admitted that the account was just, and said that he bought the goods embraced in it for her. That it was expressly understood and agreed between John M. Grubbs and R. W. Anderson, for Jane Nixon, that the amount of her account against Grubbs should be credited on the \$114.66 account which Grubbs held against her. That, pursuant to the agreement, John M. Grubbs gave to Anderson a receipt for \$75.55, the amount of Jane Nixon's account against him, and entered that amount as a credit on the \$114.66 claim held by him against her. That Anderson promised to mark paid the account of Jane Nixon against John M. Grubbs.

R. W. Anderson, for the plaintiff, denied that the conversation and agreement as testified to by J. W. Grubbs were had between him and John M. Grubbs.

The court directed a verdict for the plaintiff, and the defendant has appealed to this court.

The court erred in directing a verdict for the plaintiff. The ⁸¹ testimony of J. W. Grubbs presented an issue of fact which should have been submitted to the jury. John M.

Grubbs purchased an account of \$114.66 against Jane Nixon, and thus had a debt against her. He was indebted to her in a smaller sum, viz., \$75.55. They met and agreed that the claim of Jane Nixon should be discharged by appropriating what was due from Grubbs to her to what she owed him.

If the testimony of J. W. Grubbs to this effect was true, it constituted an executed and not an executory contract. It was a present mutual contract which at once extinguished one debt and reduced the other. This principle of the law was recognized in the cases of *Quinn v. Sewell*, 50 Ark. 380, 8 S. W. 132, and *Hill v. Austin*, 19 Ark. 230. The application of the rule was denied in those cases, because there was no agreement that the cross-demands should extinguish each other. That the statute of limitations might have been successfully pleaded against the claim of Grubbs did not make the alleged agreement one without consideration, for the statute bar does not operate of itself; and the alleged agreement constituted a waiver of it. R. W. Anderson was the manager of the mercantile business of Jane Nixon, and as such had authority to act for her in the premises.

The view of the law we have expressed necessarily leads to the conclusion that the court erred in directing a verdict for the plaintiff; and for that error the judgment must be reversed, and the cause remanded for a new trial.

The Statute of Limitations Does not Mean That the Debt has Been Paid. It is a personal privilege which the law gives to the debtor, whereby he may say that the debt is stale, and for that reason should not be enforced: *Sterrett v. Sweeney*, 15 Idaho, 416, 128 Am. St. Rep. 68; note to *Menzel v. Hinton*, 95 Am. St. Rep. 656. That the defense of the statute may be waived, see *Gilbert v. Hewetson*, 79 Minn. 326, 79 Am. St. Rep. 486; *Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa, 590, 82 Am. St. Rep. 529; *Lyndon Savings Bank v. International Co.*, 78 Vt. 169, 112 Am. St. Rep. 900.

CROSBY v. STATE.

[93 Ark. 156, 124 S. W. 781.]

WITNESS.—An Infant Under the Age of Fourteen is not presumed to have capacity to testify, and inquiry will be made on that point. (p. 82.)

WITNESS.—The Competency of an Infant Under the age of fourteen to testify is left to the legal discretion of the trial judge, and in the absence of a clear abuse or manifest error the judicial discretion is not reviewable. (p. 82.)

WITNESS.—A Child Ten Years Old, in Order to be a Competent witness, must not only have intelligence enough to understand what he is called upon to testify about and the capacity to

state what he knows, but he must have a due sense of the obligation of an oath, by which is meant that the promise to tell the truth must be under "an immediate sense of the witness' responsibility to God, and with a conscientious sense of the wickedness of falsehood." (p. 82.)

WITNESS—Competency of Infant.—It is Reversible Error to hold a boy ten years old competent to testify in a homicide case, if in answer to a direct question he states that it is wrong not to tell the truth, but that he does not know what will be done to him if he does not tell the truth, the examination proceeding no further, and he not stating anything from which it can be inferred that he has a sufficient sense of the danger and wickedness of false swearing or comprehends the sanctity and obligation of an oath. (p. 83.)

CRIMINAL LAW.—Confessions Voluntarily made while the accused was in jail, or in the jail-yard, are admissible in his trial for murder. (p. 83.)

Sellers & Sellers and Moose & Reid, for the appellant.

Hal L. Norwood, attorney general, and C. A. Cunningham, assistant, for the appellee.

¹⁵⁷ HART, J. Will Crosby was indicted, tried and convicted in the Conway circuit court for the crime of murder in the first degree, and has duly prosecuted an appeal to this court.

The state relied for a conviction upon the confession of the defendant and the testimony of Will Howard, a little negro boy ten years old, who was a witness to the killing. No evidence was adduced in behalf of the defendant. The killing occurred in Conway county, Arkansas. Both the deceased and the defendant were colored, and both were boys. The witnesses for the state, except the sheriff, stated that the defendant was sixteen or seventeen years old. The sheriff said he looked to be twenty-one or twenty-two years old. The killing occurred in the night-time, and the weapon used was a cane hoe. The views we will hereinafter express render it unnecessary to make a detailed statement of the circumstances of the killing. It will be sufficient to say that the confession made to the sheriff, together with the testimony of the boy Will Howard, if competent, was sufficient to warrant a verdict for murder in the first degree.

Counsel for defendant object that the witness, Will Howard, was incompetent on account of his tender years and his inability to comprehend the nature and binding obligation of an oath. The examination made by the court is as follows:

"Q. What is your name? A. William Howard.

"Q. Were you sworn with the other witnesses a while ago?

A. Yes, sir.

"Q. How old are you? A. Ten years old.

"Q. Do you know what it means to be sworn? A. No, sir.

"Q. Do you know what you mean when you hold up your hand and take the oath? A. Yes, sir.

"Q. What is it? A. Tell the truth.

"Q. If you was not to tell the truth, what would be done to you? A. I don't know, sir.

"Q. Would it be wrong? A. Yes, sir."

¹⁵⁸ Whereupon the court held him to be a competent witness, and counsel for defendant saved exceptions to the ruling of the court.

In the case of *Warner v. State*, 25 Ark. 447, the court held that in criminal cases the common-law rule in relation to the competency of witnesses had not been changed by the code. And in the case of *Flanagin v. State*, 25 Ark. 92, the rule is stated as follows: "As to children, there is no precise age within which they are absolutely excluded, or the presumption that they have not sufficient understanding. At the age of fourteen all persons are presumed to have common discretion and understanding, until the contrary appears; but under that age it is not presumed; hence inquiry should be made as to the degree of understanding which the child, offered as a witness, possesses; and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he should be admitted to testify, no matter what his age may be." To the same effect, see 1 *Greenleaf on Evidence*, 15th ed., sec. 367; *Underhill on Criminal Evidence*, sec. 205; *Wharton's Criminal Evidence*, 8th ed., secs. 366-368; 1 *Wigmore on Evidence*, sec. 508; 3 *Wigmore on Evidence*, sec. 1820.

It will be seen from the above authorities that under the age of fourteen there is no presumption of capacity, and inquiry will be made on that point. The question of his competency is left to the legal discretion of the trial judge, and, in the absence of clear abuse or manifest error, the judicial discretion is not reviewable.

In the present case we do not think the examination of the witness by the circuit judge was sufficiently comprehensive. The child must not only have intelligence enough to understand what he is called upon to testify about and the capacity to tell what he knows, but he must also have a due sense of the obligation of an oath, by which is meant, as we deduce from the authorities *supra*, that the promise to tell the truth must be made under "an immediate sense of the witness' responsibility to God, and with a conscientious sense of the wickedness of falsehood": See, also, *Bouvier's Law Dictionary*, p. 529.

In answer to a direct question the boy stated that it was wrong not to tell the truth, but also said that he did not know ¹⁵⁹ what would be done to him if he did not tell the truth. The examination proceeded no further. He was not asked

nor did he state anything from which it could be inferred that he had a sufficient sense of the danger and wickedness of false swearing, or that he comprehended and appreciated the sanctity and obligation of an oath.

Counsel for the defendant objected to the admission of the evidence of his statements as made to Sheriff Hervey and to George Brooks. The confession to Brooks was made while the defendant was in jail, and that to the sheriff was made at a later date in the jail yard. The record shows that both statements were voluntarily made; and the statements were properly admitted in evidence: *Hammons v. State*, 73 Ark. 495, 108 Am. St. Rep. 66, 84 S. W. 718, 68 L. R. A. 234, 3 Ann. Cas. 912; *Youngblood v. State*, 35 Ark. 35, and cases cited.

We have carefully examined the instructions given by the court, and find them to be correct.

Counsel for defendants urge upon us as a ground for reversal certain remarks made by the prosecuting attorney in his argument to the jury, but this assignment of error will not likely occur on a new trial, and need not be considered.

For the error in holding that the boy Will Howard was competent to testify under the examination as disclosed by the record, the judgment will be reversed, and the cause remanded for a new trial.

“McCulloch, C. J., Dissenting. I dislike to record a dissent in a case involving human life, but it seems to me that the court, in holding the admission of the child's testimony to be reversible error, is not only making a mistake, but is taking a backward step in the law of evidence, which is a field in which there has been a more wholesome growth than in any other branch of the law. The test of the competency of children under the age of fourteen, as witnesses in criminal cases, is that they must be found on examination ‘to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath’: *Flanagin v. State*, 25 Ark. 92. This must be left largely to the sound discretion of the trial judge, who has an opportunity to see the child and judge of the degree of intelligence which it possesses. An appellate court should not disturb the trial court's exercise of this discretion unless it clearly appears to have been abused. I understand this to be the rule universally followed by all appellate courts.

“In the present case the learned trial judge vouched for the competency of the child's testimony by his finding as to the latter's intelligence and understanding of the nature of an oath, and there is nothing in the record to show that the finding was erroneous. The child in his examination declared his belief that an oath meant to tell the truth, and that it is wrong not to do so. The court heard these declarations, and observed from the appearance of the child not only its degree of intelligence, but the sincerity with which they were made. We ought, therefore, to accept the finding of the trial judge, and in failing to do so we discard his exercise of discretion, when no abuse appears. It is true, the child said he did not know what would be done to him if he failed to tell the

truth. Whether he understood the question to refer to future punishment or to that to be immediately inflicted by the court for perjury, we do not know, but doubtless the trial judge understood what the child meant.

"The authorities on this question are collected in a note to the case of *State v. Meyer* (135 Iowa, 597, 124 Am. St. Rep. 291, 113 N. W. 322), in 14 Ann. Cas. 1, and I think that, according to the great weight of authority, both English and American, the majority has reached the wrong conclusion in reversing the judgment on this point. I understand the effect of the decision to be that, before we can sustain the ruling of a trial court in admitting the testimony of a child, the record must affirmatively show that the child took the oath under an immediate sense of responsibility to God. In other words, that his answers must affirmatively show that he has an intelligent conception of his responsibility to God and takes the oath under a sense of that responsibility. This is in conflict with the decision of this court in *Flanagin v. State*, 25 Ark. 92, where the test is declared to be sufficient intelligence and a capacity to comprehend the nature and effect of an oath. I think this is the only test approved by the great weight of authority.

"It seems to me that the court falls into error in holding that the record must affirmatively show the capacity of the child. In *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. Rep. 93, 40 L. ed. 244, Judge Brewer, speaking for the court on the admissibility of the testimony of a child witness, said: 'This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. . . . So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear.'

"The best and most concise statement of the rule, and one fully sustained by the authorities, is found in *State v. Reddington*, 7 S. D. 368, 64 N. W. 170, as follows: 'No witness, whether child or adult, is required to be able or willing to discuss with the court or counsel either the fact or condition of a future state. He may even have no established views of general theology. He is only required to be able to distinguish the moral difference between right and wrong; and, when the law or the court says he must understand the obligation of an oath, it means only that, possessing such ability to discriminate, he understands that his position as a witness imposes upon him the moral and legal duty to tell only what is true. Whether a witness is so qualified is left in the first instance to the discretionary judgment of the trial court, after informing itself by proper examination.'

"The Kentucky court of appeals, in a very recent case, in passing on the ruling of a trial court as to the testimony of a child, said: 'His evidence was clear, and showed mental capacity, understanding and memory sufficient to qualify him. It appears that he was conscious that the oath bound him to speak the truth, and he know the difference between telling the truth and telling a lie. It did not disqualify him as a witness that he was not able to define the legal obligation of an oath. Whether his religious training had been so developed that he comprehended his responsibility to God for lying was not made clear, nor was it material as affecting his competency': *Bright v. Commonwealth*, 120 Ky. 298, 117 Am. St. Rep. 590, 86 S. W. 527.

"The same court in an earlier case said: 'The intelligence of the witness is the true test of competency, and that must be determined by the court, while the weight to be given to the evidence is for the jury. A child may be ignorant of "God" and of the evil of lying and of the punishment prescribed therefor, both here and hereafter, and yet have sufficient intelligence to truthfully narrate facts to which its attention is directed': *White v. Commonwealth*, 96 Ky. 180, 28 S. W. 340.

"The Pennsylvania court, in a case of this kind, said: 'It seems to us that the crude and shadowy beliefs of small children concerning God and the hereafter are so uncertain that the tests, based upon religious instruction, even though given by the trial judge himself, are of little or no moment, and should rather be discarded than followed in this enlightened age. The whole purpose of the trial is to ascertain the truth, and the oath is in pursuance of that object. If the witness understands that this is demanded and that punishment will follow its violation, it is sufficient. It is the substance, instead of the form, that is required; and if we secure this, there would seem to be little benefit in pursuing the shadow. A witness may easily show intelligence and understanding, without being asked each perfunctory question.'

"The evidence in the present case shows that the defendant is guilty of the horrible crime of which he was convicted. The testimony of the child witness was heard by the trial judge, who pronounced him of sufficient natural intelligence and of sufficient capacity to comprehend the nature and effect of an oath. The trial was a fair one, and the record is, I think, free from error, and the judgment should be affirmed."

The Competency of Children as Witnesses is the subject of a note to *State v. Meyer*, 124 Am. St. Rep. 295.

FRANKS v. HOLLY GROVE.

[93 Ark. 250, 124 S. W. 514.]

MUNICIPALITY—Liability for Enforcement of Void Ordinance.—A municipal corporation is not liable for the acts of its mayor and marshal in enforcing by unlawful imprisonment a void ordinance, since they are acting in a public and governmental capacity. (p. 86.)

Manning & Emerson, for the appellant.

Thomas & Lee, for the appellee.

²⁵¹ WOOD, J. This appeal is to determine whether an incorporated town is liable in damages for the acts of its mayor and marshal in enforcing by unlawful imprisonment a void ordinance of the town making it a misdemeanor for persons fifteen years of age and under to get on or off any moving trains within the corporate limits, such persons not being passengers. What these officers did in connection with the arrest, conviction and imprisonment of appellant was in their capacity as public officers. ²⁵² They acted without malice toward appellant. Although the ordinance was illegal and void as to minors under the age of twelve years, still the appellee is not liable for the acts of its officers in seeking to enforce it, for the reason that the officers were acting in a public and governmental capacity. The functions they performed were of a public, not private, nature: 28 Cyc. 1257. As early as the case of Trammell v. Russellville, 34 Ark. 105, 36 Am. Rep. 1, we held: "For acts done by them in their public capacity, and in discharge of their duties to the public, cities and towns incur no liability to persons who may be injured by them. Neither for the act of the council in passing an illegal ordinance, nor for that of the mayor in issuing a warrant of arrest for the violation, nor for that of the marshal in arresting the offender under it, is a town liable to him." And as late as Collier v. Fort Smith, 73 Ark. 447, 84 S. W. 480, 68 L. R. A. 237, we said: "Towns and cities are not answerable for the acts or omissions of their officers or agents while acting for the state or sovereign in public or governmental capacity": See, also, Gray v. Batesville, 74 Ark. 519, 86 S. W. 295. Whatever may be the rule in other jurisdictions, the above is the established doctrine of this court. It has good reason and authority to sustain it, and we therefore adhere to it. See other authorities cited in appellee's brief.

The judgment therefore is affirmed.

That a City is not Liable for the Acts of Its Officers or Agents in enforcing a void ordinance, see the note to Goddard v. Inhabitants of Harpswell, 30 Am. St. Rep. 376; Simpson v. City of Whatcom, 33 Wash. 392, 99 Am. St. Rep. 951.

ADAMS v. STATE.

[93 Ark. 260, 124 S. W. 766.]

SEDUCTION—Impeachment of Prosecutrix.—Where the prosecutrix in seduction testifies in her examination in chief that she has never had intercourse with anyone but the defendant, the testimony of another man that he has had intercourse with her since the time of the alleged seduction is admissible to contradict or impeach her. (p. 88.)

SEDUCTION—Resemblance of Child to Defendant.—The prosecuting witness in seduction may testify that her child resembles the defendant. (p. 89.)

Ben Cravens, for the appellant.

H. L. Norwood, attorney general, and C. A. Cunningham, assistant, for the appellee.

²⁶¹ **BATTLE, J.** Will Adams was indicted for seducing Rowena Hamblin, and convicted. He prosecutes an appeal to this court from this conviction.

Rowena Hamblin testified in the trial of the defendant that he, in the month of October, 1908, obtained carnal knowledge of her by virtue of a false promise of marriage made to her by him; and of this intercourse a child was born. In her examination in chief she testified that she never had sexual intercourse with any other man at any time or anywhere. Defendant offered to prove that Charles Abels had sexual intercourse with her since the last day of November, 1908, which is since the day of seduction, at different times, for the purpose of contradicting her and thereby impeaching her credibility; and the court refused to allow him to do so.

The prosecuting witness was allowed to testify, over the objection of the defendant, that the child resembled him.

In *Butler v. State*, 34 Ark. 480, it is said: "In order to avoid an interminable multiplication of issues, it is a settled rule of practice that when a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question.

²⁶² The test of whether a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea? This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief: 1 Wharton on Evidence, sec. 559."

In *McArthur v. State*, 59 Ark. 431, 27 S. W. 628, "the indictment, in substance, charges that appellant slandered one Pearl Jones by falsely uttering and publishing about her words which in their common acceptation amounted to charge the said Pearl Jones with having committed fornication and adultery with the sons of appellant. On the trial of the case,

Pearl Jones was introduced as a witness for the state, and testified that she had never had sexual intercourse with either of defendant's sons or anyone else. On cross-examination she was asked if she had not had sexual intercourse with Joe Darr, and concerning other circumstances having no connection with the charge in the indictment. To contradict the prosecutrix, and to show that she was a woman of lax morals, the appellant was allowed to introduce proof to show that she had committed fornication with Joe Darr, and had been guilty of other criminating acts." Mr. Justice Riddick, speaking for the court, said: "The general rule is that, when a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question; but this limitation only applies to answers on the cross-examination. It does not affect answers to the examination in chief: Wharton on Criminal Evidence, 8th ed., sec. 484; State v. Sargent, 32 Me. 429. When a party, in his examination in chief, is allowed to inquire about collateral acts, the opposing side will usually be allowed to contradict the witness by evidence showing to the contrary. The prosecuting attorney, after having asked Pearl Jones whether she had had sexual intercourse with either of the sons of defendant, elected to proceed further, and to ask her if she ever had sexual intercourse with any man. It was therefore proper to allow defendant to contradict her by evidence to show that she had been guilty of such acts of illicit intercourse, though such evidence could not go in justification of the crime, but at most only to contradict and impeach the witness": Polk v. State, 40 Ark. 482, 48 Am. Rep. 17.

²⁶³ The testimony of Charles Abels, offered to show that he had illicit intercourse with Rowena Hamblin, should have been admitted to contradict or impeach the prosecuting witness.

In Land v. State, 84 Ark. 199, 120 Am. St. Rep. 25, 105 S. W. 90, it was held that in a case of bastardy the child may be exhibited in the trial to show its resemblance to the putative father; and in State v. Horton, 100 N. C. 443, 6 Am. St. Rep. 613, 6 S. E. 238, in a case of seduction, it was held that such a child may be exhibited for the same purpose. This evidence, it seems, should be admissible in both classes of cases for the same reason. The admissibility of the testimony of the witnesses to prove the resemblance of the features of the child to those of the putative father is doubtful. Professor Wigmore discussed this subject in a satisfactory manner, and concluded as follows: "The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is, in the opinion of the trial court, old enough to possess settled features or other corporal indications. It is to be noted that the evidence is relevant, not

merely in bastardy proceedings, but also in trying the legitimacy of a child born during marriage, whenever the presumption of legitimacy allows the issue to be raised, as well as occasionally in other proceedings": 1 Wigmore on Evidence, sec. 166, and notes; 3 Wigmore on Evidence, secs. 1974-1977. We think that such evidence is admissible in cases of seduction: *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687; *Paulk v. State*, 52 Ala. 427. The weight of the evidence should be left to the jury, uninfluenced by any opinion of the court as to the child being old enough to possess settled features or other corporal indications.

Reversed and remanded for new trial.

The Crime of Seduction is discussed in the notes to *Bradshaw v. Jones*, 76 Am. St. Rep. 659; *State v. Carrow*, 87 Am. Dec. 405. As to whether, in a prosecution for seduction, evidence is admissible that the prosecutrix had intercourse with other men than the accused, see *People v. Kehoe*, 123 Cal. 244, 69 Am. St. Rep. 52; *Bracken v. State*, 111 Ala. 68, 56 Am. St. Rep. 23. That evidence of her general character is admissible where evidence has been offered tending to impeach her character for chastity, see *Knight v. State*, 147 Ala. 93, 119 Am. St. Rep. 58.

COX v. SMITH.

[93 Ark. 371, 125 S. W. 437.]

PLEADING—Complaint not Subject to Demurrer.—If a cause of action can be reasonably inferred from the allegations of a complaint, it is not subject to a general demurrer. (p. 91.)

DAMAGES—Penalty or Liquidated Damages.—An agreement between the vendor and vendee of a lot that if the vendee fails to build a specified partition wall, the vendor shall have a lien on the land for a certain sum, provides for liquidated damages, not for a penalty, if the damages from a breach thereof would be uncertain and difficult to prove. (p. 91.)

A VENDOR'S LIEN will not Arise to Secure the Performance of an act the nonperformance of which would make a claim for unliquidated damages. (p. 92.)

VENDOR'S LIEN.—Where the Vendee of Land Pays Part of the consideration in cash, and agrees to pay the balance, which is a definite sum, by building a partition wall, but in case of his failure to build the wall he agrees to pay such sum in cash, the vendor has a lien for the unpaid portion if the vendee fails to construct the wall. (p. 92.)

EQUITABLE MORTGAGE.—An Instrument Styled a Title Bond, by the terms of which a vendee of land acknowledges himself indebted to the vendor in a certain sum to be due in case of his failure to construct a partition wall, and agrees that the vendor shall have a lien for the amount thereof, is an equitable mortgage. (p. 92.)

A. G. Leming, for the appellant.

372 FRAUENTHAL, J. This is an appeal from a decree of the chancery court sustaining a demurrer to the complaint and dismissing same for the want of equity. The complaint, in substance and effect, alleged that the plaintiff, W. R. Cox, was the owner of a block of land in the town of Waldron, Arkansas, containing four lots, and that on the twenty-first day of February, 1907, he sold one of these lots, describing same, to the defendant, H. N. Smith, for the price and sum of \$550; that the defendant paid \$250 of said purchase money in cash, and he agreed to pay the balance of said purchase money, to wit, \$300, in the following manner: The plaintiff was the owner of the lot adjoining the lot sold to defendant, and the defendant agreed to build a partition brick wall of the height of a two-story building and from sixty to eighty feet long, **373** at the defendant's option, so that one-half of said partition wall should stand on the lot retained by the plaintiff and the other half on the lot sold to defendant; and that plaintiff should own and use the said one-half of said wall for a building which he might construct on his lot; and defendant agreed to complete the wall by October 1, 1908. The plaintiff at the time of the sale executed a deed to the defendant for the lot, in which the consideration is named at \$250, and as paid. At the same time the defendant executed to plaintiff an instrument which is styled a bond for title, but which plaintiff alleges is a mortgage, which was duly acknowledged and recorded. The writing is as follows:

"TITLE BOND.

"Know All Men by These Presents:

"I, H. N. Smith, of Waldron, Arkansas, am held and firmly bound unto W. R. Cox, of Waldron, Arkansas, in the sum of \$300, in lawful money of the United States of America; conditioned, however, as follows:

"Whereas, The Said H. N. Smith has this day purchased of the said W. R. Cox part of the lot 1, block 6, in the original donation of the town of Waldron, being 27½ feet by 100 feet on the south side of said block, and has agreed to build thereon a brick house two stories high, 60 or 80 feet long, the north wall of said house to be built on the line of said lot, nine inches on one side of said line and nine inches on the other side of said line. the said wall to be built on or before the 1st day of October, 1908. Now, if the said H. N. Smith shall build or cause to be built said wall by said date, this obligation shall be void; otherwise, to remain in force and effect. Said W. R. Cox shall have a lien on said lot for the payment of said sum of \$300.

"Witness my hand this 21st day of February, 1907.

"H. N. SMITH."

The plaintiff alleged that the defendant had wholly failed and refused to build said wall on or before October 1, 1908, or thereafter, and had failed to pay the said \$300, the balance of the said purchase money, for said lot. He asked for a judgment for \$300, and that same be declared a lien on said lot.

Did this complaint state a cause of action? If a cause of ³⁷⁴ action can be reasonably inferred from the allegations of the complaint, it is not subject to a general demurrer; if the facts stated, together with every reasonable inference therefrom, constitute a cause of action, then the demurrer should be overruled: *Murrell v. Henry*, 70 Ark. 161, 66 S. W. 647; 6 Ency. of Pl. & Pr. 389; *Cazort & McGehee Co. v. Dunbar*, 91 Ark. 400, 121 S. W. 270.

By the allegations of this complaint, the plaintiff sold the lot to defendant for \$550, of which a part was paid in cash, and for the balance of the purchase money the defendant was to do certain work and perform certain services for the plaintiff in the construction of a partition wall, and the value of that work and material in the construction of the wall was placed at \$300, the said balance of the purchase money. It was agreed that the wall was to be completed by a specified time, and it is urged that this agreement is in the nature of a penalty or forfeiture, for which equity will not grant relief. But under the allegations of the complaint the lot was sold for a specific consideration in money, and it was only agreed that a certain and definite portion thereof might be paid in certain work to be done by a fixed time. If the work was not done or the service rendered, then the plaintiff could recover said balance in money. If the defendant failed to pay this balance, either in work or money by the day named, then it became a fixed debt due by him: *Young v. Harris*, 36 Ark. 162; *Nix v. Draughon*, 54 Ark. 340, 15 S. W. 893. But, if the contract should be considered to be of a nature that named a stipulated amount which defendant should pay upon its breach, it would not be a penalty but liquidated damages. The breach of the contract to build the wall would make uncertain and difficult of ascertainment the amount of damages which the plaintiff might suffer. The wall was to be a partition wall, and by the refusal of the defendant to build it or permit it to be built the plaintiff would be compelled to build a wall of the full thickness upon his own lot in order to construct a building thereon, and would thus narrow the width of his building. As is said in *Stillwell v. Paepcke-Leicht Lumber Co.*, 73 Ark. 432, 108 Am. St. Rep. 42, 84 S. W. 483: "Usually, the surest test of liquidated damages is where the actual damages caused by the breach would be uncertain and difficult of proof, and the sum stipulated appears to be reasonable compensation": *Williams v. Green*,

14 Ark. 315; *Lincoln v. Little Rock* ³⁷⁵ *Granite Co.*, 56 Ark. 405, 19 S. W. 1056; *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. 1093; *Young v. Gaut*, 69 Ark. 114, 61 S. W. 372.

In this case the defendant agreed to build the wall by a certain date. In event he failed to do so he agreed that he would pay the plaintiff \$300. The amount named for the building of the wall was not an unreasonable compensation therefor, and the defendant had actually received from the plaintiff in payment on the lot the full consideration for the work and material he agreed to do and furnish. If this sum stipulated to be paid in the event of the nonperformance of the contract on his part shall be considered in the nature of damages, then it must be held to be liquidated damages for which he is liable. Upon the failure by defendant to complete the wall by the day named, the defendant became, therefore, indebted to plaintiff in the stipulated sum of \$300. This was part of the purchase money for said lot. Now, a vendor's lien will not arise "to secure the performance of an act, the nonperformance of which would make a claim for unliquidated damages": *Harris v. Hanie*, 37 Ark. 348; *Bell v. Pelt*, 51 Ark. 433, 14 Am. St. Rep. 57, 11 S. W. 684, 4 L. R. A. 247; *Salyers v. Smith*, 67 Ark. 526, 35 S. W. 936.

But this is not a claim for unliquidated damages; it is a debt for unpaid purchase money, the amount of which is definitely fixed. And where such debt for the purchase money may be paid in work or services, the vendor's lien therefor does exist, and may be enforced if such work is not done or the services rendered: *Young v. Harris*, 36 Ark. 162; *Nix v. Draughon*, 54 Ark. 340, 15 S. W. 893.

Furthermore, the above instrument, styled a title bond, is in effect an equitable mortgage. By its terms the defendant acknowledged himself indebted to the plaintiff in a certain sum. That sum was due upon his failure to do the work and things therein named by the day therein specified. It was not in the nature of a penalty or a forfeiture; but it was a liability founded on a valuable consideration. To secure that debt, the instrument stated that the plaintiff "shall have a lien on said lot for the payment of said sum of \$300." The manifest intention of the instrument was to fix a charge upon the lot for the payment of said debt. As is said by Mr. Pomeroy, "the form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final intent and purpose, rather than at the form; and if the intent appear to give or ³⁷⁶ to charge or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows. . . . The form of the contract is immaterial; if the intent appears to make any identified property a security for

the fulfillment of an obligation," it will constitute an equitable lien: 3 Pomeroy's Equity Jurisprudence, sec. 1237; Turner v. Watkins, 31 Ark. 429; Taliaferro v. Barnett, 37 Ark. 511; Bell v. Pelt, 51 Ark. 433, 14 Am. St. Rep. 57, 11 S. W. 684, 4 L. R. A. 247; Williams v. Cunningham, 52 Ark. 439, 12 S. W. 1072; Martin v. Schichtl, 60 Ark. 595, 31 S. W. 458; Ward v. Stark Bros., 91 Ark. 268, 121 S. W. 328.

We are of the opinion that the allegations of the complaint, with every reasonable inference to be drawn therefrom, set forth an indebtedness due by the defendant to the plaintiff, and that such indebtedness has matured; and that for the payment thereof he has an equitable lien upon the lot described in the complaint.

The chancellor therefore erred in sustaining the demurrer to the complaint.

The decree of the chancery court is reversed and this cause is remanded, with directions to overrule the demurrer to the complaint and for further proceedings.

Agreements Purporting to Liquidate Damages are discussed in the note to Stillwell v. Paepcke-Leicht Lumber Co., 108 Am. St. Rep. 46.

As to When a Vendor's Lien Exists, see Finnell v. Finnell, 156 Cal. 589, 134 Am. St. Rep. 143, and authorities cited in the cross-reference note thereto.

As to What Constitutes an Equitable Mortgage, see the note to Hutzler Bros. v. Phillips, 4 Am. St. Rep. 696. An equitable mortgage ordinarily arises whenever a writing shows a clear agreement to make some particular property security for the debt or obligation mentioned therein: Dulaney v. Willis, 95 Va. 606, 64 Am. St. Rep. 815; Higgins v. Manson, 126 Cal. 467, 77 Am. St. Rep. 192; Thompson v. Grace, 91 Ark. 52, 134 Am. St. Rep. 52. Any agreement which shows an intention to create a lien is an equitable mortgage: Bell v. Pelt, 51 Ark. 433, 14 Am. St. Rep. 57.

STATE v. PEYTON.

[93 Ark. 406, 125 S. W. 416.]

RAPE.—It must be Alleged in an Indictment for rape that the act was committed "against the will" of the female. But the facts constituting the crime need not be charged in the precise words of the statute. (p. 94.)

RAPE—Indictment—"Against Her Will."—An indictment for rape which charges that the accused did "unlawfully" and "forcibly ravish and carnally know" a certain female, alleges that the act was done "against her will." (p. 95.)

H. L. Norwood, attorney general, and W. H. Rector, assistant attorney general, for the appellant.

⁴⁰⁷ McCULLOCH, C. J. The state appeals from a decision of the circuit court of Jefferson county sustaining a de-

murrer to the following indictment (omitting caption): "The grand jury of Jefferson county, in the name and by the authority of the state of Arkansas, accuse Arthur Peyton of the crime of rape, committed as follows, to wit: The said Arthur Peyton, in the county and state aforesaid, on the seventh day of August, A. D. 1909, did then and there willfully, unlawfully, forcibly and feloniously make an assault on Laura Jones, and her, the said Laura Jones, did then and there feloniously and forcibly ravish and carnally know, against the peace and dignity of the state of Arkansas."

The objection urged against the indictment is that it does not contain an allegation that the act was committed against the will of the female. The crime of rape is defined by statute as "the carnal knowledge of a female forcibly and against her will": Kirby's Digest, sec. 2005.

In *Beard v. State*, 79 Ark. 293, 95 S. W. 995, 97 S. W. 667, 9 Ann. Cas. 409, the indictment was in about the same language, omitting an express allegation that the act was committed against the will of the female; and we held that it was a good indictment when questioned for the first time on appeal, as the words in the indictment necessarily involved a ⁴⁰⁸ charge that the act was committed against the will of the female. We declined to decide whether or not the indictment would be good on demurrer, though two of the judges, in a separate opinion, expressed the view that it was good. We now have to decide that question.

Of course, it must be alleged in an indictment for rape that the act was committed "against the will" of the female, for that is an essential element of the crime. But the facts constituting the crime need not be charged in the precise words of the statute. If words are used which convey the same meaning, so as to charge all the essential elements of the crime, it is sufficient. The Criminal Code of Practice provides that "the words used in a statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used"; and that "the words used in an indictment must be construed according to their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning": Kirby's Digest, secs. 2241, 2242. The code also contains the following provisions: "The indictment must contain: . . . a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended": Kirby's Digest, sec. 2243. "The indictment is sufficient if it can be understood therefrom . . . that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the

case": Kirby's Digest, sec. 2228. "No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits": Kirby's Digest, sec. 2229.

In the Beard case we said that an allegation of an unlawful assault necessarily implied an allegation that the act was done against the will of the assaulted female. In addition to this, we have in the indictment the word "ravish," which means "to seize" or "to snatch by force" (Webster), and the allegation that the act was done forcibly. The words "against her will" have the same meaning in the definition of the crime of rape as the words "without her consent," and proof that the act of sexual ⁴⁰⁰ intercourse was committed without the consent of the female, as when she was unconscious and could not consent, is sufficient to sustain an allegation that it was done against her will: Harvey v. State, 53 Ark. 425, 22 Am. St. Rep. 229, 14 S. W. 645; 1 Wharton on Criminal Law, sec. 556; Commonwealth v. Burke, 105 Mass. 376, 7 Am. Rep. 531.

Now when we consider, in the ordinary acceptation of those words, the charge that the accused did "unlawfully" and "forcibly ravish and carnally know" the female, there is no escape from the conclusion that the act is alleged to have been done "against the will" of the female, or without her consent, which has the same meaning. Any other interpretation of those words would do violence to their plain meaning: Jackson v. State, 114 Ga. 861, 40 S. E. 989.

The judgment is therefore reversed and the cause remanded, with directions to overrule the demurrer, and for further proceedings under the indictment.

The Crime of Rape is the subject of a note to Smith v. State, 80 Am. Dec. 361. As to the sufficiency of the indictment in alleging "force" and "against the will," see Taylor v. State, 50 Tex. Cr. 362, 123 Am. St. Rep. 844; McGuff v. State, 88 Ala. 147, 16 Am. St. Rep. 25.

GAY OIL COMPANY v. ROACH.

[93 Ark. 454, 125 S. W. 122.]

SALE—Breach of Warranty—Rescission.—In the absence of fraud or an agreement to rescind, a contract of sale cannot be rescinded for a mere breach of warranty. (p. 97.)

SALE.—A Warranty is an Undertaking Collateral to the express object of the contract, and in effect is an agreement to pay the damages sustained by reason of the article not being as represented. (p. 97.)

SALE—Breach of Warranty—Remedy of Buyer.—A buyer of oil under a contract which guarantees the barrels in which it is shipped against leakage cannot reject the oil because several barrels leaked. His remedy is to recoup or sue for damages. (p. 98.)

Moore, Smith & Moore and H. M. Trieber, for the appellant.

⁴⁵⁴ FRAUENTHAL, J. This was an action instituted by the Gay Oil Company, the plaintiff below, against N. B. Roach to recover the purchase price of sixty-four barrels of oil, which it alleged it sold to the defendant. The defendant alleged that he purchased the oil under a contract by which the plaintiff "guaranteed" the barrels in which the oil was to be shipped against leakage; that when the shipment arrived several of the barrels leaked, and that he on that account refused to accept the oil, and at once notified plaintiff of his rejection thereof.

The defendant was a merchant doing business at Mena, Arkansas, and the plaintiff was located at Little Rock, Arkansas. The defendant made a written order, directed to plaintiff, for sixty-four barrels of oil, and in said order was the following: "Guaranty against leakage." The order was accepted by the plaintiff, who delivered the sixty-four barrels of oil to a common carrier at Little Rock, consigned to the defendant at Mena. When the oil arrived at Mena, the defendant found that several of the barrels leaked. He notified the plaintiff of this leakage, and refused to remove the oil from the car. The defendant testified that several of the ⁴⁵⁵ barrels leaked, but did not state the number thereof or the extent of the leakage. There was some testimony that the barrels appeared to be in good shape, and that the car did not leak very much, and that there was no drip therefrom.

The lower court peremptorily directed the jury to return a verdict in favor of the defendant, which was done. The plaintiff prosecutes this appeal from the judgment entered upon that verdict.

The defendant executed a written order or contract for the purchase of sixty-four barrels of oil from plaintiff in which it was stated that there was a "guaranty against leakage." The rights of the parties under this contract of sale are determined by the nature and effect of this clause of "guaranty against leakage." In strict legal contemplation there is a difference between a "guaranty" and a "warranty." They are both collateral undertakings; but a guaranty is the assurance of the payment of a debt or the performance of a duty or contract by another person, while a warranty is an assurance of the title or quality of property. The two are often used interchangeably and with the same effect. The meaning of the word "guaranty" in this contract must be gathered from the context of the entire instrument and from the subject matter about which it treats; for this will more surely give the expression that meaning which will carry out the true intent of the parties. Considered in this way, it appears that the parties used the term "guaranty" synony-

mously with warranty; and the clause in effect stated that the barrels in which the oil was shipped were warranted against leakage: 20 Cyc. 1403.

Ordinarily, a warranty is an agreement to be responsible for all damages that arise from the falsity of the statement or assurance of a fact. But the statement or assurance is sometimes the condition upon which an executory sale is made, although it may be called a warranty. The general rule is that, in the absence of fraud or an agreement to rescind, a contract of sale cannot be rescinded for a mere breach of warranty. But where the stipulation is a condition, the performance of which is precedent to the completion of the sale, the purchaser is entitled to reject the article if such condition is not performed: 2 Mechem on Sales, sec. 816; Tiedeman on Sales, sec. 197; 24 Am. & Eng. Ency. of Law, 1109.

⁴⁵⁶ A warranty is an undertaking that is collateral to the express object of the contract, and is in effect an agreement to pay the damages sustained by reason of the article not being as stated or represented. A condition is one of the essential terms which identifies and describes the article, and for a nonconformity to such description the article may be rejected: Benjamin on Sales, sec. 1349.

If, therefore, the stipulation in the contract involved in this case relative to leakage was in effect a warranty, properly so called, then the defendant did not, upon the breach of such warranty, have the right to rescind the contract. His remedy, in such event, was to recoup or sue for the damages sustained by reason of such leakage. In that event the sale was absolute and not conditional, and the warranty was only an undertaking that was collateral to the sale. In the case of *Thornton v. Wynn*, 12 Wheat. 183, 6 L. ed. 595, it is said that "if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article and the vendee tendered a return of it within a reasonable time."

Where there is a contract for the sale of an article which is not at the time in existence or ascertained, or where there is a sale by sample, the agreement that such article shall be of a certain description or quality is not merely a warranty, but it is a condition upon the performance of which depends the completion of the contract of sale, and the sale does not become absolute until the article has been inspected and found to conform to the description of kind or quality. The existence in such case of the quality or kind of the article becomes essential to the identity of the article sold, and the purchaser cannot be required to accept and pay for an article which he in fact did not buy: 2 Mechem on Sales, sec. 1209; Tiedeman

on Sales, sec. 197; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. Rep. 12, 29 L. ed. 366; *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. Rep. 69, 29 L. ed. 393; *Plant v. Condit*, 22 Ark. 454; *Overstreet v. Gallaher*, 42 Ark. 208; *Weed v. Dyer*, 53 Ark. 155, 13 S. W. 592; *Bunch v. Weil*, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80; *Ward Furniture Mfg. Co. v. Isbell*, 81 Ark. 549, 99 S. W. 845.

But the contract of sale in the case at bar was not of an article not in existence or by sample; nor was there any warranty as to its kind or quality.

⁴⁵⁷ In the case at bar the defendant purchased from the plaintiff sixty-four barrels of oil, which were then in the hands of the vendor. The oil was contained in wooden barrels, and at the time of the contract a fear was entertained that the barrels might leak. To save the purchaser harmless if any leakage should occur, the vendor warranted the same against leakage, and by that agreement simply undertook to pay to the defendant all loss and damage which he might suffer by reason of any leakage. The article purchased under the contract was oil, and no question is made of its quality, but it is conceded that the plaintiff shipped the identical article that was ordered. It was delivered to a common carrier properly directed to the defendant and in the barrels named in the contract. The sale then became complete. There was no stipulation in the contract that the defendant could refuse to accept, or that he could return the oil if the barrels leaked; but, on the contrary, by the use of the stipulation of "guaranty against leakage," it must have been in the contemplation of the parties that the barrels might leak; and in that event by this warranty the plaintiff undertook to pay to defendant all loss that he would suffer thereby. The stipulation was therefore not a condition the performance of which was precedent to the obligation upon the defendant; and the defendant was not entitled to reject the oil because several of the barrels leaked. The stipulation was a warranty, properly so called; and if the barrels leaked, the defendant had a right to recoup, in a suit for a recovery of the purchase money of the oil, all damages which he sustained by reason of such leakage.

The circuit court erred in giving the peremptory instruction to the jury.

The judgment is reversed and the cause is remanded for a new trial.

In the Case of an Executed Contract for the Sale of a Chattel with warranty, there being no contract right or obligation to return it in case it does not prove to be as warranted, the buyer, in the absence of fraud, cannot rescind the sale and reject the chattel. His sole remedy is an action for damages for the breach of the warranty. Where, however, the contract of sale is executory or conditional, the buyer,

although the chattel is warranted, has the right to make a trial of it, reasonable as respects both time and manner, and to reject it if it does not fulfill the warranty or conditions, by so notifying the seller. He need not return it; but he will be deemed to have accepted it if he does not exercise his right of rejection within a reasonable time, or if he does any act in relation to it inconsistent with its ownership by the seller; *Wirth v. Fawkes*, 109 Minn. 254, 134 Am. St. Rep. 778.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. JONES.

[93 Ark. 537, 125 S. W. 1025.]

CARRIER OF LIVESTOCK—Merger of Contract in Bill of Lading.—All previous contracts between a shipper of livestock and the carrier are merged in the contract evidenced by the bill of lading. (p. 104.)

CARRIER OF LIVESTOCK—Release of Accrued Damages.—A bill of lading limiting a carrier's liability does not have the effect of releasing his liability for damages already accrued, if there is no separate consideration therefor. (p. 104.)

CARRIER OF LIVESTOCK—Time for Transportation.—Although a bill of lading does not stipulate that cattle are to be transported within any specified time, or delivered at any particular hour, the carrier is nevertheless bound to transport them within a reasonable time. (pp. 104, 105.)

CARRIER—Contract Against Liability for Negligence.—Common carriers cannot contract for exemption from liability from losses occurring through their negligence. (p. 105.)

CARRIER OF LIVESTOCK—Validity of Contract Limiting Liability.—A contract by which a shipper of livestock assumes all risk and care of the animals while in the pen, and by which the carrier does not become liable until they are loaded on a train, is valid if based upon a consideration. It is not a stipulation against the negligence of the carrier. (p. 105.)

CARRIER OF LIVESTOCK—Interstate Shipments.—A Stipulation in a bill of lading that a shipper of livestock assumes all risk and expense of caring for the animals until they are loaded in cars is not in conflict with the Hepburn act. (p. 106.)

CARRIER OF LIVESTOCK—Liability Before Loading.—A Stipulation in a bill of lading that the carrier shall not be liable for the animals while they are in the pen and before they are loaded on cars does not change the duty of the carrier to furnish cars for their transportation within a reasonable time. (p. 106.)

CARRIER OF LIVESTOCK—Contract to Pay for Lost Cattle.—Where a bill of lading stipulates that the shipper of livestock assumes the risk and care of the animals until they are loaded on cars, and they escape from a pen while awaiting shipment, and some of them are never recovered, an agreement by the railway agent that the carrier will pay for the lost animals if the shipper will ship such as he can find is without consideration, and not binding on his principal. (p. 106.)

Kinsworthy & Rhoten, S. D. Campbell and James H. Stevenson, for the appellant.

O. C. Blackford, for the appellee.

⁵³⁹ BATTLE, J. Charles Jones inclosed about thirty head of his cattle in the stock-pen of the St. Louis, Iron Mountain and Southern Railway Company at Minturn, Arkansas, for shipment over its railway. About the tenth day of June, 1908, the cattle escaped from the pen. After much trouble and some expense he recovered a part of them. About eleven of them he never recovered. He brought this action against the railway company to recover the losses sustained by him by reason of their escape. He alleged in his complaint as follows:

"That on or about the tenth day of June, 1908, plaintiff made arrangements with the station agent of the defendant at Minturn, Arkansas, to set a car at the stock-pen, suitable to the ⁵⁴⁰ shipping of a carload of cattle. That the defendant, by negligence of its agents and employes in the first instance, unlawfully failed and refused to spot or locate said car within the statutory time or at the proper place for the loading of the cattle. That he, depending upon the defendant to comply with its contract and the provisions of law, procured and gathered together and placed in the stock-pen, at said station, a carload of cattle for shipment to E. St. Louis, Illinois, consisting of twenty short four year old steers, average weight of which was nine hundred pounds each, six head of cows, average weight of which was eight hundred pounds each, four three year old heifers, average weight six hundred pounds each, one two year old heifer, weight five hundred pounds, and one two year old steer, weight five hundred pounds. That by the malicious, wanton negligence of the defendant's agents and employes in locating car at the proper place for loading and within the proper time, and by negligently failing to accept and receive for transportation of cattle, the same having remained in the stock-pen for fifteen hours, without food or water, after they had been delivered to defendant for transportation, and after the defendant, by its station agent at Minturn, had executed and delivered to plaintiff its bill of lading for same, the cattle became restless and began to try to break out of the stock-pen, and about 10 o'clock on the night of the tenth day of June, 1908, the cattle remaining in the stock-pen by the negligence of the defendant as aforesaid, said cattle became frightened and stampeded by reason of the different trains of the defendant that were passing upon the main line of its road and upon the sidetrack at the station, breaking out of the stock-pen and scattering in every direction, some going upon the track and being killed by the trains

of the defendant, some being crippled, the number of which that were killed or crippled, the kind of trains or the direction going being to the plaintiff unknown. Plaintiff states that he made an agreement with P. H. Fullenwider, purporting to be the agent of the defendant, subsequent to the time that the cattle escaped from the stock-pen as above alleged, that plaintiff should get up all of the thirty-two head of cattle he could find upon the range, and ship them to the same market, and the same commission men that he had originally contemplated, and that the defendant would pay the market⁵⁴¹ price for every and all of such cattle as plaintiff failed to find, and pay the plaintiff the difference he received on those he could find and ship, and the price they were worth at the time they would have reached the market had plaintiff got proper transportation originally, and for such shrinkage as the cattle that he should find sustained by reason of delay in shipping, and to pay plaintiff a reasonable price for his trouble in locating and repenning the cattle; and for such necessary expenses as he might be put to in and about the same. Plaintiff states that he has made diligent search to find all of the cattle, but that he is unable to find any except nine steers, four years old, two three year old heifers, and four cows, of the original thirty-two head, which cattle were under the agreement shipped, together with other cattle of plaintiff, on the twenty-third day of June, 1908.

"That by reason of the defendant's negligence, plaintiff was compelled to sell the cattle upon the market for a price less than he would have received for the fifteen head of cattle on the date he would have sold them as originally contemplated, in the sum of \$51.80, and that the cattle were caused to shrink by reason of the defendant's negligence aforesaid two hundred pounds, to his further damage in the sum of \$7, and that he employed help in getting up the fifteen head of cattle and expended therefor the sum of \$10, and that he was compelled to hire pasturage for the cattle during the time he was regathering same, and paid therefor the sum of \$15, and that since shipping the fifteen head of cattle, he has located one of the cows, one three year old heifer, and one two year old steer, and one two year old heifer, and that plaintiff, after making diligent search for all of the cattle as aforesaid, had been unable to find eleven head of the twenty four year old steers, as aforesaid, except those that were dead or crippled by the negligence of the defendant's agents and employes, and says as he believes and avers that all of the eleven head of steers were either killed or entirely gone, which were worth to the plaintiff the market price at the time he placed same in defendant's stock-pen at Minturn, which was four and a half cents per pound on foot, amounting to \$445.50, to his great damage all in the sum of \$529.30.

"Wherefore, premises considered, plaintiff prays judgment against the defendant in the sum of \$529.30, for costs and all other and proper relief."

⁵⁴² The defendant answered, and denied the allegations of the complaint, and alleged that plaintiff's damages, if any, were caused by his own negligence, and that by the terms of the bill of lading executed by it to him it was not liable for the loss sustained by the escape of the cattle from the stock-pen.

The plaintiff testified in the trial of the issues as follows: Sometime in June, 1908, he went to Minturn in this state, and made arrangements with the defendant's station agent at that place to furnish him with a car for the shipment of his cattle. He collected his cattle, and drove them to Minturn, and placed them in the defendant's stock-pen. There was no means provided for fastening the gate of the stock-pen, except a trace chain, but no lock. He purchased a lock and fastened the gate with the chain and lock, keeping the key to the lock. On the 9th of June, 1908, the agent told him that there would be a special train at the station on the next morning about 7:40 o'clock A. M., and the agent wanted him to ship his cattle on that train, but he failed to ship on that train. The agent then said that "there will be another train here in a short time, and you can ship on that." In the meantime the agent executed to him a bill of lading for the cattle, which he accepted. Among other things, it substantially provides as follows:

"1. That the livestock was not to be transported within any specified time, or delivered at destination at any particular hour, nor in season for any particular market.

"2. That the railway company is exempted from loss or damage arising out of any accident or causes not arising out of its own negligence.

"3. That the shipper assumes all risk and expense of feeding, watering, bedding and otherwise caring for said stock while in the pens or elsewhere, and of loading and unloading same.

"4. That the shipper, by said contract, releases and waives all cause of action for damages that may have accrued to him by any prior written or verbal contract.

"5. That the shipper acknowledges that he has had the option to select this or the unlimited liability contract, and has taken this one because the rate is cheaper.

"6. That no agent of the company has the right to agree ⁵⁴³ to ship said livestock by any particular train or to reach any particular market, or to furnish cars on any particular day; and that the carrier expressly declines to do this."

About the time the bill of lading was executed the promised train passed without stopping. The agent then said there

will be another train here about 5 or 6 o'clock of the evening of the same day, and "it will stop and take your cattle." At the designated time the train arrived, and because his cattle was not already loaded refused to take them and moved on. The agent then said there will be another train here to-night at 11 o'clock, and it has orders to take your cattle. It came between 11 and 12 o'clock that night, but the stock was gone. The gate to the pen was opened, and the chain with which it was fastened was broken. He further testified that he made an agreement with P. H. Fullenwider to the effect stated in his complaint; and that he sustained damages as stated in his complaint. Other witnesses testified, but plaintiff's testimony is most favorable to him.

There was no evidence adduced to show how the cattle escaped from the pen, except through the gate. A part of the evidence tended to show that they were let out by some one. There was no complaint or evidence to show that the pen was defective.

Over the objections of the defendant the court instructed the jury as follows:

"1. The jury is instructed that if they believe, from the preponderance of the evidence in this case, that the plaintiff, Charley Jones, had an understanding with the station agent at Minturn that he desired to ship certain livestock to a foreign market, and it was understood between said plaintiff and said agent that a proper car for the shipment of said livestock would be spotted at the proper place for loading on the morning of the tenth day of June, 1908, and on the strength of said understanding the plaintiff gathered together a car-load of livestock, had them placed in the stock-pen of defendant at Minturn, Arkansas, and that the agent was negligent, and that said negligence concurred with the negligence of other agents of the defendant, failed and refused to properly place said car for the loading of said livestock at the time agreed upon between the parties, and that [by] the failure on the part of the defendant's agents ⁵⁴⁴ aforesaid the plaintiff was not permitted to load said cattle in time to be taken and transported to the market which plaintiff contemplated to place them for sale, and that said failure on the part of defendant's agents aforesaid was the direct and proximate cause of the injury complained of in plaintiff's complaint, then you are authorized to find for the plaintiff in whatever sum you find he was damaged by such failure on the part of the defendant, unless you further find that the plaintiff was negligent, and that his negligence contributed to the injury complained of.

"2. The jury is instructed that it is the duty of the defendant, after accepting personal property for shipment, such as livestock, to transport same without delay, and that any negligence on its part through its agents and employes in the non-

performance of such duty is chargeable to it; and if you believe by a preponderance of the evidence in this case that the agents and employes of the defendant were negligent in furnishing speedy facilities for the transportation of the cattle in question, and that such failure was the direct and proximate cause of the injury complained of in plaintiff's complaint, then you are authorized to find for the plaintiff in such sum as the evidence warrants under the instructions of the court, taken together in this case, unless you find that plaintiff contributed to the said injury by his own negligence."

"4. The jury is instructed that it is the duty of the defendant to provide without delay reasonable facilities of transportation to all shippers at any station who, in the regular and expected course of business, offer their freight for transportation; and if you believe that the defendant was negligent in furnishing the plaintiff a car, properly placing same, in which to ship his cattle, and that such negligence was the direct and proximate cause of the injury, then you should find for the plaintiff, unless you further find that the plaintiff contributed to his injury by his own negligence.

"5. If you find that there was an adjustment agreed upon between the plaintiff, Jones, and Fullenwider, the agent of the defendant company, agreed that the company would pay for all the cattle lost and for the expense of getting up the cattle, and for pasturage, you should find for the plaintiff as to all items ⁵⁴⁵ included in such agreement, irrespective of the question of the prior negligence of the company."

The jury returned a verdict in favor of the plaintiff, and the court rendered judgment accordingly. To reverse the judgment defendant prosecutes an appeal to this court.

In the bill of lading executed by the defendant, and signed by both parties, and which is the contract of shipment entered into by them, the plaintiff released and waived all causes of action for damages, if any, that may have accrued to him by any prior written or verbal contract. All previous contracts were merged in the contract evidenced by the bill of lading. This included the agreement by the agent to furnish a car for the shipment of the cattle made prior to the execution of the bill of lading. But the bill of lading did not have the effect to release the appellant of liability for damages already accrued, there being no separate consideration for such release: *St. Louis etc. R. R. Co. v. Pearce*, 82 Ark. 353, 118 Am. St. Rep. 75, 101 S. W. 760, 12 Ann. Cas. 125.

It was also agreed that the cattle was not to be transported within any specified time, or delivered at destination at any particular hour nor in season for any particular market. This did not, however, exempt the carrier from the consequences of its or its agent's negligence. While it was not bound according to agreement to transport cattle within any specified time,

or to deliver them at destination at any particular time, it was its duty to transport them with all convenient dispatch, with such suitable and sufficient means as it was required to provide in its business; that is to say, in a reasonable time: *St. Louis etc. Ry. Co. v. Deshong*, 63 Ark. 443, 39 S. W. 260; 2 *Hutchinson on Carriers*, 3d ed., sec. 651.

From what we have said it follows that instruction numbered 1, copied in this opinion, should not have been given.

The escape of the cattle from the stock-pen of appellant was the immediate cause of the greater part of the damages suffered by appellee, if not all. There was no duty of the appellant to furnish cars for their shipment after their escape and before their recovery. Who is responsible for their escape? The contract provides: That the second party (appellee) shall assume all risk and expenses of the feeding, watering, bedding, and otherwise caring for the livestock (cattle) covered by this ⁵⁴⁶ contract while in cars, yards, pens, or elsewhere, and shall load and unload the same at his own expense and risk." By this contract appellee assumed all care and risk for the cattle while in the pen, and appellant did not become liable for them until they were loaded on its train. Was it a valid contract? This court has repeatedly held that common carriers cannot contract for exemption from liability from losses and damages happening from the negligence of themselves or their servants—that it is against public policy to permit them to do so: *Taylor v. Little Rock etc. R. R. Co.*, 32 Ark. 393, 29 Am. Rep. 1; *Taylor v. Little Rock etc. R. R. Co.*, 39 Ark. 148; *St. Louis etc. Ry. Co. v. Lesser*, 46 Ark. 236; *Little Rock etc. Ry. Co. v. Talbot*, 47 Ark. 97, 14 S. W. 471. And yet, while so holding, it has sustained contracts similar to the one in this case as valid, when based upon a consideration as this is: *St. Louis S. W. Ry. Co. v. Butler*, 82 Ark. 469, 102 S. W. 378; *St. Louis etc. R. R. Co. v. Burgin*, 83 Ark. 502, 104 S. W. 161; *St. Louis etc. Ry. Co. v. Weakley*, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; *Fordyce v. McFlynn*, 56 Ark. 424, 19 S. W. 961. Under the rulings of this court such contracts are not stipulations against the negligence of the carrier or its servants.

The contract in this case is for the shipment of cattle from this state to another, and it is said that it is in conflict with the act of Congress known as the Hepburn act. So much of that act as is applicable to this case is as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or

lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed," etc. The act prohibits contracts, receipts, rules or regulations by the carrier against liability for any loss, damage or injury caused by it, its servants and agents, or connecting carriers, and not against consequences of any other causes. The liability of the carrier does not begin until the property ⁵⁴⁷ is delivered, or lawfully tendered for transportation. The carrier and shipper may stipulate as to when the property is delivered before it is placed upon the car or other conveyance for transportation. It is not necessary that the carrier take possession before it is placed upon his car or conveyance for transportation if the shipper desires and does retain control until that time, and such contracts are not against liability for his own acts. If he is willing and does retain control, who has the right to complain or object? In such cases there is no conflict between the shipper and carrier or their rights.

In *St. Louis etc. Ry. Co. v. Ozier*, 86 Ark. 179, 110 S. W. 593, 17 L. R. A., N. S., 327, it is said: "The delivery or tender of freight to the carrier for shipment may be made in accordance with such arrangement between the parties—that is, between the shipper and carrier's agent—as they may choose to make in regard to the mode of delivery. Says Mr. Hutchinson: 'They make such stipulations upon the subject as they see fit; and when such stipulations are made, they, and not the general law, are to govern': 1 Hutchinson on Carriers, sec. 115. A station agent has authority to consent to such arrangements: 1 Hutchinson on Carriers, sec. 462."

According to the contract entered into by the parties to this action, the appellee assumed the risk and care of the cattle until they were loaded upon the car; and appellant became liable for them after they were loaded.

The contract as to the liability of the appellee for the cattle while in the pen and until loaded did not interfere with or change the duty of appellant to furnish cars for the transportation of the cattle within a reasonable time after a demand therefor, provided such reasonable time did not expire before the escape of the cattle. It would still be liable for damages incurred by appellee by reason of the failure to furnish the car within such reasonable time.

The contract with P. H. Fullenwider was without consideration, and not binding on appellant. The principal, if not the sole, inducement to enter into the contract was the undertaking of appellee to collect and ship all of the cattle he could find. If appellant was liable for the losses sustained by the escape of the cattle, it was the duty of appellee to use all reasonable ⁵⁴⁸ means to arrest and reduce the loss. He could not stand idly by and permit the loss to increase and then

hold the appellant liable for the loss which he might have prevented: *St. Louis etc. Ry. Co. v. Neal*, 56 Ark. 279, 19 S. W. 963; *St. Louis etc. Ry. Co. v. Stroud*, 67 Ark. 112, 56 S. W. 870; *St. Louis etc. Ry. Co. v. Ayres*, 67 Ark. 371, 55 S. W. 159; 13 Cyc. 71, 72, 74, 75. He is seeking compensation for doing his legal duty, which is not a sufficient consideration for the agreement with Fullenwider.

The instructions are not in accordance with the law as we find it.

The judgment reversed and cause remanded for a new trial.

Hart, J., dissents.

Stipulations in Bills of Lading Limiting the Carrier's Liability are considered in the note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74.

The Liability of Carriers of Livestock is the subject of a note to *Stiles v. Louisville etc. R. R. Co.*, 130 Am. St. Rep. 432.

SALYERS v. LEGATE.

[93 Ark. 606, 125 S. W. 1010.]

PARTY-WALL—Statute of Frauds.—An Oral Contract whereby an owner of land agrees to permit coterminous proprietors to join and use his wall in the construction of their building, upon their promise to pay one-half of the cost of the wall, is, after they make such use of the wall, taken out of the statute of frauds, and enforceable against them. (p. 109.)

PARTY-WALL—Structure not Built for That Purpose.—A wall that has already been constructed by one proprietor may become a party-wall by force of an agreement whereby an adjoining proprietor promises to pay one-half of the cost of the wall if permitted to join and use it in the construction of his building. (p. 109.)

PARTY-WALL—Enforcement of Cost—Existence of Lien.—Land owners, who, in constructing a building, use the wall of an adjoining proprietor under an agreement to pay one-half of its cost, cannot, in his action to recover the agreed amount, plead an outstanding mortgage lien on his land. (p. 109.)

Pole McPhetrige and J. I. Alley, for the appellant.

Elmer J. Lundy, for the appellee.

McCULLOCH, C. J. Plaintiffs, George and Henry Legate, owned a lot in the city of Mena, Polk county, Arkansas, described as lot 1 of block 61 of the original town-site of Mena; and the defendant, Salyers, owned an adjoining lot described as lot 2 in said block. Plaintiffs were engaged in the livery business, and in the year 1906 they erected on their said lot a livery barn or stable, the walls of which

were made of cement blocks. Plaintiff intended to put the wall of the building out to the boundary line of their lot on the side next to defendant's lot, but it was afterward found that the wall failed to precisely follow the line. At the east end, the edge of the foundation underground is on the line, and the wall proper drops back about an inch inside the line on plaintiff's side of the lot; but at the west end the wall is eight or ten inches back from the line of plaintiff's lot. The whole of the wall is therefore on plaintiff's lot, and most of it is a few inches back from the line.

It is alleged by the plaintiffs that in January or February, 1908, after the completion of their said building, defendant, desiring to erect a building on his own lot, entered into an agreement with them to the effect that they were to allow him, in erecting his building, to join to the wall of plaintiffs' building so as to use the wall as a part of his own building, and that in consideration he, defendant, would pay plaintiffs one-half the original cost of the said wall. They alleged that pursuant to said agreement defendant proceeded to erect his building, and in doing so joined to their wall, and entered upon and occupied a strip of their land, but that he has refused to pay one-half of the cost of the wall as agreed. They instituted this action to recover the amount alleged to be due, and offered in their complaint to execute a deed or written agreement granting to defendant the right to use said wall in accordance with the terms of said oral agreement.

Defendant answered, presenting an issue as to the allegations of the complaint. The chancellor heard the case on the pleadings and oral testimony, and rendered a decree in favor of plaintiffs for the amount sued for, and directed plaintiffs to "execute and deliver to the defendant a good and sufficient deed conveying to the defendant a one-half interest in that portion of the wall and foundation used by defendant as long as the same shall stand." Defendant appealed from the decree.

The evidence sustains the finding of the chancellor that the wall in question is situated wholly on plaintiff's lot, and that defendant ⁶⁰⁸ entered into an agreement to join to it in the construction of his building and use it as a part thereof, and to pay to plaintiffs one-half the cost of said wall. Defendant denies that he agreed to use plaintiffs' wall or to pay a part of the cost. He admits that before he began the construction of the building he had a conversation with plaintiffs, in which they proposed to let him use the wall if he would pay one-half of its original cost, but he says that afterward he found that the wall was defective, and could not be used with safety in the construction of his building. He built his side walls up to plaintiffs' wall, and joined it with mortar, but did not cut into the wall, or tie his wall onto it except with the mortar

joints. He put the tin roof close to the wall and supported it with posts, but did not actually join it to the wall.

Defendant's conduct is nothing short of an ingenious attempt to make use of plaintiffs' wall without paying for it, and he now attempts to evade liability by pleading the statute of frauds. According to the testimony accredited by the chancellor, he agreed to use the wall and pay for it. In order to do so, he invaded plaintiffs' premises, with their permission, by making use of the strip of land between the wall and the boundary line of the lot. Unfortunately for his contention, this amounted to performance of the contract, which took the case out of the statute of frauds and gave plaintiffs a right of action for the agreed price: *Walker v. Shackelford*, 49 Ark. 503, 4 Am. St. Rep. 61, 5 S. W. 887; *Rudisill v. Cross*, 54 Ark. 519, 26 Am. St. Rep. 57, 10 S. W. 575. It is unimportant that the wall was not built as a party-wall. It became a party-wall by force of this agreement (*Dorsey v. Habersack*, 84 Md. 117, 35 Atl. 96) and its use as such by defendant took the agreement out of the operation of the statute.

The evidence shows that there is a mortgage on plaintiffs' lot; but this does not absolve defendant from his obligation to pay one-half of the cost of the wall. He has enjoyed the rights acquired under the contract, and must pay according to his obligation. A different question might be presented if the premises were sold under the mortgage; but defendant cannot plead an outstanding mortgage lien in bar of plaintiffs' right to recover on the contract.

Decree affirmed. ●

The Law Concerning Party-walls is the subject of a note to *Dunscorn v. Randolph*, 89 Am. St. Rep. 924. The term "party-wall" is usually applied to such walls as are built on the land of another for the common benefit of both in supporting timbers used in the construction of contiguous buildings. And a division wall may become a party-wall by agreement, either actual or presumed: *Coggins & Owens v. Carey*, 106 Md. 204, 124 Am. St. Rep. 468.

One Who Uses a Wall Erected on the Dividing Line by the Owner of an adjacent lot should pay a reasonable price for the use estimated as of the time the user takes place, and this although neither he nor his vendor was a party to the erection of the wall, and made no agreement, express or implied, concerning it: *Spaulding v. Grundy*, 126 Ky. 510, 128 Am. St. Rep. 328.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

ESTATE OF MURPHY.

[157 Cal. 63, 106 Pac. 230.]

WILL—Gift to Class.—The Death of One of the class to which a testamentary devise is made, prior to the death of the testator, does not cause the legacy to lapse, but those of the class who survive the testator take the whole devise. (p. 113.)

WILL.—A Gift to a Class is a Gift of an Aggregate Sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number. (p. 113.)

WILL—Gift to Class.—In Determining Whether a devise is to a class or to individuals, importance is attached to the fact that the gift is to the devisees nominatim, and that the particular share they shall each receive is mentioned. When this appears the bequest constitutes a gift and devise, individually as tenants in common, and not as a devise to a class. (p. 114.)

WILL—Gift to Class.—If Words Which, Standing Alone, would be effectual to create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers from the designation by name and mention of the share each is to take that the devisees are to take individually and as tenants in common, and that the descriptive statement is intended merely as matter of identification. (p. 114.)

WILL—Gift to Class.—The Rules of Construction for determining whether a gift is to a class are not absolute, but give way to the intention of the testator as gathered from the consideration of all the provisions of the will, or, if they are not clear, by a consideration of the circumstances surrounding the making of it. (p. 115.)

WILL—Gift to Class—Circumstances Showing Intention.—Where a testator gives the residue of his estate equally to four named children of his sister, the fact that he lived with her from the childhood of the children up to her death, had a deep affection for the children, took great interest in their welfare, and had other nieces and nephews whom he did not mention in his will, does not aid the construction of the will as to whether the gift is to the individuals or the class. (pp. 115, 116.)

WILL—Gift to Class—Prevention of Intestacy.—The canon of interpretation applicable to prevent intestacy cannot be invoked to establish a gift to a class against the rules of law declaring the legal meaning of the language in a will. (p. 116.)

WILL—Gift to Class, What is not.—A Residuary Clause, “all the rest of my property both real estate and personal property shall go to, and be equally divided among the four children of my late sister Catherine F. Flynn, deceased; that is to say: I give, devise and bequeath all the rest of my personal property and all my real estate of whatsoever kind and wheresoever situate, share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast”—does not constitute a gift to a class, and upon the death of one of the children without lineal descendants before the testator, the share devised to him lapses and goes to the heirs of the testator. (pp. 117, 118.)

Sullivan & Sullivan and Theo. J. Roche, for the appellants.

Mastick & Partridge and E. J. Mize, for the respondents.

64 LORIGAN, J. The will of Denis B. Murphy contained, among other provisions, the following residuary clause:

“Fourth. It is my will and desire that all the rest of my property both real estate and personal property shall go to, and be equally divided among the four children of my late sister Catherine F. Flynn, deceased; that is to say: I give, devise and bequeath all the rest of my personal property and all my real estate of whatsoever kind and wheresoever situate, share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast.”

The will was admitted to probate and in due time the executors thereof petitioned for a distribution of the estate. The petition set forth the will of deceased and referring to **65** the clause thereof above quoted alleged that William D. Flynn, named therein as one of the residuary legatees of the estate of decedent, had died prior to the death of the testator, and then with reference to said clause in the will it was alleged: “That the intention of said decedent in said will was to devise and bequeath the residue of his estate to the said Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast as a class, namely, as the children of his said sister, and to those of said class only who should be living at the death of the said decedent, and upon the death of the said William D. Flynn during the life of the said decedent, the said Timothy J. Flynn, Mary Jane Logan and Kate I. Prendergast became and are the sole survivors of said class, and are entitled to the whole of said residue.”

Certain nieces and nephews of the deceased, claiming to be among his heirs at law, answered the petition for distribution denying all the foregoing allegations as to the intent of the testator to devise the residue of his estate to the devisees named in said fourth clause as a class, and averring that on the contrary said William D. Flynn, named in said will, as a devisee, died prior to the death of the testator without issue; that as to the portion of his estate devised to said William D. Flynn the testator died intestate, and that they, with other heirs at law of the testator, were entitled to participate in

the distribution thereof. A hearing was had on the petition and the court made findings of fact wherein it found, as alleged in the petition for distribution, that the intention of the decedent was to devise the residue of his estate to the devisees named in said fourth clause of his will as a class, namely, to the children of his said sister and to those of said class who would be living at the death of said decedent.

In accordance with this finding the court distributed the property to the survivors of those mentioned in the residuary clause of the will, namely, Timothy J. Flynn, Mary J. Hyde (formerly Logan), and Kate I. Prendergast, share and share alike.

This appeal is by those heirs at law of decedent—the nieces and nephews—who contested the distribution of the estate to the devisees named in the residuary clause as a class and is taken from the decree of distribution accompanied by a bill of exceptions.

It must be conceded upon this appeal that under the testamentary clause in question the devise to William D. Flynn lapsed upon his death, without leaving lineal descendants, before the testator (Civil Code, section 1343), and that as to the portion of the estate devised to him the testator died intestate, unless from the clause in the will creating the devise in which he was to participate, considered by itself, it is apparent that the testator intended the devise of the residue of his estate to go to the children of his sister Catherine as a class, or that such intention appears from extraneous evidence properly admissible to disclose it.

While the lower court reached the conclusion that the devise in question was to a class consisting of the children of the deceased sister of testator who might survive him, we are of the opinion, in the light of the established rules of construction and authorities, that this conclusion was not justified either from the express terms of the devise itself or aided by extrinsic evidence.

It is declared by section 683 of the Civil Code that a joint interest created by a will exists only “when expressly declared in the will to be a joint tenancy,” and by section 685 of the same code it is declared that every interest created in favor of several persons (except acquired under certain conditions not involved here) is an interest in common unless declared in its creation to be a joint interest.

It is quite apparent from an examination of the testamentary clause in question that this devise does not expressly declare a joint tenancy with its accompanying right of survivorship in the devisees named therein, and unless there is some rule capable of application so as to prevent it, the interest which each devisee took under the devise was an interest in common.

It is not contended by the respondents that the clause does create any joint tenancy, nor do they predicate their right to take the whole devise as survivors by reason of any expressly created joint tenancy. They base their claim solely on the ground that the devise, while not in terms creating a joint tenancy, still is a devise to a class—the children of the deceased sister of testator—and that under a well-recognized rule of law where a devise is made to a class, the death of one of the class prior to the death of the testator does not have ⁶⁷ the effect of causing the legacy to lapse, but those of the class who survive the testator take the whole devise.

The rule contended for by respondents is correct, but we cannot agree with them, or with the trial court, in the conclusion that either the terms of the devise disclose an intention on the part of the testator to devise to a class, or that, accepting the extraneous testimony admitted as bearing on his intention, it discloses any such intention.

As to a gift to a class the rule is stated as follows: "In legal contemplation a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number": 6 Jarman on Wills, sec. 232; Matter of Kimberly, 150 N. Y. 90, 44 N. E. 945; Matter of Russell, 168 N. Y. 169, 61 N. E. 166; Kent v. Kent, 106 Va. 199, 55 S. E. 564.

Tested under this rule, there is nothing in the devise which would indicate that the intention of the testator was that the devisees should take as a class, or in any other way than as individuals, and under our code provision as tenants in common. There is nothing on the face of the devise indicating any uncertainty in the number of persons who were to take the property, or that they were to be ascertained at a future time, or that the share of the residuary estate which the devisees were ultimately to have was to be determined as to the amount by the number of those who would survive the testator. All the persons who are to take were specifically named and the share of each was designated. In fact, it is not only quite apparent that under the rule relied on this devise cannot be said to contain any of the elements which should characterize a gift to a class, but the plain impression which one would receive by reading the clause is that the testator intended to give to each individual an equal portion of his estate. It is true that the testator uses language in the clause of his will which would, if it stood alone, amount to a devise to a class. This would be the result if the devise had been to "the four children of my late sister Catherine" without further words. But here the terms of the bequest—the

designation of the number of the children, followed by a ⁶⁸ repeated and express devise to them by name and in an equal share, cannot be ignored so as to make the other words in the will constitute a class.

In determining whether a devise is to a class or to individuals, great importance is attached in the solution of the question to the fact that the gift is to the devisees nominatim and that the particular share they shall each receive is mentioned, and when this appears, the bequest is held to constitute a gift and devise individually as tenants in common and not as a devise to a class: *Savage v. Burnham*, 17 N. Y. 561; *Hornberger v. Miller*, 28 App. Div. 199, 50 N. Y. Supp. 1085; *Rockwell v. Bradshaw*, 67 Conn. 8, 34 Atl. 758. But assuming, however, that the language used in the clause in question is capable of two different legal meanings resulting from the testator devising his estate to the four children of his late sister, followed by other words of express devise to each of the children by name and in equal proportions, still this mention of them by name and a devise to them in equal shares will control the description of them as children of his deceased sister. If words, which, standing alone, would be effectual to create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers from the designation by name and mention of the share each is to take, that the devisees are to take individually and as tenants in common, and that the descriptive portion of the clause (children of a deceased sister) is intended merely as matter of identification: *Hoppock v. Tucker*, 59 N. Y. 202; *Hornberger v. Miller*, 28 App. Div. 199, 50 N. Y. Supp. 1085.

In the *Estate of Hittell*, 141 Cal. 432, 75 Pac. 53, which was a case similar in some respects to the one at bar, the devise there in question was of the testator's property "to Anna P. Greer and Mary M. Greer, with whom I live at this house . . . , and whom I regard and treat as my adopted daughters." It was contended that this was a devise to a class, and the lower court so decreed. In reversing the decree this court discussed the rule of construction which we have been considering and said: "A common instance of a devise to a class is where a testator gives property, generally to the 'children' of a certain person, without naming them—as to 'the children of my brother John'; and in such a case it is held that the ⁶⁹ devise is to such children of John as will be in existence at the time of the testator's death. There are cases where in the devise the individuals and the class are both named—as, for instance, where it is 'Charles, James, and Robert, children of my brother John'—and in such cases courts have had some difficulty in determining whether the devise was to the individuals named or to the class. In such

a case, the general rule is, that the persons named take as individuals and not as a class, unless some other clause of the will, or some evidence outside of it calls for a different construction. The result of the authorities—and counsel for each side have cited a large number of them—is correctly stated in Page on Wills (section 543) as follows: 'Where there is a gift to a number of persons who are indicated by name, and also further described by reference to the class to which they belong, the gift is held *prima facie* to be a distributive gift and not a gift to a class'; and, after citations in his notes, he says: 'In such cases if one of the beneficiaries dies before the testator, there is, therefore, no right of survivorship to the other named beneficiaries.' Therefore, in the case at bar, even if a class had been named, the gift would have been to the individuals, because there is nothing in the other parts of the will, or in any extrinsic evidence, showing a different intent, and there are no operative words creating any right of survivorship."

It is true that these rules of construction are not absolute, but must give way to the manifest intention of the testator, which is always paramount, as that intention may be gathered from a consideration of all provisions of the will, or when the language of the will is not sufficiently clear to remove all doubt as to its intention, by a consideration of the circumstances surrounding the making of it (exclusive of the oral declarations of the testator) in so far as they may throw light on that intention: Civ. Code, sec. 1318; Estate of Langdon, 129 Cal. 451, 62 Pac. 73.

It is not pretended that there are any other provisions of the will bearing on the subject, and the only circumstances appearing from the extrinsic evidence are that the testator had lived with his sister, the mother of the devisees mentioned in the clause of the will in question, and who constituted all her children; that he had lived with this sister, paying for ⁷⁰ room and board, from the childhood of said devisees up to the death of their mother; that he had a deep affection for these four children and took great interest in them and in their welfare. Also, that he had other nieces and nephews not mentioned in his will. But these facts throw no more light on the intention of the testator than appears upon the face of the devise itself. All that this evidence discloses is just what the clause of the will does. It furnishes a reason, generally, why the testator devised his estate to these four devisees in preference to his other nieces and nephews, and a particular reason why, having an equal affection for all of them, he made no distinction between them in his bequest, but gave to each an equal share in his estate. Giving this evidence the greatest force that can be claimed for it, it discloses, at most, that the intention of the testator was just as

compatible with the devise to these children individually as to them as a class. But this cannot aid the respondents. It would simply leave the intention of the testator as much in doubt after a consideration of these intrinsic facts as before. This evidence throws no more light on the intention of the testator than appears upon the face of the devise itself, and so we are still remitted to the application of the general rule that when in a devise a class and individuals are both mentioned, and nothing appears from other clauses of the will or extraneous evidence requiring a different construction, the devise will be construed as one to devisees individually and not to them collectively—to them as tenants in common and not to them as survivors of a class.

Nor is the claim of respondents that the devise should be held to be one to a class strengthened by invoking the canon of construction that such an interpretation should be given to a will as will prevent intestacy as to any portion of the testator's estate. The code provides that where a devisee dies before the testator, the devise to him lapses unless an intention appears on the face of the will to substitute some other person in his place. So that the question presented here is not: Did the testator by the terms of his will intend to prevent intestacy as to any portion of his estate, but whether in the terms of this particular clause of his will did he use language disclosing an intention to leave his estate to the devisees individually or to them collectively? The question⁷¹ is one of intention to be derived from the language used in the devising clause itself, there being nothing in other provisions of the will bearing on it. By the clause in question, the testator undoubtedly intended when he made his will to dispose of all the residue of his property and to dispose of it in favor of the devisees therein named, because he expressly said so. The language, however, which he used, naming the devisees individually and giving to each an equal portion of all the residue of his estate, is construed, under well-settled rules of law to which we have heretofore referred, to be a devise to the devisees named as individuals and as tenants in common and not as a class. The law declares this to be the meaning of the language which he has used, and a canon of interpretation applicable to prevent intestacy cannot be invoked to set aside plain rules of law declaring the legal meaning and effect to be given to language used in such a devise as is here under consideration.

In the Estate of Hittell, 141 Cal. 436, 75 Pac. 54, from which we have heretofore quoted, practically the same contention as the one which is urged now was made, and it was said: "The will was made in view of conditions existing at the time of its execution; and as he gave all of his property to the two women, both of them living, of course he intended

at that time and under existing circumstances that his heirs should take nothing. . . . As in the case of innumerable wills, the testator did not anticipate changed conditions, and did not provide for the event of the death during his lifetime of one of the named devisees, which he could easily have done, if he so desired, by giving the property to them or to the survivor of them. What his actual intent may have been after the conditions were changed by the death of Mary we have no means of knowing, except from the fact that he allowed the will to stand as originally executed. He may have thought that one-half of his estate would be sufficient for the wants of the remaining woman. At all events, we must apply the law to the will as it reads, and to the fact of the death of Mary before that of the testator, and thus applying it, the conclusion clearly follows that the living devisee, Anna, took one undivided half of the estate, and that the other half vested in the heirs at law."

In support of their claim that this devise was properly ⁷² construed by the trial court as a devise to a class, respondents rely on *Schaffer v. Kettell*, 14 Allen, 528, *Stedman v. Priest*, 103 Mass. 293, *Swallow v. Swallow*, 166 Mass. 241, 44 N. E. 132, *Bolles v. Smith*, 39 Conn. 217, *Warner's Appeal*, 39 Conn. 253, and *Springer v. Congleton*, 30 Ga. 976. But in none of those cases was any different rule of construction announced. All of them—save *Bolles v. Smith*, and *Swallow v. Swallow*—are commented on in *Church v. Church*, 15 R. I. 138, 23 Atl. 302, and with reference to them it is said: "In these cases, however, the general rule that a gift to persons named is a gift to them individually, is recognized, and reasons are found in the language or structure of the will, or in the circumstances, for deciding that the intent of the testator, which is, of course paramount to the rule, would be best subserved by disregarding it." In all these cases, too, while the gift was to individuals named, language was used which might imply a gift to them as a class, and as it appeared, either from other parts of the will or from extraneous facts, that it was the manifest intention of the testator to make a gift to the devisees named as representing some particular member or branch of the family as a class, it was held that the presumption of a devise individually must give way to the paramount intention of the testator. But here there is nothing in the will or in the extraneous facts to overcome the presumption of a devise to each of the devisees individually under the general rule, and hence it must apply.

There is nothing further to be said on this subject. We do not discuss the claim of appellants that the court improperly admitted testimony showing the relationship between the testator and the devisees when the will was made. It is not necessary. Assuming it was properly admitted, it proved

nothing as to intention more than the devising clause did. Under the law, that clause must be construed as a devise to the devisees individually and as tenants in common. By it each devisee was given one-fourth of the residue of the testator's estate, and had all lived, each would have been entitled to that proportion on distribution. One of the devisees, William D. Flynn, having died prior to the testator, the devise of one-fourth of the residue of the estate to him lapsed. No provision being made in the will otherwise disposing of this portion of his estate, the testator died intestate as to it and ⁷³ it vested in his heirs at law, and should have been distributed to them and not to the surviving devisees as a class.

The decree of distribution is reversed.

Melvin, J., and Henshaw, J., concurred.

Hearing in bank denied.

Testamentary Gifts to a Class of Persons is the subject of a note to Thomas v. Thomas, 73 Am. St. Rep. 413. See, also, the subsequent cases of Rudolph v. Rudolph, 207 Ill. 266, 99 Am. St. Rep. 211; Downing v. Nicholson, 115 Iowa, 493, 91 Am. St. Rep. 175. When a devise is to a class, the death of one member of the class before the testator will not cause a lapse of any part of the gift, but those of the described class who survive the testator will take the whole: Lancaster v. Lancaster, 187 Ill. 540, 79 Am. St. Rep. 234.

The Bequest of the Residue of the Testator's Estate to her younger children, E. G. C. and E. I. B., to be divided equally between them, is a separate bequest to each, and not one bequest to them as a class. Hence on the death of E. G. C. during the life of the testator, E. I. B. does not take the residue, but the deceased, as to it, must be regarded as dying intestate: Best v. Berry, 189 Mass. 510, 109 Am. St. Rep. 651.

BIG THREE MINING AND MILL COMPANY v. HAMILTON.

[157 Cal. 130, 107 Pac. 301.]

MINING CLAIMS—Work on One for Benefit of Others.—Where mining claims are held in common, the expenditure required by the laws of the United States may be made upon any one of the claims. The work done, however, must be done in good faith for the benefit of all the claims, and have a tendency to benefit or develop the claims other than the one upon which it is done. (p. 122.)

MINING CLAIMS—Work on One for Benefit of Others.—Whether the work done on one of several claims held in common is done in good faith for the benefit of all of them, and has a tendency to benefit or develop them, is a question of fact for the jury. (p. 122.)

MINING CLAIMS—Work on One for Benefit of Others.—Assessment work done upon one of group of claims owned in common may inure to the benefit of all, even though the claims are not adjoining. (p. 123.)

MINING CLAIMS—Work Done Outside of Claim.—Under the rule that instructions are to be read together and harmonized if possible, there is no necessary conflict between an instruction that a locator has the burden to show that work done outside of a mining claim must have a "tendency to" benefit or develop the claim, and an instruction that it must be shown that such work "did actually benefit" the claim. (p. 125.)

MINING CLAIMS—Forfeiture—Sufficiency of Evidence.—While it is said that a forfeiture can be shown only upon clear and convincing evidence, the requisite proof is made whenever it is shown by a preponderance of evidence that the full amount of work or improvements was not made or expended within the given year. (pp. 125, 126.)

MINING CLAIMS.—To Acquire Title by Prescription to a mining claim, the possession must not only be hostile, but exclusive and uninterrupted for the period of five years. If possession is neither exclusive nor uninterrupted during that period, the statute vests no title in the claimant. (p. 126.)

MINING CLAIM.—A General Verdict in Favor of a Defendant, who asserts title to a mine both by prescription and by priority of location, imports findings in his favor upon both issues. And if either defense is sustained by the evidence and is not affected by error, the want of evidence to sustain the finding on the other defense, or error committed in regard to it, is not prejudicial. (pp. 126, 127.)

MINING CLAIMS—Statute of 1897.—Mining Locations made while the law of 1897 was in force, but invalid by reason of noncompliance therewith, will be valid after the repeal of that law, if the provisions of the mining laws of the United States have been complied with and there are no intervening rights before the repeal, and if the claim has been occupied and worked up to the time of and after the repeal. (p. 127.)

MINING CLAIMS—Extent of Possession.—Evidence Tending to show that a claimant had continuously, up to and after the repeal of the law of 1897, prosecuted work under a system tending to the development of a group of three claims, and that a part of this work had been done within the boundaries of one of them, is enough to constitute possession of that entire claim to the extent of the visible boundaries. (p. 128.)

MINING CLAIM—Delay in Recording Claim.—Within the twenty days allowed for recordation after posting notice, the claim of a locator in possession, although he does not record the notice, is valid, and no other entry can be made as a foundation of a claim of title. (p. 128.)

MINING CLAIM.—Whether or not Assessment Work on a Claim was Actually paid for is not material. (p. 129.)

MINING CLAIM—Erection of Mill—Good Faith.—Evidence is admissible that a mill erected on a mining claim is of no value for the purpose of reducing the ore there found, as this has a bearing upon the question of good faith in making the expenditure. (p. 129.)

MINING CLAIM.—Affidavits or Proofs of Labor duly recorded are by statute prima facie evidence of facts therein stated, but no substantial injury results from their exclusion if the affiants fully testify to the material facts therein stated. (p. 129.)

MINING CLAIMS.—Where the Testimony of a Witness, if true, establishes the paramount right of one of the parties to a mining claim in controversy, it is prejudicial error to permit his impeachment by proof of contrary statements made by him for which no proper foundation has been laid. (p. 130.)

J. W. P. Laird, Wm. Chambers and William J. Hunsaker, for the appellant.

Sherman Page and Roger S. Page, for the respondents.

¹³³ SLOSS, J. The action was brought to quiet plaintiff's title to four quartz mining claims, the "Occidental," the "Rosamond," the "Kid," and the "Home No. 1," together with the "Big Three Millsite." There is no dispute as to plaintiff's ownership of the Home No. 1, and all controversies relating to the ownership of the millsite were settled by agreement of the parties before the trial. The questions presented upon this appeal relate entirely to the three claims first mentioned—the Occidental, the Rosamond, and the Kid. As claimed by plaintiff, these three, together with the Home No. 1, ran along an easterly and westerly line, end to end. The Occidental lay to the west; adjoining it on the east was the Rosamond; next came the Kid, and adjoining the Kid to the east lay the Home No. 1. Each of the claims, except the Kid, was of the full size permitted by the United States statutes, to wit, fifteen hundred feet in length by six hundred feet in width, or thereabouts. The Kid was a smaller or fractional claim, occupying the space left between the Rosamond and the Home, its end lines constituting the easterly and westerly ends, respectively, of the claims last named. The north line of the Kid, according to plaintiff's testimony, is sixty-four feet in length and the south line eighty-seven feet eight inches.

The allegations of plaintiff's complaint as to the ownership and possession of these claims were denied by the defendants. In addition, separate defenses were set up whereby title to various portions of the property claimed by plaintiff was asserted by different defendants. The defendant, E. M. Hamilton, claimed ownership of substantially all of the Rosamond claim, in part by virtue of his prior location of a claim also designated the Rosamond (hereinafter referred to as the "Hamilton Rosamond"), and in part by reason of his location ¹³⁴ of two overlapping claims known as the Fay No. 1 and the Lida. The Rosamond, as claimed by this defendant, covered the greater part of plaintiff's Rosamond. The north lines of the two are very nearly identical. The east end-line of Hamilton's Rosamond is five hundred and forty-two feet in length, while the west end-line is three hundred and forty-four and seventy-five hundredths feet long. The Fay No. 1 is located to the south of Hamilton's Rosamond and overlaps plaintiff's Rosamond to the extent of five and one-fourth acres, being nearly all of that portion of plaintiff's Rosamond lying south of the Hamilton Rosamond. The Lida lies to the north and east of both Rosamond claims and overlaps them at their northeasterly corners to the extent of

something over three acres. Said Lida claim overlaps the Kid as claimed by plaintiff to the extent of sixty-four one-hundredths of an acre. It should here be said that these statements regarding the location and extent of the Fay No. 1, the Lida, and the Hamilton Rosamond are disputed by appellant, which denies not only the fact of location of these claims, but contends that the Fay and the Lida, if located, did not cover any part of the Rosamond.

Title to plaintiff's Rosamond is also claimed by Hamilton by virtue of adverse possession for the statutory period.

Title to the Occidental and Kid mining claims are asserted by various defendants by virtue of relocations made by them following an alleged forfeiture of said claims by plaintiff for failure to do the annual assessment work. The Occidental is claimed by E. M. Hamilton and J. Frank Walters, each asserting ownership to an undivided one-half interest. The Kid is claimed in like manner by D. M. Reck and Roger S. Page.

The case was tried before a jury which, after hearing a considerable mass of testimony, much of it conflicting, returned a verdict as follows: "1. With respect to plaintiff's claim of ownership of the Occidental Mining Claim, we find in favor of defendants. 2. With respect to plaintiff's claim of ownership of the Rosamond Mining Claim, we find in favor of defendants. 3. With respect to plaintiff's claim of ownership of the Kid Mining Claim, we find in favor of the defendants." In addition the jury made answer to nine special issues. We shall have occasion to refer to some of these later.

Before taking up the issues arising with reference to the Rosamond, it will be convenient to consider separately the questions relating to the claims of title to the Occidental¹³⁵ and the Kid by virtue of relocations. The Occidental is claimed by Hamilton and Walters under a location made by them on the first day of January, 1905; the Kid by Page and Reck on a location made on the fifth day of March, 1904. The questions presented to the jury with reference to these claims were whether the Occidental had been forfeited by plaintiff by its failure to do the necessary work on said claim during the year 1904, and whether the Kid had been so forfeited by failure to do such work during 1903. On these points the jury found in answer to the special issues submitted to them as follows: "What was the value of the work and improvements done on the Occidental Mining Claim during the year 1904? Answer. Thirty-five dollars." "What was the value of the work and improvements done on the Kid Mining Claim during the year 1903? Answer. Thirty-five dollars." There can be no question that the findings are fully sustained by the evidence in so far as such evidence related to the work done within the boundaries of

the respective claims. A number of witnesses who had first shown their familiarity with the work done and their ability to estimate its value, testified that the amount of work done on the claims in the years in question did not exceed the sums found by the jury.

It is claimed, however, by the appellant that, during the year 1904, plaintiff was the owner, not only of the Occidental and Kid claims, but also of the Home No. 1, and that it did work and placed improvements upon this claim to an amount in excess of that necessary to hold all three claims. Where claims are held in common, the expenditure required by the laws of the United States may be made upon any one of the claims: U. S. Rev. Stats., sec. 2324; U. S. Comp. Stats. 1901, p. 1426. The work so done, however, must be done in good faith for the benefit of all the claims, and it must be such as to have a tendency to benefit or develop the claims other than the one upon which the work is done. Whether it is so done or has such tendency is a question of fact (*Snyder on Mines*, sec. 482; *Chambers v Harrington*, 111 U. S. 350, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301, 27 L. ed. 990; *De Noon v. Morrison*, 83 Cal. 163, 23 Pac. 374; *Mt. Diablo M. & M. Co. v. Callison*, 5 Saw. 439, Fed. Cas. No. 9886; *Book v. Justice Mining Co.*, 58 Fed. 106; *Hall v. Kearney*, 18 Colo. 505, 33 Pac. 373), and this question was ¹³⁶ submitted to the jury in the case at bar. The evidence was such as to fully warrant the jury in finding that the work done on the Home No. 1 was not done for the purpose of developing the Kid or the Occidental, and that such work had no tendency to develop either of them. The appellant offered some testimony in support of its theory that the four claims to which it asserted title were located upon the line of a vein running east and west; that this vein could be traced continuously through the four claims and that a reasonable and proper mode of developing each of the claims was to enter the vein within the limits of Home No. 1 and thence drift, along the vein, through the Kid, Rosamond and the Occidental, with a view to taking all of the ore extracted back to the Home, upon which reduction works had been placed. But as against this there was an abundance of testimony on behalf of the respondents to the effect that there was no such continuous vein, but that, on the contrary, the country was much broken up; that all veins which were discoverable ran from the northeast to the southwest or from the northwest to the southeast; and that such of them as were to be found within the limits of the Home No. 1 passed out of the sidelines of that claim without entering either the Kid, the Rosamond, or the Occidental.

But, apart from the question of sufficiency of evidence, it is contended that the court erred in its instructions to the jury regarding the matter of forfeiture by failure to do the annual work. One instruction (numbered 6) reads as follows: "You are instructed that the laws of the United States require one hundred dollars' worth of work or of improvements annually to be performed or made on a mining claim. Such work or improvements so required by the laws of the United States may be done or made within the boundaries of such claim or such work may be done outside the boundaries of such claim on one of a group of claims adjoining each other and owned by the same party, if done in pursuance of a system of development and if the same has a tendency to benefit or develop each claim in the group. Work done on one of a group of mining claims which has a tendency to develop or benefit all of the claims in the said group inures to the benefit of each and all of said claims, even though the system adopted may not be the best that could have been devised under the circumstances. Improvements made, such as the construction of roads, mills ¹³⁷ or mining machinery for the working and operation of an entire group owned by one party, and which said improvements tend to the benefit of all of the claims in said group will inure to the benefit of each and all of the claims in said group, even though such improvements be made outside the lines of any of said claims. If you believe that in the year 1904 there was more than four hundred dollars' worth of work done within the boundaries of Home No. 1 Mining Claim by the plaintiff in this case, or anyone acting under the plaintiff, and with the plaintiff's consent, and that such work was done in pursuance of a system that tended to the development of all of the claims claimed by the plaintiff herein in its complaint, and tended to the development and benefit of all such claims, then the work so performed was sufficient to prevent a forfeiture of any of said claims on account of the annual labor or improvement requirements of the year 1904. You are further instructed that even though the work done on said Home No. 1 claim in 1904 was not of the value of four hundred dollars, still if you believe from the evidence that improvements were made consisting of a mill, cyanide tanks and waterworks of as great a value as four hundred dollars, which, taken in connection with such work as you find to have been done on the claim under such conditions as those above stated, would equal or exceed the sum of four hundred dollars, and that such improvements were of such a character and so constructed as to benefit and tend to the development of all of said claims, and each of them, then the court instructs you that upon those facts existing there was no forfeiture of such claims, or either of

them, on account of the said annual labor or improvement requirements. It is not necessary that a party in doing work on a claim or on a system for the benefit of all claims held by such party and contiguous to each other shall do the same specifically as annual labor or assessment work, but if such work is done in good faith and is equal in amount to the work required to be done by the act of Congress, then the same will be sufficient to prevent a forfeiture." One criticism of this instruction is that the court speaks of work done outside the boundaries of a claim as required to be done on one of a group of claims "adjoining each other." Undoubtedly, the better authority supports the contention that assessment work may be done upon one of a group of claims owned in common, even though the claims are not all adjoining: ¹³⁸ 1 Snyder on Mines, p. 444; Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047. Accordingly, it is claimed that in this case, inasmuch as the jury found that the plaintiff was not the owner of the Rosamond, it must have concluded from the instruction of the court that it could not consider work done on the Home in connection with the Occidental, since the Occidental was, according to the verdict, not adjoining other claims owned by plaintiff. We think, however, that in view of the language used by the court in a later part of the same instruction, the inaccurate expression first used could not have influenced the jury to plaintiff's detriment. The court specifically instructed the jury that if the requisite work was done upon the Home, and such work was done "in pursuance of a system that tended to a development of all the claims claimed by the plaintiff herein in its complaint," such work was sufficient to prevent a forfeiture of any of such claims. In view of this language it is clear that the court had reference to plaintiff's assertion of title to the four claims rather than to the validity of that title, and that it instructed the jury that work done upon any one of such four claims (which were in fact adjoining), could, under proper conditions, be applied to any one of the four. No prejudice could have resulted from the instruction, limited as it thus was.

It is not disputed that instruction 6 correctly defines the character of the work that may be done upon one claim for the development of another owned in common with it. It states that work done outside the limits of a claim must be such as has a tendency to develop or benefit the claim. It is argued, however, that a subsequent instruction is in conflict with it. Instruction No. 30 reads as follows: "In accordance with instructions heretofore given, the burden of proof is on the defendants to show that the necessary assessment work was not done as required by law on the Occidental claim for the year 1904, and on the Kid claim for the year

1903, but in so far as the plaintiff's case is made to depend upon work done outside of the Occidental and Kid during said years 1903 and 1904, the burden of proof is on the plaintiff to show that such work done outside of said claims did actually benefit said claims." This instruction is assailed upon the ground that it requires the plaintiff to show ¹³⁹ that work done outside of the claim actually benefited the claim, whereas the true rule is the one stated in the prior instruction that it need only tend to its benefit. We need not here enter into any extended discussion of the distinction, if there be any, between the words "actually benefited" the claim and "tend to benefit" the claim. It would seem that a greater burden is imposed upon a party if he be required to show that his work actually benefited the claim than if he be merely called upon to establish that it had a tendency in that direction. But under the familiar rule that the instructions of the court are to be read together and harmonized, if possible, we think there is no conflict between instruction 30 and the earlier one above quoted. The first instruction was intended to define to the jury in specific terms the tests by which they were to determine whether work done outside of the claim could be counted as annual work sufficient to hold it. The rule was set out at considerable length and with clearness. The declaration that the work must merely have a tendency to benefit or develop the claim is found at least six times in this instruction. Instruction 30, the one complained of, is one dealing, not with the question of the character of proof that must be made in such cases, but purely with the burden of proof. At its very beginning it is qualified with the words "in accordance with instructions heretofore given," and then goes on to define that in one state of circumstances the burden of proof is upon the plaintiff and in the other upon the defendants. But in either case such burden is sustained by making proof in accordance with instructions theretofore given. We do not think the jury could have been misled by the omission of the words "tend to."

One further point is made with regard to the instructions on the matter of forfeiture. In instruction 9 the court told the jury that "the law requires clear and convincing evidence to support the forfeiture" of a claim duly located and worked in good faith. It then stated that "if the evidence does not satisfy you by a clear preponderance thereof that the plaintiff failed to perform the necessary work, then it follows that the plaintiff did not forfeit the said claim." We are unable to see any error in this. While it is often said that a forfeiture can be shown only upon clear and convincing evidence, "the proof is made as required whenever it is shown by a preponderance ¹⁴⁰ of the evidence that the full

amount of annual labor or improvements was not made or expended within a given year": Snyder on Mines, sec. 726. See further, to the effect that a preponderance of the evidence is all that is required to establish a fact necessary to be shown in a civil action, section 2061 of the Code of Civil Procedure; Ford v. Chambers, 19 Cal. 143; Murphy v. Waterhouse, 113 Cal. 467, 54 Am. St. Rep. 365, 45 Pac. 866.

The foregoing discussion is directed to the contention that work done on the Home No. 1 in 1904 was applicable to the Occidental. It is not necessary to make any additional answer to the point that work done on the Occidental in 1903 was sufficient to prevent a forfeiture of the Kid.

As has been stated, the claim of Hamilton to the ownership of the Rosamond mine rests upon different grounds from those heretofore considered. He asserts title to this property by virtue, first, of adverse possession; second, of locations of three mining claims, the Fay No. 1, the Hamilton Rosamond, and the Lida, covering the territory of plaintiff's Rosamond. We are satisfied that the evidence is insufficient to support the finding that Hamilton had acquired title to this claim by adverse possession. To acquire title by prescription the possession of the property must not only be hostile to plaintiff's title, but must be exclusive, continuous and uninterrupted for a period of five years prior to the commencement of the action: San Francisco v. Hulde, 37 Cal. 349, 99 Am. Dec. 278; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100. Any interruption of the adverse possession within the required five years prevents the acquisition of the title by prescription: Cave v. Crafts, 53 Cal. 135; Thomas v. England, 71 Cal. 456, 12 Pac. 491; Bree v. Wheeler, 129 Cal. 145, 61 Pac. 782; Hamilton v. Southern Nev. G. & M. Co., 13 Saw. 13, 33 Fed. 562.

It is shown by the testimony of the respondents themselves that the predecessors in interest of plaintiff went upon the Rosamond claim from time to time during the five years preceding the commencement of the action and conducted quite extensive mining operations there. While Hamilton protested against their presence upon the claim and asserted title in himself, his protests were not heeded and the work continued. It is clear that Hamilton's possession was neither exclusive nor uninterrupted for the period required by statute to vest title in him.

¹⁴¹ Inasmuch as a general verdict imports findings in favor of the prevailing party upon all material issues, we must assume that the jury found in favor of Hamilton on his claim under prior locations, as well as his plea of title by prescription. In fact, in answer to a special issue, the jury found specifically that the first location on the Rosamond was made by Hamilton on October 26, 1897. Either de-

fense was sufficient in law to entitle the defendant Hamilton to judgment. If, then, either was sustained by the evidence and was not affected by any error, the want of evidence to sustain the finding on the other defense or any errors committed in regard to it could not have been prejudicial: *Crosett v. Whelan*, 44 Cal. 200; *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517, 47 Pac. 364.

The facts shown with reference to the locations of the various claims covering the ground included in plaintiff's Rosamond are as follows: Plaintiff offered evidence tending to show that on the sixth day of November, 1897, Charles A. Graves and E. C. Johnson, plaintiff's predecessors in interest, located plaintiff's Rosamond by posting thereon a notice which was thereafter recorded and by distinctly marking the claim on the ground so that its boundaries could be readily traced. There was also evidence tending to show that the locators and their successors in interest had thereafter continuously done work upon the claim. On the other hand, the defendants offered evidence sufficient to justify the jury in finding that Hamilton had at a prior date, to wit, on the twenty-sixth day of October, 1897, taken steps to locate the claims hereinbefore described under the names of the Lida, the Fay No. 1, and the Hamilton Rosamond by posting notices upon said claims and distinctly marking the boundaries thereof after discovering upon each of said claims mineral-bearing quartz in place. There is also evidence sufficient to show that after taking these steps Hamilton had continuously, up to the time of the commencement of the action, prosecuted work upon each of the locations. There had not been on his part a compliance with all of the requirements of the statute of 1897 prescribing the manner of locating mineral claims (Stats. 1897, p. 214), nor for that matter, had plaintiff's predecessors in interest complied with the requirements of that statute. Under these circumstances the court instructed the jury that ¹⁴² "mining locations made while the law of 1897 was in force, but invalid by reason of noncompliance with the provisions of that law, will be valid after the repeal of that law, providing the provisions of the mining laws of the United States have been complied with and there are no intervening rights before the repeal of that law, and provided further that the claim has been occupied, held, and worked up to the time of and after such repeal." This instruction was in accord with the rules laid down by this court in *Dwinnell v. Dyer*, 145 Cal. 12, 78 Pac. 247, 7 L. R. A., N. S., 763. In that case it was held that a locator, entering upon unappropriated land of the United States while the act of 1897 was in force and performing all acts necessary to constitute a valid location under the laws of the United States and remaining in possession

and working the claim until the repeal of the state statute (in 1899 or 1900), acquired upon the repeal of the state statute the rights incident to a valid location, notwithstanding his failure to comply with the requirements of the state law. Such was the situation of the defendant Dyer in the case cited, and there was sufficient evidence in the case at bar to justify the jury in finding that Hamilton occupied the same position with reference to the claim here in dispute. The evidence regarding Hamilton's possession of the Rosamond claim was, to be sure, sharply conflicting, but he did introduce testimony tending to show that he had continuously, up to and after the repeal of the law of 1897, prosecuted work under a system tending to the development of all three claims, and that a part of this work had been done within the boundaries of the Rosamond itself. This was enough to constitute possession of the entire claim to the extent of the visible boundaries: *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574; *Dwinnell v. Dyer*, 145 Cal. 12, 78 Pac. 247, 7 L. R. A., N. S., 763. The court did not err in instructing the jury, in effect, that if Hamilton had on October 26, 1897, erected the first or initial monument at the place required by the state law and posted the required notices thereon and remained in possession of the claim, no other person could make a valid entry thereon for the purpose of making another location until Hamilton was in default. Under the state law the notice of location was required to be recorded in the office of the county recorder within twenty days after the posting thereof. Without passing upon the ¹⁴³ question whether the failure to record the notice within the required time worked a forfeiture (see section 6 of act of 1897), it must certainly be held that within the twenty days allowed for recordation, the claim of the locator is valid and no other entry can be made as the foundation or basis of a claim of title. This is the purport and effect of the instruction complained of. Assuming, as we must upon this appeal, that the jury found all controverted questions of fact in favor of the defendants, there is no basis for the claim that the doctrine of *Dwinnell v. Dyer* protects the plaintiff in its claim. The jury having found that Hamilton took the preliminary steps required to effect a valid location and that he remained thereafter in possession of the claim, the predecessors of the plaintiff, in attempting to locate the same land within the twenty days allowed to Hamilton for recordation, were entering upon appropriated public lands in the possession of another. Such entry, as is well settled, confers no right to a valid location: *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735.

Various rulings of the court in admitting and rejecting evidence are assigned as error. We think that none of these

affecting the issues concerning the ownership of the Occidental and the Kid claims were of sufficient consequence to justify a reversal. The witness Cochrane, one of the directors of the plaintiff, was asked on cross-examination whether the plaintiff paid for the assessment work that was done on the claims in 1904 by the Dry Process Company, which held under a contract with plaintiff. Over the objection of the plaintiff that the question was immaterial and irrelevant, he was permitted to answer that the plaintiff did not pay for such work. Whether or not the work was actually paid for was a fact entitled to no weight: Snyder on Mines, sec. 492. But the error in overruling the objection could not have harmed the appellant, inasmuch as the court instructed the jury that whatever work was done by the Dry Process Company in the year 1904 in connection with any of the mining claims claimed by plaintiff inured to the benefit of the plaintiff. It was proper to allow the same witness to testify that the mill which had been put up on the Home No. 1 by the Dry Process Company was of no value for the purpose of reducing the ore there found. This had a bearing upon the question of the good faith of the parties in making the expenditure, and their good¹⁴⁴ faith was a matter proper to be considered by the jury in determining what amount of money had been expended in the development and working of the claims.

The court should have permitted the introduction of affidavits or proofs of labor made by the witnesses Cochrane and Donovan and duly recorded. Such proofs are by statute made prima facie evidence of the facts therein stated (Stats. 1891, p. 219), but inasmuch as both Cochrane and Donovan had testified fully and in detail to all of the material facts stated in their respective affidavits, no substantial injury could have resulted from the exclusion of their written declarations.

A more serious point arises in connection with the admission of evidence bearing upon the issues as to the locations of the Rosamond, the Lida, and the Fay. N. V. Gray, a witness for plaintiff, gave testimony tending to show that none of the locations claimed by Hamilton had actually been made as locations of quartz claims prior to November 8, 1897; but that all claims located by Hamilton theretofore had been located as placer claims. He further testified that at that time Hamilton had not located the Rosamond as claimed by him and that the Lida when located by Hamilton as a quartz claim was bounded on the south by plaintiff's Rosamond, already located by plaintiff's predecessor in interest, Charles A. Graves. This testimony, if true, established clearly that Graves, and not Hamilton, was prior in

time in the location of the Rosamond, and that he and his successors, if remaining in possession and working the claim until the time of the repeal of the state law, were entitled to hold the same under the rule declared in *Dwinnell v. Dyer*. The defendants undertook to impeach Gray by proof of contrary statements made by him to one Moffett. With a view to such impeachment Graves was asked upon cross-examination whether or not he had made certain statements to Moffett. The questions did not specify, as required by section 2052 of the Code of Civil Procedure, the time and place of the alleged conversations or the persons present thereat. Objection was duly made upon the ground that the proper foundation had not been laid. This objection was, however, overruled and the witness answered denying the alleged statements. The substance of the matter alleged to have been stated by Gray to Moffett was that Graves had admitted to Hamilton that in locating the Rosamond he had located upon a claim belonging ¹⁴⁵ to Hamilton and that he would take his papers off the claim, which he did. Moffett was subsequently called and was permitted, over the objection of the plaintiff that no proper foundation had been laid for contradicting Gray in that regard, to testify that Gray had made the statements as claimed by defendants. This was error (*Birch v. Hale*, 99 Cal. 299, 33 Pac. 1088), and error that cannot be regarded as without prejudice to plaintiff. The statement by Gray that Graves had, at the time of the transaction, admitted locating his Rosamond claim upon ground already owned by Hamilton had a strong tendency to throw discredit upon the testimony of Gray that Hamilton had never made any location of the Rosamond ground prior to Graves' location. But beyond all this, Moffett was permitted to testify over the same objection, i. e., that no foundation had been laid, to statements made by Gray which had not in any way been called to the attention of the latter upon his cross-examination. One of these statements was to the effect that Hamilton had arrived at the mines one day ahead of Graves and placed his papers on the claim. This testimony clearly should not have been admitted. It is impossible to determine what effect it may have had on the jury, in leading it to its answer on the very material issue of priority in the location of the claims.

These errors, together with the insufficiency of the evidence to sustain the finding of title by prescription, will necessitate a new trial of the issues affecting the Rosamond.

The order denying a new trial is reversed as to the issues affecting the Rosamond (as claimed by plaintiff), and in all other respects it is affirmed.

The appellant shall recover costs of this appeal against the respondent E. M. Hamilton, the amount of such costs to in-

clude the clerk's fee for filing transcript, together with such part of the cost of printing transcript as may by the trial court be fixed as the just proportion thereof made necessary by the issues hereby remanded for a new trial.

Shaw, J., Angellotti, J., Melvin, J., Henshaw, J., and Lorigan, J., concurred.

Rehearing denied.

The Rule That Work on One Mining Claim of a Group Inures to the Benefit of other claims is considered in the recent cases of Copper Mt. Min. etc. Co. v. Butte etc. Co., 39 Mont. 487, 133 Am. St. Rep. 595; Hawgood v. Emery, 22 S. D. 573, 133 Am. St. Rep. 941, and in the note to McKay v. McDougall, 87 Am. St. Rep. 411.

ESTATE OF GIRD.

[157 Cal. 534, 108 Pac. 499.]

ILLEGITIMATES—Adoption by Father.—The Existence of a Family into which the father of an illegitimate can receive the child is essential to an adoption under section 230 of the Civil Code. (p. 134.)

ILLEGITIMATES—Proof of Paternity—Mother as Witness.—Where a mother has testified as to the paternity of her illegitimate children, the effect of an attempted impeachment of her testimony, by showing inconsistent statements and conduct, is for the trial court. (p. 135.)

ILLEGITIMATES—Proof of Paternity—Testimony of Mother. Nonaccess by the husband being proved to a reasonable certainty, the positive testimony of the wife that another man is the father of her children is competent evidence and a sufficient basis for findings on the question of paternity. (pp. 135, 136.)

ILLEGITIMATES—Adoption by Father—Sufficiency of Evidence.—In determining the sufficiency of the evidence to sustain findings that a father adopted his illegitimate children under section 230 of the Civil Code, the supreme court will not apply a different rule than in other cases. (p. 136.)

ILLEGITIMATES—Proof of Paternity—Mother as Witness.—Where both the trial judge and the jury conclude that the mother of an illegitimate child was, as a witness, entitled to full credit on the question of its paternity, their conclusion is not open to review by an appellate court. (pp. 136, 137.)

ILLEGITIMATES—Adoption by Father—Treating as Legitimate.—Under section 230 of the Civil Code, providing that "the father of an illegitimate child . . . otherwise treating it as if it were a legitimate child thereby adopts it," the criterion referred to is the treatment usually accorded to legitimate children (p. 137.)

ILLEGITIMATES—Adoption.—The Words "Publicly Acknowledging," in section 230 of the Civil Code, providing what constitutes an adoption of an illegitimate child by its father, are taken in their ordinary sense. And where children are born to a woman living in

the household of a single man on a farm, and they grow up on the farm like other children, go to school, receive no wages, and the man manifests a kindly interest in them and assists in their education, this is sufficient to constitute a "public acknowledgment," although they bear the name of the mother, and although to many persons whom he meets, including his brother, he does not make an express acknowledgment. (pp. 137, 138.)

WORDS AND PHRASES.—"A Family" is a Collective Body of persons living together under one head or manager. A bachelor may have a family. (p. 139.)

ILLEGITIMATES—Adoption by Father—Reception into Family.—When a man has a home of which he is the head and in which he lives with a woman and others, he has a family within the meaning of section 230 of the Civil Code, into which he may receive an illegitimate child by her. (p. 139.)

ILLEGITIMATES—Adoption by Father.—The Word "Family," in section 230 of the Civil Code, which requires a father adopting an illegitimate child to receive it into his family, means no more at most than that he must have a "home," a settled place of habitation of which he is the head. (p. 139.)

ILLEGITIMATES—Adoption—Reception into Family.—The brothers and sisters of a man who have never lived with him in the state constitute no part of his family within the meaning of section 230 of the Civil Code. (p. 139.)

ATTORNEY—Right to Participate in Argument After Testifying.—A party is not prejudiced by a rule of court forbidding an attorney who testifies as a witness from participating in the argument of the case, if he is also represented by another attorney who has ample opportunity to prepare and make argument, and counsel are advised of the rule. (p. 140.)

ATTORNEY—Right of Party to be Heard by Several Counsel. Parties are not entitled as a matter of right to be heard by as many separate attorneys as they see fit to present. The court may exercise a reasonable supervision of such matters, and under ordinary circumstances a party allowed full opportunity to present argument by one counsel cannot complain of any deprivation of his rights in this behalf. (p. 140.)

ILLEGITIMATES—Proof of Paternity—Mother as Witness.—Where a mother of illegitimate children has testified as to their paternity, evidence tending to show her unchaste conduct with other men is allowable only in so far as it tends to show that another may be the father of the children, and hence it must be directed to about the time when the child was begotten. (p. 141.)

ILLEGITIMATES—Proof of Paternity.—Evidence of Sexual Intercourse between the alleged father of an illegitimate child and the mother a short time after the birth of the child is admissible on the question of paternity, since it tends to show intimacy between the parties. (p. 141.)

WITNESS—Impeachment by Showing Immorality.—Questions on cross-examination, tending to show the general immorality of the witness or specific acts of immorality, should never be allowed in any case for the mere purpose of discrediting or impeaching the witness. (p. 141.)

WITNESS—Method of Impeachment.—The Code of Civil Procedure prescribes the method of impeaching witnesses, and they can be impeached in no other way than therein prescribed. (p. 141.)

ILLEGITIMATES—Proof of Paternity.—Declarations of the Mother of an illegitimate child, made a few months before its birth, that she was in the family way by another man than the one alleged

to have adopted the child as his, are not admissible against the child in a proceeding in which the mother is not a party but only a witness on behalf of the child. (p. 142.)

WITNESS—Cross-examination—Collateral Matter.—A recognized rule, or rather qualification of the rule, governing the impeachment of a witness by proof of contradictory statements elsewhere made by him, is that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relative to the issue being tried. (p. 142.)

ILLEGITIMATES—Adoption by Father.—An Instruction, on the issue of the adoption by a father of his illegitimate child, which is argumentative in stating in effect that mothers of nameless children will not hesitate at fraud or perjury, and which also informs the jury that to hold that there has been an adoption would require "liberality of construction destructive of language of the statute itself," is properly refused. (p. 143.)

ILLEGITIMATES—Adoption—Reception into Family.—An instruction to the effect that the father of illegitimate children does not receive them into his family unless he acknowledges his paternity to every relative, friend and acquaintance who visits his house after their birth, is properly refused. (p. 143.)

ESTATE OF DECEDENT—Scope of Partial Distribution.—The law does not contemplate the distribution of all the property of an estate under partial distribution proceedings, or prior to the settlement of the final account of the executor or administrator. (p. 144.)

ESTATE OF DECEDENT—Time for Final Distribution.—The distribution of all the property of an estate can be had only upon the final settlement of the account of the executor or administrator. The court must necessarily retain, until such time, what reasonably may be anticipated as necessary to pay debts and expenses of administration. (p. 144.)

ESTATE OF DECEDENT.—On Partial Distribution the court should reserve what it deems a sufficient portion of the estate to pay expenses of administration and claims, including any probable deficiency on a mortgage debt. But if the land mortgaged is ample security, the mortgage debt may be disregarded so far as partial distribution is concerned, the land being subject to the mortgage after distribution. (p. 144.)

J. A. Barham, J. W. Rose and Mastick & Partridge, for the appellants.

R. L. Thompson and C. H. Pond, for the respondents.

⁵³⁸ **ANGELLOTTI, J.** This is an appeal from a decree distributing all of the property of the estate of deceased to William Stephen Bennett and Nellie Florence Bennett, and from an order denying a motion for a new trial made by the administrator of said estate and two brothers and a sister of deceased. The application for distribution was one made under section 1658 of the Code of Civil Procedure by said distributees, claiming to be adopted children of deceased under the provisions of section 230 of the Civil Code. This claim being opposed, the application was heard by the court and an advisory jury, and the latter found in response to questions submitted to them that deceased was the father of said petitioners, that he publicly acknowledged each during

its minority as his own child, that he received each during its minority into his family as his own child, and that he otherwise treated each child during its minority as if it was his legitimate child. The trial court adopted these findings of the jury.

It is earnestly contended that the evidence is not sufficient to sustain these findings. All of them are essential to the affirmance of the decree, section 230 of the Civil Code providing that: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." Different views have ⁵³⁹ been entertained by justices of this court whether the existence of a family into which the child can be received is essential to an adoption under this section, but that question has been finally determined in the affirmative by this court in *Estate of De Laveaga*, 142 Cal. 158, 75 Pac. 790.

Material facts of the case concerning which there is no dispute are as follows: Deceased was born July 29, 1837, and died intestate April 4, 1904, leaving an estate valued at about twenty-one thousand dollars. He left two brothers and a sister, the brothers residing in Los Angeles county and the sister residing in the state of Illinois. In 1853 or 1854 he settled in Alexander Valley, Sonoma county, on what was thereafter known as the Gird Ranch, and this continued to be his home until the time of his death. He was never married. No person claiming relationship to him ever resided there with him other than the petitioners here. About the year 1865 or 1866 Mr. and Mrs. Fletcher, husband and wife, came to this ranch, bringing with them a half Indian girl about three years old, called Alice. For a time Fletcher worked for the deceased on the ranch, but left the neighborhood within two or three years and never returned. Mrs. Fletcher and Alice remained on the ranch, Mrs. Fletcher doing the general housework, and Alice helping as she grew older, until at the time of her marriage she was doing a great part of the housework and much farm work outside. During all of this time deceased, Mrs. Fletcher, and Alice lived in the same house and ate at the same table, Mrs. Fletcher and Alice sleeping in one room and deceased in another. Deceased was a highly educated man, and took an interest in teaching Alice to read and write. He always treated her kindly and much as any one would treat a child in his household. She finally married one Owen Bennett, and lived with him as his wife for a short time, when they separated and she resumed her life on the Gird Ranch with Mrs. Fletcher and deceased, but the marriage between Bennett and herself was not dissolved

until after the death of deceased. The manner of living was the same as before her marriage, she continuing to occupy a sleeping-room with Mrs. Fletcher, and deceased occupying another room. She worked about the ranch as before. She was never paid any wages. On May 22, 1885, she gave birth to William Stephen Bennett, one of the petitioners. Deceased sent for and paid the doctor. ⁵⁴⁰ The boy was kept on the place, and there grew to manhood, being treated practically as any boy raised on a farm. As he grew older he worked on the ranch and attended the public school. Deceased always manifested a kindly interest in him and assisted him in his education. He always went by the name of Bennett, and was registered at school under that name. He was never paid any wages for his work. In the year 1895, Mrs. Bennett gave birth to the other petitioner, Nellie Bennett, who thenceforth was one of the household. This child was always known as Nellie Bennett. Deceased always treated her kindly. The evidence very clearly establishes that Mrs. Bennett's husband was not the father of Nellie. It must also be taken as establishing that he was not the father of Stephen. The only evidence as to the year of the marriage was to the effect that it occurred in the year 1880, and there was no evidence to contradict that given to the effect that Bennett and Alice separated not later than the year 1881, and never thereafter cohabited or even saw one another until long after the birth of Nellie, except on one occasion when Alice saw him at a distance, saving and excepting evidence to the effect that Alice had on several occasions admitted to others that Stephen was Bennett's child. The evidence was clearly of such a nature that we cannot say that the jury and court were not warranted in concluding that Stephen was not Bennett's child.

The only evidence that deceased was the father of these children was that given by Alice, and that afforded by the circumstances under which all the parties lived, certain alleged admissions of deceased, and his general treatment of Alice and the children. This evidence was of such a nature that an appellate court cannot hold, however much it may doubt the correctness of the conclusion of the trial court, that the conclusion of the trial court on the question of paternity is without sufficient support in the evidence. Alice testified positively that she commenced to have sexual relations with the deceased in the year 1884, and that he was the father of both Stephen and Nellie. There was evidence given of statements and conduct on her part that was inconsistent with her testimony, but the effect of this attempted impeachment was purely a question for the trial court. Nonaccess by the husband being clearly shown, or at least being shown to a reasonable certainty, ⁵⁴¹ the positive testimony of Alice as to the paternity of her children

was competent evidence, and, under the law, sufficient basis for a finding by the jury on the question of paternity. It may reasonably be argued that corroboration of her evidence is to be found in the fact that these children were apparently accepted by deceased without demur or objection as a part of his household, and were treated and brought up as his own children would have been, and that he, Alice, and the children all continued to live as members of one family ordinarily live. In addition to this, two witnesses testified positively that just after the birth of Nellie, deceased in their presence, another person also being present, when some question was suggested as to the paternity of Nellie, that Stephen and Nellie were his children, and one of these witnesses testified that he heard deceased say many times that Stephen was his son, and Stephen testified that deceased told him that he was his son. Learned counsel for appellant is in error in his claim that a different rule may be applied by this court in cases of this character, in determining the sufficiency of evidence to sustain the findings, from that applicable in other cases. What was said by Justice Fox in the Matter of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, quoted in counsel's brief, was said solely with reference to the proper construction of a statute from the standpoint of policy, and while it might constitute good material for argument to the trial court or jury on the question of the weight to be given by them to certain evidence, cannot be taken as laying down any rule of law. Estate of Sandford, 4 Cal. 12, involved no other question than whether an alleged written acknowledgment sufficiently complied with the terms of a statute. In Hite v. Hite, 124 Cal. 389, 71 Am. St. Rep. 82, 57 Pac. 227, 45 L. R. A. 793, only three of the justices concurred in any expression of opinion that might serve as a basis for the contention that an appellate court would ever review the finding of a trial court in regard to a matter where there is substantial evidence to support the finding, and we do not construe anything in the opinion signed by these three justices as intimating any such doctrine. By section 1844 of the Code of Civil Procedure it is provided: "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason." But, says counsel, there are eight separate reasons ⁵⁴² why Alice Bennett was not "entitled to full credit," such as swearing to her own adultery, admissions and inconsistent acts. In reply we can only point to section 1847 of the Code of Civil Procedure, which, after declaring the manner in which a witness may be impeached, declares, "and the jury are the exclusive judges of his credibility." Both the trial judge and jury concluded that she was a witness entitled to

full credit, and their conclusion on that question is not open to review by us: See *Fowden v. Pacific etc. Co.*, 149 Cal. 151, 161, 86 Pac. 178.

We do not deem it open to serious question that the evidence is sufficient to support the conclusion on the part of the trial court that deceased treated both Stephen and Nellie as if they were his legitimate children, and will not unnecessarily prolong this opinion by discussing the evidence in regard thereto. "The criterion referred to in the statute is the treatment usually accorded to legitimate children": *Estate of Heaton*, 139 Cal. 237, 73 Pac. 186.

A more serious question exists as to whether the evidence sufficiently shows that deceased publicly acknowledged Stephen and Nellie as his children to sustain the findings of the trial court to that effect. The language of section 230 of the Civil Code is simply "by publicly acknowledging it as his own." There is no provision as to what shall constitute "a public acknowledgment," and the words of the statute must be taken in their ordinary sense: *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40; *Townsend v. Meneley*, 37 Ind. App. 127, 74 N. E. 274, 76 N. E. 321. In *Crane v. State*, 94 Tenn. 86, 28 S. W. 317, a prosecution for bigamy, the statute provided that the testimony of a bystander who witnessed the ceremony and "the public acknowledgment of the party charged shall be competent evidence." The court said: "Criticism is directed to the term 'public acknowledgment of the party charged,' and it is insisted that this means some acknowledgment before a court or other public tribunal. We do not so construe the law, but any acknowledgment of the fact of marriage, by confession or conduct, in the presence of one or more individuals, would answer the requirement of the statute. It need not be in the shape of a public avowal, made in the courts, or in the market place, or from a housetop, but can be made as well by acts and conduct recognizing the marriage, as by oral statements to ⁵⁴³ third persons." In *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40, it was said in the main opinion signed by three of the justices that "this acknowledgment was also public, for as we have seen, the thought of concealment of the paternity of the child never entered his mind." In the light of what is said in the various authorities as to the meaning of such terms as "public acknowledgment," we are of the opinion that there was sufficient evidence to support the conclusion of the trial court. The circumstances surrounding the birth of these children and the conditions existing in the household of deceased before and after their birth, coupled with his treatment of them, and his interest in them, were of such a nature, in the absence of any statement to the contrary by him, as to con-

stitute evidence of a general acknowledgment of paternity to the community. In the face of circumstances which might well be accepted as calling for explanation as to the true situation if he was not the father of these children, he never expressly denied that he was such or made to any living person, so far as the evidence shows, any explanation why these children were accepted by him as a part of his household. Of course, he was under no obligation to make any explanation to anyone, but in the absence thereof he could not complain if the community accepted, as they might very reasonably do, that he was the father of these children. In addition to the evidence of this character there was the evidence of his declarations to three persons on the only occasion when the question of the paternity of these children appears to have been raised in his presence, to the effect that they were his children, and also the evidence of a witness to the effect that he had heard deceased on many occasions say that Stephen was his son. It may be proper to say again, as we said in regard to the witness Alice Bennett, that the question of the amount of credit to be given to these witnesses was one solely for the trial court. That the children always went by the name of Bennett, and that deceased on two separate occasions introduced Stephen as Mr. Bennett or Mr. Steve Bennett, once to his attorney and once to a stranger, do not destroy the effect of the evidence given in support of the children's claim. Nor is the fact that he did not say anything about the matter to his brother when he visited his home shortly before his death of such importance, under the circumstances, as to forbid the conclusion of public acknowledgment. ⁵⁴⁴ The many reputable witnesses called by appellants to show absence of express acknowledgment to them or in their presence amounted to no more than that they had never heard any such acknowledgment made by deceased, but as to practically all of such witnesses there was nothing to indicate that there was in the circumstances anything to call for an acknowledgment to them. While the case, both on the question of paternity and that of public acknowledgment, may not be a very strong one in favor of claimants, we are constrained to hold that it was sufficiently strong to support the findings of fact of the trial court thereon, and that being so, those findings are conclusive on us, however we might decide the matter had we the right to review findings of fact made on conflicting evidence.

It is claimed that the evidence is insufficient to support the conclusion that he received these children "into his family." If his household in Sonoma county is to be regarded as "his family" within the meaning of section 230 of the Civil Code, it cannot be questioned, of course, that the evidence was sufficient. In *Estate of Bennett*, 134 Cal. 323, 66 Pac. 371,

this court said: "The meaning which is to be given to the word (family) is to be determined by the context, and also from a consideration of the subject matter to which it relates. Every case must depend upon its particular circumstances. Mr. Jarman says (Jarman on Wills, page 941): 'Family' is not a technical word, and is of flexible meaning. Anderson's Law Dictionary defines the word: 'In its modern comprehensive meaning, a collective body of persons living together in one house.' It is sometimes used to include parents with their children, whether dwelling together or not. The word has also a broader and secondary meaning, which includes all the offspring or descendants of a common progenitor, but is not to receive this construction unless such intention is manifested from the context." Webster defines it as: "The collection of persons forming a domestic household, including parents, children, servants, and sometimes lodgers." By the Century Dictionary it is declared to be: "The collective body of persons who form one household under one head and one domestic government, including parents, children and servants." In their concurring opinion in *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40, Justices McFarland and De Haven said: "Either a ⁵⁴⁵ widower or a bachelor, as we all know, may have a family, viz., 'a collective body of persons living together under one head or manager.'" In *Garner v. Judd*, 136 Cal. 394, 68 Pac. 1026, this court in bank said, speaking through Chief Justice Beatty: "We have no doubt that when a man has a home where he lives with a woman whom he holds out to the world as his wife, he has a family within the meaning of section 230 of the Civil Code, into which he must receive an illegitimate child in order to legitimate it under that section." In *Estate of De Laveaga*, 142 Cal. 158, 75 Pac. 790, this court was careful to limit its language as to the necessity of the existence of a family into which the child can be received as one of the cardinal conditions prescribed for an adoption under section 230 of the Civil Code, by saying "having a family, or at least a home in which he can receive him" is such a condition. The words of section 230, "receiving it . . . into his family," imply a receiving into a place of which he is the head, of which he has control. As used in this section, the word "family," in our opinion, means no more at most than that the father must have a "home," a settled place of habitation of which he is the head, into which he must receive the child, such receiving to be with the consent of his wife if he be married. The brothers and sisters of deceased, who never lived with him in California, constituted no part of his "family" within the meaning of that section.

It is claimed that the trial court committed many errors in the trial of this case.

On objection of respondents, the trial court precluded J. W. Rose, Esq., one of appellants' two attorneys, from arguing the case to the jury or the court. The reason for this action on the part of the trial court was that Mr. Rose was an important witness for appellants and testified on their behalf, and there was a rule of the court purporting to preclude counsel who gave evidence in a case from participating in the argument thereof. The evidence given by Mr. Rose related to matters of such a nature that it must have been known before the commencement of the trial that he would necessarily be a witness, and at the time he was called as a witness he was warned by the court that he would be precluded from arguing the case if he testified. The reason for the refusal was stated by the court in the presence of the jury to be that the rule precluded ⁵⁴⁶ one who was a witness from arguing a case. The suggestion that the court by this refusal cast any reflection on Mr. Rose or his evidence is unwarranted. We do not deem it necessary to discuss the question of the validity of the rule of the superior court of Sonoma county invoked by respondents. We can well see that the facts of a case might be such as to make its application such an unwarranted deprivation of a party's rights as to constitute an abuse of discretion. In this case appellants were not deprived of the right to argue this case by counsel of their own selection. The record shows that J. A. Barham, Esq., was one of the attorneys of record for appellants, participating throughout all the proceedings in this case, and practically conducting the trial on the part of the appellants. It further shows that the cause was argued to the jury by respective counsel. Counsel were fully advised by the court at the time Mr. Rose was called as a witness that he would thereby render himself ineligible to argue the case as counsel, and we are warranted in assuming that Judge Barham made his preparation for argument accordingly. Without intending to reflect in the slightest degree upon the ability of Mr. Rose in the matter of argument to a jury, we have no hesitation in saying that it would be absurd to hold that any prejudice may have accrued to appellants by reason of the refusal of the court to allow any additional argument to that of Judge Barham, especially when they were fully advised a sufficient time before argument that such would be the ruling of the court. Appellants were not deprived of any statutory right. Parties are not entitled as a matter of right to be heard by as many separate attorneys as they see fit to present. The trial court may exercise a reasonable supervision of such matters, and under ordinary circumstances if a party is allowed full opportunity to present argument by one counsel, he cannot complain of any deprivation of his rights in this behalf.

Certainly no statute prescribes that he shall be entitled to present separate arguments by different counsel.

Alice Bennett was asked on cross-examination: "Since Mr. Bennett left how many men have you had sexual intercourse with, and who are they?" An objection to this question was sustained, the court holding that the question was too general as to time, and should be confined to the "time or around the ⁵⁴⁷ time of gestation." A subsequent question of the same nature directed to "at or about the time immediately before the conception of Nellie" was then asked, and the witness answered that deceased was the only one. Error is alleged in sustaining the objection to the former of these questions. The authorities are practically in accord to the effect that evidence tending to show unchaste conduct of the alleged mother with other men is allowable only in so far as it has a bearing upon the question of the paternity of the child—in so far as it tends to show that another is or may be the father of the child, and hence that it must be directed to a time at or about the time the child was begotten: See 3 Am. & Eng. Ency. of Law, 2d ed., 822; 5 Cyc., p. 661; State v. Lavin, 80 Iowa, 555, 46 N. W. 553. The question here, one directed solely to mere acts of sexual intercourse, was not so confined, but, on the contrary, embraced a period of over twenty years. The only other basis on which it could be claimed to be a proper question was that of impeachment of the witness. But it is thoroughly settled that "questions on cross-examination, tending to show the general immorality of the witness, or specific acts of immorality, should never be allowed in any case for the mere purpose of discrediting or impeaching the witness. . . . The Code of Civil Procedure prescribes the method of impeaching witnesses, and they can be impeached in no other way than therein provided": People v. Harlan, 133 Cal. 16, 20, 65 Pac. 9, 10. See, also, Sharon v. Sharon, 79 Cal. 673, 22 Pac. 26, 131. The ruling of the trial court sustaining the objection was correct.

Complaint is made that the court should have stricken out certain evidence given by witness Sanders. The evidence was given on direct examination without objection, and was practically that he had come upon deceased and Alice while they were engaged in an act of sexual intercourse. On cross-examination it was developed that the witness was uncertain whether the incident occurred shortly before or shortly after the birth of Nellie, the younger child. The motion to strike out was based on the ground that the witness said it was after the birth of Nellie. Assuming this to be so, we nevertheless are of the opinion that the evidence was proper as tending to show the extent of the intimacy between Alice and the alleged father of her children, and to corroborate the tes-

timony of Alice as to the nature of the relations existing between them as members ⁵⁴⁸ of the same household before and after the birth of Nellie. In *People v. Jamison*, 124 Mich. 164, 82 N. W. 835, a bastardy case, it was held that "acts of intercourse and undue familiarity both before and after the alleged act resulting in conception are admissible as bearing upon the probability of the intercourse at the time stated in the complaint." See, also, 5 Cyc. 662, declaring that evidence of the intimate relations existing between the mother and alleged father is admissible, and that evidence of previous or subsequent intercourse is competent to show the probability of the particular act having occurred.

The trial court did not err in sustaining objections to questions asked witnesses Ralph Rose and Arthur Cochrane for the purpose of showing that witness Sanders, who had testified to declarations on the part of deceased, stated shortly before the trial that he kept a memorandum of all the things that deceased told him during his stay at the Gird Ranch. On his cross-examination by appellants, Sanders had testified that he never kept such a memorandum, and that he did not remember telling Rose and Cochrane that he had done so. This was clearly a collateral matter elicited on cross-examination. In *Faulkner v. Rondoni*, 104 Cal. 148, 37 Pac. 886, it was said, quoting from *People v. Devine*, 44 Cal. 452: "A recognized rule, or rather qualification of the rule, governing the impeachment of the credit of a witness by proof of contradictory statements elsewhere made by him, is that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relevant to the issue being tried"; citing many authorities: See 1 Greenleaf on Evidence, secs. 449, 461e, 461f. As to such a collateral matter, the answer of Sanders could not be contradicted by appellants, but was conclusive on them.

It was sought by appellants to show certain declarations by Alice to a physician, Dr. Coffman, some few months before the birth of Nellie, to the effect that she was "in the family way" by one Smith, and that she desired to be rid of the child by an operation. This proposed evidence was properly excluded by the trial court. Alice was not a party to this proceeding, but only a witness on behalf of her children. Evidence of these declarations by her to the physician would have been pure hearsay, in no way binding on her children as evidence on the ⁵⁴⁹ question of paternity. Being contrary to her evidence given on that question, the declarations, waiving other objections thereto, would have been admissible by way of impeachment of Alice as a witness, but a complete answer to appellants' claim in this regard is that no foundation was laid for any such impeachment on the examination of Alice.

There was no error in refusing to give appellants' requested instruction 1, commencing, "I instruct you that of the women

who are mothers of nameless children, there are few indeed who would hesitate at fraud, or to whom perjury would seem a crime," etc. It was not only open to the objection of being in part pure argument in favor of appellants' side of the case and an instruction on the weight to be accorded the testimony of certain witnesses, but it also in terms informed the jury that to hold that there had been an adoption under section 230 of the Civil Code would require "liberality of construction destructive of language of the statute itself." There was no prejudicial error in modifying appellants' requested instruction 3. Appellants' requested instructions 4 and 5 were properly refused. They were to the effect that deceased did not receive the children into his family unless he acknowledged his paternity to every relative, friend and acquaintance who visited his house after their birth. This certainly is not the law.

It was established without conflict that there were always several hired men working on the Gird Ranch. Exclusion of other evidence going simply to that extent was, therefore, not prejudicial error.

If any of the rulings sustaining objections to questions asked Sanders on his cross-examination for the purpose of showing bias on his part were erroneous, the effect of the errors was obviated by the testimony given by the witness, in which he fully covered the subject matter of such questions.

The refusal of the trial court to allow the witness Hopper to testify as to the contents of a letter said by him to have been given to him by Alice to be given to Smith was not prejudicially erroneous. The theory of appellants was that the letter contained statements by Alice showing that Smith was the father of Nellie. But Hopper fully testified as to statements then and at other times to the same effect made by Alice to him. Additional evidence by him showing similar statements by her in a ⁵⁵⁰ lost writing could not have added to the effect of his evidence already given.

What we have said disposes of all points made in appellants' briefs that require notice, except the claim that the trial court erred in distributing all the residue of the estate to the petitioners. It must be held that there is merit in this claim. The application of petitioners was one under sections 1658 et seq. of the Code of Civil Procedure, the sections relating to "partial distribution prior to final settlement," there having been no presentation of the accounts of the administrator, a prerequisite to final distribution. By the decree all the property of deceased, both real and personal, and specifically all cash, money in bank, and every other article of personal property, is distributed to the petitioners share and share alike, and, the bond for two thousand dollars required by the court of each petitioner under section 1661 of the Code of Civil Procedure having already been given, the de-

cree orders the administrator to forthwith deliver to the petitioners all of the property distributed. While the trial court might have been warranted in finding that all debts of the deceased except the mortgage debt had been paid, it did not so find. It did find to the contrary that "the estate is but little indebted, and may be distributed as prayed for without loss to the creditors of said estate," evidently proceeding upon the theory that the creditors would be protected by the bonds ordered. It is manifest that our law does not contemplate the distribution of all the property of an estate under partial distribution proceedings or prior to the settlement of the final account of the executor or administrator. Such a distribution can be had only upon the final settlement of the accounts of the executor or administrator, or thereafter: Code Civ. Proc., sec. 1665. The court in probate must necessarily retain until such time what may reasonably be anticipated as necessary to pay debts and expenses of administration. "Creditors are not to be deprived of their lien upon the assets of the estate, and given a bond in lieu thereof. The court should see that sufficient assets are left, after partial distribution, to pay them, without recourse to the bond. The requirement of a bond is only additional security to provide against unforeseen liabilities, and against errors in judgment": *In re Painter*, 115 Cal. 635, 47 Pac. 700. This is as applicable to expenses of administration⁵⁵¹ as it is to debts of the deceased. The court here should have distributed to the petitioners a portion only of the residue of the property, reserving what it deemed a sufficient portion to pay any unpaid claims (including any probable deficiency on the mortgage claim, if any), and also to pay such expenses of administration as had been incurred and remained unpaid, and also such expenses of administration as might reasonably be incurred prior to settlement of the final account. If the land mortgaged constituted ample security for the mortgage debt, such debt could be disregarded so far as partial distribution was concerned, the land mortgaged being subject to the mortgage after distribution as before: Code Civ. Proc., sec. 1661; *Estate of Mitchell*, 121 Cal. 394, 53 Pac. 810. Nothing has been said on this appeal as to the inheritance tax due under the act of 1905, which, of course, is also payable out of the property remaining for distribution.

The decree of distribution appealed from is reversed and the matter remanded, with directions to the lower court to make a decree of partial distribution to the petitioners upon the findings and decision filed July 27, 1909, distributing to said petitioners all the property of decedent except such portion thereof as it may deem advisable to retain until final settlement of the accounts of the administrator for the purpose of paying debts and expenses of administration, upon

the giving of such bond by the distributees under section 1661 of the Code of Civil Procedure as the court may deem proper and subject to the payment by the distributees of the amounts due as inheritance tax under the act of March 20, 1905: Stats. 1905, p. 341.

The order denying a new trial is affirmed.

Shaw, J., and Sloss, J., concurred.

Hearing in bank denied.

As to the Legitimation of Illegitimate Children by their acknowledgment or adoption by the father, see *Davenport v. Davenport*, 116 La. 1009, 114 Am. St. Rep. 575; *Irving v. Ford*, 183 Mass. 448, 97 Am. St. Rep. 447; *Eddie v. Eddie*, 8 N. D. 376, 73 Am. St. Rep. 765.

The Adoption by One Person of the Children of another is the subject of a note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210. The question is further discussed with special reference to the right of inheritance in the notes to *Van Derlyn v. Mack*, 109 Am. St. Rep. 674; *Hockaday v. Lynn*, 118 Am. St. Rep. 684.

ESTATE OF GHIO.

[157 Cal. 552, 108 Pac. 516.]

INTERVENTION—Whether Known to Civil Law.—Intervention, as our law defines it, is not unknown in civil-law countries. (p. 151.)

TREATIES—Rules of Construction.—In the construction of treaties, words are to be taken as understood in the public law of nations, and not in any artificial or special sense impressed by local law, unless the restricted sense is clearly intended. (p. 152.)

ADMINISTRATOR—Right of Foreign Consul to Appointment. A treaty between the United States and a foreign nation giving the consul of such nation, in case of the death in this country of a citizen of that nation, "the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country," does not entitle him to an appointment as administrator in preference to the person designated by the local state laws. His right is to "intervene" in the proceeding, to appear as a party and represent the citizens of his country interested as heirs or creditors, and not a right to institute and carry on the proceeding himself. (p. 152.)

ADMINISTRATOR—Right of Foreign Consul to Appointment. Where a citizen of Italy, being a resident of California, dies intestate, leaving property in this state, and his heirs all reside in Italy and are citizens of that country, the consul general of Italy is not entitled to letters of administration upon his estate, in preference to the public administrator of the county of his residence. (pp. 152, 153.)

Ambrose Gherini, Clary & Loutitt and R. K. Barrows, for the appellant.

John E. Budd, Budd & Thompson, Cullinan & Hickey and John J. O'Toole, for the respondent.

554 SHAW, J. Salvatore L. Rocca appeals from an order of the superior court granting to George F. Thompson, as public administrator of San Joaquin county, letters of administration upon the estate of Giuseppe Ghio, deceased, and refusing the application of said appellant for such letters.

The appeal was submitted to the district court of appeal of the third district and decided in favor of the respondent. A rehearing in the supreme court was ordered, because, as treaty rights were involved, it was deemed advisable that the highest state court should consider the matter.

Giuseppe Ghio, at the time of his death, was a resident of San Joaquin county, California, and a citizen of the kingdom of Italy. He left a small estate situated in San Joaquin county. His heirs at law are his wife, Maria, and three minor children. All of them reside in Italy. The appellant is the consul general of the kingdom of Italy for California, Nevada, Washington, and Alaska Territory. The deceased died intestate on April 27, 1908, in San Joaquin county.

The sole question for consideration is whether or not, where a citizen of Italy, being a resident of California, dies intestate, leaving property in this state, and his lawful heirs all reside in Italy and are citizens of that country, the consul general of Italy is entitled to letters of administration upon his estate, in preference to the public administrator of the county of his residence.

The appellant bases his claim to such letters upon the provisions of the treaty of May 8, 1878, between Italy and the **555** United States. The clauses relating to this subject are articles 16 and 17, which are as follows:

“Article 16. In case of the death of a citizen of the United States in Italy, or of any Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consul or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested.

“Article 17. The respective consuls general, consuls, vice-consuls and consular agents, as likewise the consular chancellors, secretaries, clerks or attaches, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation”: 20 U. S. Stats. at Large, p. 752.

Under article 17 the appellant, as consul general of Italy, claims the rights which are given to consuls general of the Argentine Republic by the treaty between that country and the United States, concluded July 27, 1853: 10 U. S. Stats. at Large, p. 1001. The last clause of article 9 of that

treaty is as follows: "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul general, or consul of the nation to which the deceased belonged, or the representative of such consul general or consul, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs": Page 1009.

Article 6 of the constitution of the United States declares that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." And section 10 of article 1 further provides that "No State shall enter into any Treaty, Alliance, or Confederation." We will assume that the treaty-making power of the federal government is so far superior to the law-making power of ⁵⁵⁶ Congress that it would authorize the federal government to control by treaty the power of the states to confer and limit the right of administration of estates and the power of the state courts to appoint administrators, so far as the estates of resident citizens of foreign countries are concerned: See, on this subject, note to *Yeaker v. Yeaker*, 81 Am. Dec. 536. If this is the case, the treaty with the Argentine Republic, if construed in accordance with appellant's contention, supersedes, in part, the provisions of our Code of Civil Procedure of California, giving the right of administration of the estate of persons dying intestate to the public administrator, in the absence of resident legal heirs, and gives to the consular agents of that country a paramount right to letters upon the estates of citizens of that country residing here, who die intestate leaving real or personal property in this state and no resident heirs. The favored nation clause of the Italian treaty would give the like right to the appellant, as consul general of Italy, in the present case.

Similar favored nation clauses are found in the treaties with Austria-Hungary (treaty of 1870, art. 15, 17 U. S. Stats. 331); Denmark (treaty of 1826, art. 8, 8 U. S. Stats. 342); Japan (treaty of 1894, art. 15, 29 U. S. Stats. 852); Kongo (treaty of 1891, art. 5, 27 U. S. Stats. 929); Korea (treaty of 1882, art. 2, 7 Fed. Stats. Ann. 680); Russia (treaty of 1832, art. 8, 8 U. S. Stats. 448); Spain (treaty of 1902, art. 28, 33 U. S. Stats. 2120); Switzerland (treaty of 1850, art. 7, 7 Fed. Stats. Ann. 842); Tonga (treaty of 1886, art. 11, 25 U. S. Stats. 1442); and Zanzibar (treaty of 1886, art. 2, 25 U. S. Stats. 1439).

Foreign consuls and consular agents are given the same "privileges" as those of the most favored nation by the treaties with Belgium (treaty of 1880, art. 2, 21 U. S. Stats. 777); Costa Rica (treaty of 1851, art. 10, 10 U. S. Stats. 922); France (treaty of 1853, art. 12, 10 U. S. Stats. 999); Germany (treaty of 1871, art. 3, 17 U. S. Stats. 922); Greece (treaty of 1902, art. 2, 33 U. S. Stats. 2123); Honduras (treaty of 1864, art. 10, 15 U. S. Stats. 705); Netherlands (treaty of 1878, art. 3, 21 U. S. Stats. 663); Paraguay (treaty of 1859, art. 12, 12 U. S. Stats. 1097); Persia (treaty of 1856, art. 7, 11 U. S. Stats. 710); Roumania (treaty of 1881, art. 2, 7 Fed. Stats. Ann. 773); and Servia (treaty of 1881, art. 2, 22 U. S. Stats. 557 968). The treaty of 1903 with China gives Chinese consuls here the same "attributes, privileges and immunities" as those of the most favored nation: 7 Fed. Stats. Ann. 487, art. 2. The consuls from the countries thus given the same "rights," "prerogatives" or "powers," being those embraced in the list first given, could doubtless claim the same rights as those of Italy, with respect to estates of citizens of their respective countries dying here. Perhaps those included in the second list would claim the same right as a "privilege" within the intent of the respective treaties. The treaty of 1887 with Peru (25 U. S. Stats. 146), which terminated in 1899 by notification from Peru, provided that the consuls of each country, in the absence of heirs or representatives, should ex officio be the executors or administrators of the citizens of their country who died within their consular jurisdiction.

The question presented would directly affect the right of administration upon the estates of all citizens of all the above-named countries residing in this state, of whom there is doubtless a large number. It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states, and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it.

So far as we are aware, the exact point has not been considered in any of the states except Massachusetts and New York. In New York it has arisen only in the surrogate courts of two of the counties, New York county and Westchester county. The surrogate court of the latter county held that the consul general of Italy was entitled to letters of administration upon the estate of a citizen of Italy who died leaving property in that county, in preference to the county treasurer, who, by

the state law, was entitled as public administrator, in the absence of heirs and creditors: *In re Fattosini*, 33 Misc. Rep. 18, 67 N. Y. Supp. 1119. The same court, in a similar case, apparently decided that the Italian consul was entitled, by virtue of his office, to maintain a proceeding in the surrogate court, ⁵⁵⁸ before any grant of letters of administration, to obtain possession of the effects of the deceased, in order that the consul might administer the same under the direction and control of the court. It does not appear that letters had been granted to the consul: *In re Lobrasciano's Estate*, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040. The surrogate court of New York county held, in a similar case, that, where the public administrator refused to act and the Italian consul was legally competent under the state law, he would be entitled to letters, under the statutory provision that when in such case the public administrator refused to act, any person legally competent might be appointed. But his right in preference to the public administrator was denied: *In re Logiorato's Estate*, 34 Misc. Rep. 31, 69 N. Y. Supp. 507. The Massachusetts supreme court decided that, under the most favored nation clause of the treaty with Russia and by referring to the treaty with the Argentine Republic, the Russian vice-consul had a right to administer, paramount to that of the public administrator, in the case of a citizen of Russia who died in Massachusetts leaving personal property there, his legal heirs being in Russia: *McEvoy v. Wyman*, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379. In a Louisiana case—*Lanfear v. Ritchie*, 9 La. Ann. 96—the Swedish consul applied for an order that he supersede the duly appointed public administrator in the possession of the estate of a deceased citizen of Sweden, whose heirs were Swedish subjects residing in Sweden. The contention was that this was guaranteed by the treaty with Sweden. The treaty then in force did not contain any favored nation clause, nor purport to give to consuls in either country the right to administer the estates of its deceased citizens. The court denied his application on that ground, and also on the ground that a treaty could not control the state courts. In *Aspinwall v. Queen's Proctor*, 2 Curt. 241, the English court held that the United States consul, as such, had no right under the act of Congress of 1792 to administer upon the estate of American traveler who died while in England leaving property there. The court said that "the crown is the party to see that the property of any person dying in its dominions goes into proper hands," and that the law of the United States could not be allowed to control, even if it purported to do so.

We do not agree with the supreme court of Massachusetts ⁵⁵⁹ and the surrogate court of Westchester county, New York, in regard to the meaning and effect of the Argentine

treaty. They held that the right given thereby "to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country," included the right to be appointed administrator of the estate in place of the person who might be designated by the laws of the particular state to be such administrator, and who had either been previously duly appointed by the local state court or was applying for such appointment. It appears clear to us from this language that, whatever right was given, it was intended to be a right which should conform to the laws of the country, and that, in view of the well-known complex form of our government, the phrase "laws of the country," so far as the United States is concerned, means the local laws of administration and procedure of the respective states. If the right asserted is necessarily contrary to those laws, it cannot be said to conform to them. Our law declares that in the absence of next of kin entitled to inherit, the public administrator shall take charge of and administer the estate for the benefit of the creditors and heirs. The right claimed under the treaty is that, in such a case, the consul of the country of which the deceased was a citizen shall take charge and administer; a right directly in conflict with our law. The contention of the appellant is that the only effect of the phrase "conformably with the laws of the country" is that the consul, when appointed, must administer the estate in compliance with the local law of administration. The more obvious interpretation is that the phrase qualifies the right and the method of intervention, as well as the procedure after intervention takes place, that is, that if the consul intervenes, he must do so in the manner, to the extent, and for the purposes prescribed and allowed by the laws of the local jurisdiction in which the property is situated. This is the grammatical effect of the qualifying clause.

Whether the matter in hand is the possession, the administration, or the judicial liquidation of the estate, the treaty secures to the consul only the right to "intervene" therein. The word "intervene" is here used with reference to a proceeding in a judicial tribunal. In that connection the word has a settled meaning. The dictionaries declare that when applied to matters of law it means: "To interpose in a lawsuit so as to ⁵⁶⁰ become a party to it": Century Dictionary: Standard Dictionary. Bouvier defines "intervention" at common law thus: "The admission, by leave of court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings." And in the civil law as "The act by which a third party becomes a party in a suit pending between other persons," citing Pothier *Proces Civiles*, lère

part, ch. 2, S. 6, 3: 1 Bouvier's Dictionary, Rawle's ed., 1114. A similar definition is given in our Code of Civil Procedure: Sec. 387.

Appellants say that the word should be construed according to its literal meaning, "to come between," and that "to come between," in the possession and administration of an estate, means to have a preferred right to act as administrator, if it refers to a time before the appointment is made, or to supersede any other appointee, if used in reference to any subsequent time. This claim is based on the assertion that an intervention was unknown in the civil law, from which it is supposed the Argentine Republic takes its system of legal procedure, and also upon the principle that in construing treaties words are to be given their popular rather than their legal signification.

The constitution of the Argentine Republic was adopted on May 25, 1853. It was avowedly modeled upon the constitution of the United States, which it closely follows, both in general plan and in specific provisions. Its government is federal in form, with "provinces" which correspond to our states, each having power to make its own local laws, subject, however, to the civil, criminal, commercial, and mineral codes when such should be enacted by the national Congress: 9 Argentine Const., arts. 105, 108 and 67, [10], Senate Exec. Doc. The treaty with this country was made in July, 1853. At that time the public men of that country must have been very familiar with the form of government of the United States and with the fact that it committed local affairs to the several states. It is not probable, therefore, that the words of the treaty under consideration were chosen with the intent to have the international agreement become a part of, and in part supplant, the laws of the states of the United States, or of the provinces of Argentina, in matters committed solely to the ⁵⁶¹ states or provinces. The assertion that an intervention, as our law defines it, was not known in civil-law countries is shown to be without foundation by the foregoing citation of Bouvier to Pothier, and also by the fact that our own code definition of an intervention, and that of many of the other states, is taken from the code of Louisiana: *Horn v. Volcano W. Co.*, 13 Cal. 62, 73 Am. Dec. 569. The procedure and jurisprudence of that state, as is well known, was derived from the Code Napoleon, and from the system in use in the early Spanish American colonies, both of which are adaptations of the civil law. Justice Field said in *De Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. Rep. 295, 33 L. ed. 642, with regard to the construction of treaties: "As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning as understood in the public

law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." Appellant quotes this canon of construction as decisive of the sense in which the word "intervene" is to be understood. The court in that case held that the phrase "in all the states of the Union," in the clause of the treaty with France giving citizens of France the right to inherit the property of citizens of the United States, included the district of Columbia. The subject in hand and the context indicated that the phrase was used in the most comprehensive sense, to include the entire country, and the court could not reasonably have held otherwise. But treaties are subject to the same rules of interpretation as other documents. The clause of the Argentine treaty relates to legal proceedings for the settlement of estates, and the words used are to be given the meaning they usually have in the respective countries, when used in that connection. The right to intervene in a legal proceeding partaking of the nature of a proceeding in rem is not usually understood in either country to include the right to take the property from the custody of the court, or from the officer upon whom the laws of the country impose the duty of administering and distributing it. The object and purpose of the treaty would be fully met by allowing the foreign consul ⁵⁶² to represent the citizens of his country who are interested as heirs or creditors in case they are not present or otherwise represented, giving him the right to appear in court for them, either officially or in their name, to protect their interests, and requiring that he be served with notices to them, when notice is required. The use of the word "intervene" implies an intention to give a right to the consul to appear as a party in a pending administration or action carried on by another person, and not a right to institute and carry on the proceeding himself. He has, in addition, a duty pertaining to his office imposed upon him by his own government, that of seeing to the safekeeping and proper disposition of the effects of citizens of his country who may die while traveling or while temporarily present in the country to which he is accredited, or even while residing therein, and for that purpose, in the absence of any other representative of the deceased having a better right, he may "intervene in the possession" of the estate, conformably with the laws of the country. The custom of nations would permit this, and it may be that, if the public administrator refuses or fails to apply, the consul may petition for and receive letters to him-

self as the official agent for the persons interested. But the treaty is not to be understood as giving him such right in preference to those upon whom it is devolved by the laws of the country when they are present and ready to accept its possession and discharge their duty concerning it. The theory of respondent is, in our opinion, in harmony with the spirit and purpose of the treaty, and is in accord with the obvious meaning of the language used.

The order appealed from is affirmed.

Angellotti, J., Lorigan, J., Henshaw, J., and Melvin, J., concurred.

As to the Right of a Foreign Consul to Intervene in the Administration of the estate of a citizen of his nation who has died in this country, see Wyman, Petitioner, 191 Mass. 276, 114 Am. St. Rep. 601; Succession of Rabasse, 47 La. Ann. 1452, 49 Am. St. Rep. 433.

The Law of Intervention is the subject of a note to Walker v. Sanders, 123 Am. St. Rep. 280.

BACKMAN v. PARK.

[157 Cal. 607, 108 Pac. 686.]

VENDOR—Necessity of Title at Time of Contract.—One may contract to sell land to which he has no title, and the contract will be valid and enforceable if at the time of performance by him he is able to convey good title. (p. 155.)

VENDOR—Necessity of Title at Time of Contract.—In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will convey to the purchaser a title without defect. But the vendor sufficiently complies with this obligation if he is able to give a good title at the time when, by the terms of the contract, he is required to make the conveyance. And if the vendee refuses such title thus tendered, he is liable in damages for a breach of contract. (pp. 155, 157.)

VENDOR—Tender of Title not Deraigned Through Himself.—Where a vendor tenders full and complete title, not his own, but that of the owner, and the vendee refuses to accept the deed, but makes no objection that the title is not deraigned through the vendor, he waives that irregularity, and becomes answerable for a breach of the contract. (p. 157.)

F. A. Stephenson, for the appellants.

W. W. Butler, for the respondents.

608 HENSHAW, J. This action is by the vendor to recover damages for defendant's breach of agreement to purchase certain real property situate in the city of Redondo Beach. 609 By stipulation, many of the important facts were agreed upon. At the time of the execution of the contract the title to the property stood in the name of Kate

Minerva Backman Palmer, a daughter of Mary Backman, plaintiff, and there was nothing of record to disclose that plaintiff had any title to or interest in the property. But, as provided by and in accordance with the terms of the agreement, plaintiff immediately procured the execution of a grant, bargain and sale deed, executed by Kate Minerva Backman Palmer and her husband, and procured from the Title Insurance and Trust Company of Los Angeles, an unlimited certificate of title. On the seventh day of August, within the time limited by the contract, plaintiff tendered to the defendants the deed to the property so executed by Kate Minerva Backman Palmer and her husband, and again, on the sixteenth day of August, made a like tender, offering also the sum of twenty dollars to cover taxes for the fiscal year of 1905 and 1906, the amount of which taxes had not then been determined. The defendants refused to accept the conveyance or to execute any note or mortgage as contemplated by their agreement. It is not questioned here by defendants that the agreement to purchase was in form and substance sufficient to charge them. No objection was made by them to the certificate of title or to the deed.

The court gave judgment for defendants upon the contention, on which they here rest, that as it appears that plaintiff Mary Backman, at the time of entering into the contract with defendants, did not have any title or interest in or to the property which she agreed to convey, she was not a vendor under section 3307 of the Civil Code. They further insist that their position finds abundant support in *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280, and *Gray v. Smith*, 83 Fed. 824, 28 C. C. A. 168. As to the cases which appellants cite in support of their contention that the contract was valid and that plaintiff, Mary Backman, under that contract, stood in law as a vendor, they answer that the cases are to be read in the light of their facts, and that, so read, it appears that in each instance the purported vendor had some interest or title which he could perfect.

The question is thus presented whether one who, at the time of entering into the contract, has no right or title to the ⁶¹⁰ land in question, may make a valid contract for the sale of that land to a vendee. In this state the question has long been settled in favor of the validity of such contracts. In *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320, the first installment had been paid under an executory contract for the purchase of land. No other installments had been paid, and after the time for the payment of the last installment the vendor had conveyed the land for a valuable consideration to a third party; whereupon the vendee brought action to recover the first installment. This court, by Temple, J.,

first discussed the doctrine of rescission, whereby, upon mutual abandonment, either party may recover the consideration paid, but declared that this was not a case for rescission, but was an effort by the purchaser, after his own default, to recover money paid by him when the vendor has not refused to complete the sale. Says the court: "The conveyance by the vendor was not a breach of the contract. One may sell land which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent on him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." It will be noticed that herein the rule is fairly and squarely declared, not as respondents would have it, that one may contract to sell land to which he has an imperfect or inchoate title, but that one may contract to sell land to which he has no title, and the contract will be valid and enforceable if at the time of performance by him he is able to convey good title. *Joyce v. Shafer* is approved in *Shively v. Semi-Tropic etc. Co.*, 99 Cal. 259, 33 Pac. 848; in *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857, and finally in *Hanson v. Fox*, 155 Cal. 106, 132 Am. St. Rep. 72, 99 Pac. 489, 20 L. R. A., N. S., 338, where the previous cases are reviewed, and it is said: "Nor does the fact which the court found, namely, that defendant had no title to the lots, afford any reason for the interposition of equity. In a case such as this it is permissible for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish. Such is, and always has been, the ⁶¹¹ settled rule in this state." *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280, contains no declarations of law at variance with this, and indeed, if it did, of necessity it would follow that those declarations were overruled by the above-quoted utterances of this court in later cases. *Easton v. Montgomery* declares: "We cannot lose sight of the proposition that in this country, where values of land fluctuate rapidly and where transfers are so frequent, it is very common for the purchaser of land to make a transfer of land before he has acquired the title. It would work great injustice to hold that no one could make a valid contract for the sale of land until he had himself become clothed with the absolute title. . . . It is not necessary however, that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale." In *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123,

27 Pac. 280, the vendee sought to justify his refusal to proceed upon the ground of a defect in the vendor's title. The court was not considering the case of a vendor without title at the time of making the contract, and its language is addressed to the situation actually before it. The court lays down the well-established rule that in every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the purchaser by his deed of conveyance a title unencumbered and without defect; but the vendor sufficiently complies with this obligation if he is able to give a good title at the time when, by the terms of his contract of sale, he is required to make the conveyance. Says the court: "It is not necessary that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale. An equitable estate in land, or a right to become the owner of the land, is as much the subject of sale as is the land itself, and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof." Measured by the rule and language of *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280, the plaintiffs by the tender of a good and sufficient deed to the property, within the time and under the terms limited by their contract, demonstrated their ability to acquire and transfer the title⁶¹² by the voluntary act of the parties who had formerly held it. Upon this subject and in support of the doctrine of our court, reference may be made to *Dresel v. Jordan*, 104 Mass. 407; *Daily v. Minnick*, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840, and *Logan v. Bull*, 78 Ky. 607.

Gray v. Smith, 83 Fed. 824, 28 C. C. A. 168, does not express views at variance with those adopted by this court, and if it did it would be sufficient to say that those views, not being upon a federal question, would have no weight in overthrowing the deliberate judgments of this court. *Gray v. Smith* was an effort by a vendor to recover damages for the vendee's withdrawal from an executory contract of sale. But the vendor in that instance had neither title nor means of procuring title, and did not and was not able to tender title, but rested his right of action solely upon the default and refusal of the vendee to proceed. It is in view of these facts that the circuit court used the following language: "The case presented for our consideration, therefore, was one in which the plaintiff made a contract to sell real estate of which he was not the owner and in which he had no right, title or interest, nor the ability to compel, by the law or otherwise, a conveyance from the owner. . . . One who

makes a contract to sell property of which he has no title, nor the certain means of procuring title, presents no facts upon which damage to him may be predicated if the purchaser withdraws from the contract." This last declaration is in strict accord with the views of this court, with the proviso added that the time limited by the contract in which the vendor is to procure title has at the time of the vendee's withdrawal expired. Otherwise, and by the very terms of the contract, the vendor, who has stipulated to make title by a certain date, cannot be in default. Such in effect was the case of *Burks v. Davies*, 85 Cal. 110, 20 Am. St. Rep. 213, 24 Pac. 613, where the contract was a mere option, exercisable by the vendee at any time within its life, to purchase lands agreed to be conveyed by the vendor. As to some of these lands the vendor had no title, discovering which the vendee gave notice of rescission. The vendor at the time of the notice had not procured or taken steps to procure title to the lands, which he did not own. As the vendee's option could be exercised at any time, it was held by this court that it became the vendor's duty to be ready at all times ⁶¹³ within the period of the option during which a conveyance might be demanded by the purchaser to convey good title to him of all the lands which he had agreed to sell, and his inability and unreadiness so to do justified a rescission of the option.

But the case at bar is radically and essentially different from the two which have last been considered. Here the vendor entered into a contract to make a conveyance within a given time. She made tender, of full and complete title, and the tender was refused. True, the title tendered was not her own, and it is recognized that the vendee might have insisted upon title deraigned through the vendor. But their failure to object upon this ground was a waiver of the irregularity: *Royal v. Dennison*, 109 Cal. 558, 42 Pac. 39. The case then presented, in brief, is one where the vendor within the time limited by the contract has made good and sufficient tender of full and complete title to the land agreed to be sold. No reason in law or in equity exists for defendants' refusal to accept the tender, and for their breach of contract they are responsible in damages.

The judgment appealed from is therefore reversed and the cause remanded.

Lorigan, J., and Melvin, J., concurred.

Hearing in bank denied.

One may Contract to Convey the Title to Land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish: Hanson v. Fox, 155 Cal. 106, 132 Am. St. Rep. 72, and see cases cited in the cross-reference note thereto.

PERKINS v. COWLES.

[157 Cal. 625, 108 Pac. 711.]

CORPORATE STOCK—Liability of Purchasers.—A purchaser in good faith of stock from the original subscribers is liable for unpaid subscriptions of which he has no actual notice but which appear from the books of the corporation, although the sellers of the stock (including the president of the corporation acting in their interest and not in its behalf) represent that the stock is fully paid. (p. 160.)

CORPORATE STOCK—Liability of Purchasers.—A purchaser of stock from the original subscribers is liable, without an express promise, for the unpaid balance of the subscription price. (p. 161.)

CORPORATE STOCK—Liability of Purchasers.—After the original subscribers to stock sell it, and the transfer is entered on the corporate books, the corporation can look only to the purchasers for the unpaid balance of the original subscriptions. (p. 161.)

CORPORATE STOCK—Liabilities of Purchaser in Open Market.—A purchaser of certificates of stock in the open market, in good faith and for value, without anything on the face of the certificates indicating that the stock has not been fully paid, does not take them free from liability for unpaid subscriptions, either at the instance of the corporation or its creditors. (p. 162.)

CORPORATE STOCK—Negotiability of Certificates.—Certificates of stock are not negotiable instruments. (p. 162.)

BANKRUPTCY.—Unpaid Subscriptions to Corporate Stock constitute assets in bankruptcy on the insolvency of the corporation. (p. 163.)

CORPORATE STOCK—Liability of Purchasers.—By purchasing stock from the original subscribers and becoming stockholders of record on the books of the company, the transferees assume, as a matter of law, all the liabilities that the transferrers were under, and take the stock subject to all their obligations. (p. 164.)

BANKRUPTCY—Unpaid Stock Subscriptions.—Purchasers of stock from the original subscribers are liable to a call for unpaid subscriptions in the corporation's bankruptcy proceedings, and the trustee may maintain an action to enforce the call. (p. 164.)

CORPORATE STOCK—Issuance as Fully Paid.—The issuance of a certificate of stock, which upon its face does not show that it is not full paid stock, is not a representation by the corporation that it has received the par value of the stock. (p. 164.)

Lawler, Allen, Van Dyke & Jutten, for the appellant.

Lloyd W. Moultrie, for the respondents.

⁶²⁷ LORIGAN, J. This case was submitted to the trial court on an agreed statement of facts. It appears therefrom that the Golden Gate Laundry, Incorporated, was organized under the laws of this state in January, 1902, with a capital stock of thirty-three thousand dollars, represented by three hundred and thirty shares of the par value of one hundred dollars each. All the stock was subscribed for by the six original incorporators. Certain of these, being the owners of a business plant known as the Golden Gate Laundry, transferred it to the Golden Gate Laundry, In-

incorporated, at a valuation of five thousand five hundred dollars. It was accepted by the latter corporation at that figure, and one hundred and sixty-five shares of the capital stock of the corporation subscribed for by said parties were credited thereby with a payment of thirty-three and one-third cents on each dollar per share of the capital stock subscribed for by them. Subsequently the subscribers to the remaining one hundred and sixty-five shares of the capital stock paid into the treasury of the corporation thirty-three and one-third cents on the dollar per share of the stock subscribed for by them. Thereupon all the stock of the corporation was issued to the original subscribers, the certificates being in the usual and ordinary form, reciting that the person named therein was the owner of a given number of shares of one hundred dollars each of the capital stock of the corporation, transferable on its books on surrender of the certificate. Some months thereafter these defendants purchased certain shares under the following circumstances:

Three of the original subscribers—Rogers, McCoy and Hedderly—being desirous of securing patronage for the business of the corporation and extending its influence, arranged with the defendants and others to purchase part of the shares held by them for forty cents on the dollar per share. Hedderly was one of the original subscribers and president of the corporation. He and the others stated to the defendants, when soliciting a purchase of the stock by them, that the stock was fully paid up at its face or par value, and that there were no unpaid subscriptions thereon. In making this statement, Hedderly acted in good faith, believing that the stock was fully paid up by the transfer of the property to the corporation from the Golden Gate Laundry. The defendants had no notice to the contrary, believed the representations as made, and stated to Hedderly and those from whom they purchased that they would not buy the stock unless it was fully paid up. Under the assurances given, the defendants then purchased a large number of the shares of the stock, which were transferred to them by the original subscribers, and such transfers entered upon the books of the corporation. The defendants ever since said transfers have been, and now are, the owners and holders of the said stock.

In 1904, on an involuntary petition in bankruptcy filed in the United States district court for the southern district of California, the corporation was adjudged a bankrupt and plaintiff was elected and duly qualified as its trustee. The bankrupt corporation, being without sufficient property to pay the debts of the corporation in full, on petition of plaintiff, as such trustee, the said United States district court, in September, 1904, ordered that a call be made of fifty per cent

of all unpaid subscriptions or balance due on the capital stock. In January, 1906, a second call for a like amount of the balance of unpaid subscriptions was made, and the defendants having failed to make payment to the trustee of either of said calls, the plaintiff brought this action against them. The corporation itself never made any calls on account of any unpaid subscriptions to its capital stock.

⁶²⁹ The trial court rendered judgment in favor of defendants, adopting the agreed statement of facts as the findings of the court, and this appeal is taken by plaintiff from the judgment.

It will be readily observed under the agreed statement of facts that the main question presented on this appeal is whether a stockholder, who has purchased the stock of a corporation in good faith and for a valuable consideration from an original subscriber, who has not paid the full subscription price thereof, can be held liable for the unpaid subscription, of which nonpayment he has no actual notice or knowledge, it in fact being represented to him by the president of the corporation, as well as the other sellers of the stock, at the time of his purchase, that the stock was fully paid for, although from the books of the corporation it appears that the stock had not been fully paid. The trial court held that under the circumstances the defendants, as transferees of the stock were not liable. But we cannot agree with that conclusion.

As far as the question is affected by the representations of the president of the corporation that the stock was fully paid, that is a false quantity. We are not referred to any authority where it has been held that even a corporation itself, let alone its creditors, would be bound by any such statement of the president of the corporation. As a matter of fact, the stock had not been fully paid, and when the president stated that it was he was not representing the corporation and did not pretend to. Himself a stockholder by virtue of his original subscription, he was simply acting with Rogers and McCoy in an endeavor to make a sale of a portion of their stock to the defendants, in order to extend the influence and increase the patronage of the corporation by having the stock of the company distributed among a large number of stockholders. He was acting in his own behalf in an effort, with the others, to dispose of a portion of his and their stock. While it is true that he made the representations in good faith, and doubtless the others did also, it is equally true that he had no authority from the corporation to do so. At least it does not appear that he had any. He was not acting in behalf of the corporation in the sale of any stock belonging to it, but simply in the personal interest of himself and the others. His conduct could not have

estopped the corporation in its ⁶³⁰ right to require, if necessary and while a going concern, the full payment of the subscription price, and certainly could not estop the receiver in bankruptcy, acting in behalf of the creditors, after the corporation had become insolvent, from making a call for such payment of it, if otherwise the transferees of the original subscribers were liable therefor.

Neither is it of any moment that representations that the stock was fully paid (independent of those made by the president) were made by the other original subscribers when selling the stock to defendant. There can be no question but that the original subscribers were liable to the corporation for the full subscription price, and, under the law of this state, when they transferred their stock to the defendants, and the latter caused the transfer to be entered on the books of the corporation, the former were released from liability for such payment, and the defendants, in law, as transferees, assumed it, as far as any action by the corporation to compel its payment is concerned. No express promise on their part to assume or pay the balance of the subscription price was necessary. The corporation could, after the transfer of the stock to defendants and entry thereof on its books, look only to the defendants as its recorded stockholders to compel payment of either calls for the original subscription to its stock or for assessments thereon: *Visalia etc. Ry. Co. v. Hyde*, 119 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858; *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280; *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1.

In view of this exclusive legal liability to the corporation for the payment of the subscription price which the transferees of stock assume by having themselves entered on the corporate books as stockholders, it would seem to be but a waste of time to give serious consideration to the proposition that a representation by a stockholder, who is an original subscriber of corporate stock, when selling his stock, that it is fully paid, would absolve both of them—the original subscriber by transfer and the transferee by the representation—from all liability to the corporation or its creditors for payment of such subscription price. A mere statement of the proposition negatives its soundness. The only right which ⁶³¹ the defendants had arising from the misrepresentation of the fact of payment was a right of action against the parties making it, personally, for damages and for rescission of the sale of the stock.

So that the matter of representation, either by the president of the corporation, or by him and the other stockholders being eliminated as obviously unimportant factors in the

present controversy, we are brought to the broad proposition and the one for which in the end respondents really contend, namely, that a purchaser of certificates of stock in the open market in good faith and for value, without anything on the face of the certificates indicating that the stock has not been fully paid, takes them free from any liability for calls for unpaid subscription, either at the instance of the corporation or its creditors, although the shares are in fact not fully paid for.

Whatever may be the rule in sister jurisdictions, and we are referred to cases therefrom so holding, this is not the rule obtaining in this state. In *O'Dea v. Hollywood etc.*, 154 Cal. 53, 97 Pac. 1, this same proposition was urged, and in answer to it this court said:

“But independent of this claim of representation, the broad proposition of appellants is that because they purchased their certificates of stock in good faith and without notice in the open market, such stock is to be deemed fully paid up, and they are protected as bona fide purchasers, even though upon the face of the certificates there was nothing to indicate that the stock had been fully paid.

“In effect, their claim is, that certificates of stock are negotiable securities and subject to the same rules governing the transfer of such instruments. But this position under the law of this state is untenable. Whatever the rule may be in other jurisdictions (and some authorities therefrom are cited by appellants in support of their claim), it is well established in this state that certificates of stock are not negotiable instruments, either in the commercial sense or within the definition of the Civil Code, and that the stock represented by them is subject to assessment for subscription call, no matter to whom it may be transferred. The rule in this state is that certificates of stock in a corporation are but mere evidences of the holder's right to a given share ⁶³² in the franchises and the property of the corporation, and are not negotiable instruments: *Barstow v. Savage M. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Graves v. Mono Lake Min. Co.*, 81 Cal. 304, 22 Pac. 665; *Craig v. Hesperia L. & W. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 45 Pac. 10, 35 L. R. A. 306.

“Such certificates of shares not being negotiable instruments, the rule analogous to other non-negotiable instruments applies, and a purchaser takes them subject to all equities in favor of the corporation. The transfer relieves him from no liability to the corporation which his transfer was under, so that when one purchases stock and causes the transfer to be entered upon the books of the corporation, he thereafter holds his shares on the same conditions as did the stockholder from whom he purchased; he acquires under them all his

rights, and is subject to all his liabilities and obligations respecting them; *Visalia etc. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; *Craig v. Hesperia L. & W. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 45 Pac. 10, 35 L. R. A. 306; *People's Home Savings Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858. Many authorities from other states might be cited to the same effect, but these from our own state declare the rule here."

In that case we had occasion to examine the authorities relied on as establishing the rule for which respondents contend—1 Cook on Corporations, sec. 50; 3 Clark & Marshall on Corporations, p. 1741; Helliwell on Stock and Stockholders, p. 911. It will be noted, however, when these authorities are looked to and the cases they cite examined, that (with a few exceptions in the latter) the rule promulgated or declared proceeded upon the theory that certificates of stock are negotiable or quasi negotiable instruments, or at least should be so treated. In this state, however, as certificates of stock are not negotiable instruments and the purchaser of stock is no more protected than the purchaser of any other non-negotiable instrument, the rule of the authorities cited, based on the negotiability or quasi negotiability of stock certificates, has no force here.

In fact, in these jurisdictions where the rule of non-negotiability of certificates of stock obtains, the rule as to the liability of transferees of stock is the same as in this state: *Upton v. Tribilecock*, 91 U. S. 45, 23 L. ed. 203; *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384; *Merrimac Min. Co. v. Levy*, 54 Pa. 227, 93 Am. Dec. 633 697. See notes to *Thompson v. Reno Bank*, 2 Am. St. Rep. 829.

As far as it is insisted that the issuance of the certificates of stock, without any statement that the stock had not been fully paid for, was equivalent to a representation that it had been so paid, this point is fully discussed and decided adversely to the respondent in *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 47 Pac. 1, heretofore quoted from. The certificates here involved, like the certificates involved in that case, were issued long before section 323 of the Civil Code was amended so as to require certificates issued prior to the payment of the full amount due to state the amount actually paid.

Some question is raised by respondents as to whether the unpaid subscription of the stock owned by defendants constitutes assets in bankruptcy. We think there can be no doubt about it. In *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440, the rule is correctly laid down as to the liability of the original subscribers. It is there said: "The amount due from the stockholders for the subscribed stock of the corporation is a trust fund for the creditors of the

corporation, and such unpaid subscriptions to its stock are a part of its assets and may be collected for its creditors: Vermont etc. Co. v. Declez etc. Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057, 56 L. R. A. 728; Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136; Visalia etc. R. R. Co. v. Hyde, 110 Cal. 630, 52 Am. St. Rep. 136, 43 Pac. 10. Such liability arises by virtue of the stockholders' contract of membership in the corporation, evidenced by the certificates of shares: Morawetz on Private Corporations, 2d ed., sec. 128; Union Savings Bank v. Willard, 4 Cal. App. 690, 88 Pac. 1098."

But the same liability attaches to transferees on becoming stockholders of record on the books of the corporation as bound the transferrers as original subscribers. By purchasing from the original subscribers the transferees assumed, as a matter of law, all the liabilities that the transferrers of the stock to them were under, and took it subject to all their obligations: Visalia etc. R. R. Co. v. Hyde, 110 Cal. 630, 52 Am. St. Rep. 136, 43 Pac. 10; O'Dea v. Hollywood Cemetery Assn., 154 Cal. 53, 97 Pac. 1. Hence the defendants were liable to a call for payment of the unpaid subscriptions ⁶³⁴ in the bankruptcy proceedings, and the trustee had the right to maintain this action to recover on the calls.

The judgment appealed from is reversed, with directions to the trial court to enter judgment in favor of plaintiff against each of the defendants for the amount due on the unpaid subscriptions to the capital stock of the corporation held by him when this action was commenced. The agreed statement of facts which has been adopted by the court as its findings in the case furnishes the data upon which the computation may be made and the judgment rendered.

Angellotti, J., Sloss, J., Henshaw, J., and Melvin, J., concurred.

SHAW, J., Concurring. I concur because the previous decisions of this court settle the question that in this state the issuance of a certificate of corporate stock, which upon its face does not show that it is not full paid stock, is not a representation by the corporation that it has received the par value of the stock. If it were a new proposition I would hold the contrary.

Rehearing denied.

Corporate Stock is not Negotiable, at least according to many authorities, in the full sense of that term: Herrick v. Humphrey Hardware Co., 73 Neb. 809, 119 Am. St. Rep. 917; Bank of Culloden v. Bank of Forsyth, 120 Ga. 575, 102 Am. St. Rep. 115, and cases cited in the cross-reference note thereto.

The Liability of the Transferee of Stock for the payment of subscriptions is considered in the note to Gettysburg Nat. Bank v. Brown, 93 Am. St. Rep. 388, on the liability to corporations of subscribers to their capital stock.

**ROYAL CONSOLIDATED MINING COMPANY v.
ROYAL CONSOLIDATED MINES.**

[157 Cal. 737, 110 Pac. 123.]

VENDOR'S LIEN—Origin in Chancery.—The lien of a vendor does not have its origin in statutory enactment; it has been generally recognized by courts of chancery. (p. 172.)

VENDOR'S LIEN.—A Vendor's Lien is not the Result of any agreement or intention of the vendor or vendee, but is a simple equity raised by courts for the benefit of vendors of real estate. (p. 172.)

VENDOR'S LIEN—Presumption of Existence.—A vendor's lien is presumed to exist in case of a sale of real estate, and as an incident of the transaction. (p. 172.)

VENDOR'S LIEN—Waiver or Relinquishment.—The right afforded by a vendor's lien of enforcing payment of the consideration against the property conveyed is a personal one, and it may be waived and relinquished without consideration or writing, and once waived is gone forever. (p. 172.)

VENDOR'S LIEN—Waiver or Relinquishment.—If a vendor does any act manifesting an intention not to rely on the lien given him by law for the payment of the purchase money, without an express agreement that he may still have his lien, it ceases to exist. (p. 172.)

VENDOR'S LIEN—Contract Inconsistent With Existence.—Where a corporation conveys mines free of encumbrance to an individual to form a corporation and transfer the properties unencumbered to it, and the latter corporation is to issue and sell its shares in an amount above three times what the selling corporation is willing to take for the properties, and ninety per cent of the shares are to be deposited in a bank to be dealt with in a specified manner, and a stated proportion of the sum realized on the sale of shares, and from the operation of the mines, is to go in satisfaction of the consideration stated in the agreement, the transaction is inconsistent with the existence of a vendor's lien. (p. 174.)

VENDOR'S LIEN.—Failure to Pay the Purchase Price cannot of itself create a vendor's lien where none has theretofore existed. (p. 174.)

MINING CORPORATION—Ratification of Mortgage by Stockholders.—The act of 1880, requiring ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of its mining ground, has been less strictly interpreted by later than by the earlier decisions, and should be construed as only illustrative and not as exhaustive of the manner of ratification. (pp. 177, 180.)

MINING CORPORATION—Ratification of Mortgage by Stockholders.—The act of 1880, requiring ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of its mining ground, is designed for the protection of stockholders, and where persons holding the required two-thirds of the stock have in a formal and unequivocal way announced their assent to the proposed transaction, their rights are as fully safeguarded as if they had ratified the transfer or mortgage by subsequent writing or at a meeting. (p. 180.)

MINING CORPORATION—Ratification of Mortgage by Stockholders.—The act of a director of a mining corporation, who is the holder of two-thirds of the stock, in authorizing, executing and acknowledging a mortgage of the corporation's properties, answers the demands of the act of 1880, which requires ratification of such mortgages by the holders of two-thirds of the stock in the corporation. (p. 180.)

CORPORATION.—The Test of the Right to Vote as a Stockholder at corporate meetings is ordinarily the ownership of shares, as disclosed by the proper record books of the corporation. (p. 181.)

MINING CORPORATION—Ratification of Mortgage by Stockholders.—At a meeting of stockholders under the act of 1880 to ratify a mortgage of mining properties of the corporation, the right to vote resides in every bona fide stockholder having stock in his own name on the stock-books of the corporation ten days prior to the meeting. (p. 181.)

MINING CORPORATION—Ratification of Mortgage by Stockholders.—The act of 1880, requiring ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of its mining ground, governs foreign as well as domestic corporations in their dealings with property in California. (p. 183.)

MINING CORPORATION—Ratification of Mortgage by Stockholders.—Under the act of 1880, requiring ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of its mining ground, the ratification need not necessarily be made by the persons having the ultimate beneficial ownership in two-thirds of the stock. (p. 183.)

MINING CORPORATION—Ratification of Mortgage by Stockholders.—Under the act of 1880, requiring ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of its mining ground, the stockholders and corporation are bound by the ratification of those whom they have invested with the actual legal title to the stock. The latter are authorized under the statute to act in the matter, although, in favor of parties claiming under the corporate conveyance, courts may look behind the apparent ownership and sustain a ratification made by the beneficial owners. (p. 183.)

MINING CORPORATION—Ratification of Mortgage by Stockholders.—Estoppel of stockholders to rely on a want of ratification of a mortgage of properties of a mining corporation cannot be predicated upon the acts of the corporation or the directors alone. (p. 184.)

Bishop, Hoefler, Cook & Harwood and A. J. Harwood, for Leon Ephriam Morris, William Bryson Butler and John Thomas Hodson, defendants and cross-complainants, appellants and respondents.

Nicol & Orr, Campbell, Metson & Campbell, S. D. Woods, Solinsky & Wehe, Jesse W. Lilienthal, and Vogelsang & Brown, for Royal Consolidated Mines and J. C. Kemp Van Ee, appellants and respondents.

740 SLOSS, J. On the ninth day of February, 1898, Royal Consolidated Mining Company, a corporation (designated in this opinion as the "vendor" or the "California corporation"), entered into a written contract with J. C. Kemp Van Ee for the sale by it to him of certain mining properties in Calaveras county. The terms of the contract, which will be set out at greater length hereafter, provided for the incorporation by the purchaser of a company under the joint stock companies acts of Great Britain, for the purpose of acquiring the properties. Such company, the Royal Consolidated Mines (California) Company Limited (which will be referred

to by us as the "British corporation") was formed, and title to the properties in question became vested in it. In 1902 this corporation executed, or attempted to execute, to Frederick Rheinwald Bullock, William Bryson Butler and John Thomas Hodson, as trustees, an instrument purporting to convey said properties to the trustees as security for the payment of £75,000 of debenture stock to be issued by the corporation (and in fact subsequently issued by it) to persons lending money on the faith of such debentures. Pending this action, Bullock, one of the trustees, died, and was succeeded by Leon Ephraim Morris.

This action was brought by the California corporation against the British corporation, J. C. Kemp Van Ee, the trustees above named, and other defendants designated by fictitious names, to foreclose a vendor's lien upon the property conveyed by said plaintiff, its claim being that some \$312,000 with interest was due on the purchase price of the mines, and that it was entitled to a lien for such unpaid balance. Each of the named defendants appeared and resisted plaintiff's claim. Albert Raymond, appearing as a defendant sued by a fictitious name, also denied the existence of plaintiff's asserted lien. ⁷⁴¹ Raymond himself claimed a lien on the property by virtue of an attachment for the sum of \$64,421 and interest, levied in an action brought against the British corporation.

The trustees, Morris, Butler and Hodson, filed in addition to their answer a cross-complaint, seeking foreclosure of the instrument executed to them to secure payment of the £75,000 of debentures.

The trial resulted in findings upon which the court entered its judgment: 1. That plaintiff recover nothing and that its action be dismissed against defendants and cross-complainants; 2. That cross-complainants take nothing as against plaintiffs and defendants, except that cross-complainants have and recover from the British corporation the sum of \$242,500 with interest; 3. That defendants recover costs from plaintiff; 4. That Van Ee and Raymond recover costs from cross-complainants; 5. That cross-complainants recover costs from the British corporation. In other words, the court determined in the original action that the plaintiff had not established its right to a vendor's lien, and, in the cross-action, that the instrument under which the trustees claimed was not a valid mortgage and could not be foreclosed, but that such trustees were entitled to a money judgment against the British corporation for the sums actually advanced to it by the debenture holders.

From this judgment three appeals have been taken. No. 1744 is the appeal of the cross-complainants (trustees) from those parts of the judgment denying them the relief of fore-

closure, giving them a money judgment, and awarding costs against them. They appeal also from an order denying their motion for a new trial.

No. 1750 is the appeal of plaintiff from the parts of the judgment decreeing that it recover nothing, that the action be dismissed, that cross-complainants have judgment for \$242,500, and that defendants recover from plaintiff their costs.

No. 1764 is an appeal taken by the British corporation and J. C. Kemp Van Ee from the part of the judgment whereby cross-complainants (trustees) recover a money judgment and costs against said corporation.

The bills of exception presented by the respective parties are, except for the assignments of error, identical, and for this ⁷⁴² reason, among others, the various appeals can most conveniently be considered in a single opinion.

It will be well to take up first the questions arising on plaintiff's appeal (No. 1750) from the judgment declaring that it is not entitled to a vendor's lien. Some of the facts to be stated in this connection will be important in considering the other appeals.

The complaint sets forth at length the terms of the agreement of February, 1898, between the plaintiff, the then owner of the properties in question, and Van Ee. This agreement, after reciting that the plaintiff is the owner of the mining properties in question, and that Van Ee is desirous of acquiring such property, provides that the vendor (plaintiff) agrees to sell, and Van Ee agrees to purchase, the aforesaid properties for the sum of \$400,000, payable as provided in the agreement. The purchaser, it is agreed, shall on the signing of the agreement, pay the sum of \$60,000 to the credit of the vendor with the Anglo-Californian Bank, Limited, at its San Francisco office, on account of the purchase consideration. The third paragraph reads as follows: "The purchaser shall proceed forthwith to incorporate a company in London under the joint stock companies acts of Great Britain, for the purpose of acquiring the aforesaid properties, and said company shall have a nominal capital of 250,000 shares of one pound each, of which 25,000 shares, at the par value, shall be reserved for the purpose of providing working capital for the said properties, and the balance of shares, namely, 225,000 shares, shall be issued fully paid up and be deposited in London with the Anglo-Californian Bank, Limited, as security for the payment of the balance of the purchase consideration of \$400,000 for the said properties, and upon the allotment and deposit of said 225,000 shares, the property shall be duly and legally conveyed by the purchaser to the company to be formed as aforesaid to acquire the same, free from all encumbrances."

The agreement further provides that the balance of the purchase price, namely, \$340,000, "shall be paid in the manner following, that is to say, an amount equal to eighty per cent of the net proceeds arising from the working of said mines shall be paid to the vendor monthly on or before thirty days after the time of each and ⁷⁴³ every clean-up, and shall be credited as aforesaid on account of the purchase consideration; provided, however, that as sales are made of said 225,000 shares, or any part thereof, as herein provided, the purchaser shall pay only such proportion of said amount equal to said eighty per cent of said net proceeds as the number of shares remaining in said bank bears to the total of 225,000 shares." The following paragraph provides that "the purchaser, however, shall have the right from time to time to otherwise discharge so much of the purchase consideration as he may think fit by the sale of as many of the said 225,000 shares as he may think necessary or advisable, always provided that none of the said shares shall be sold for less than their par value, and that in any event, as the same may be sold, they may be withdrawn by the purchaser or released, as he shall direct, against a payment to said bank for account of said vendors of ninety per cent of the par value of said shares, to apply upon said purchase consideration."

After the payment, however made, of the balance of the purchase price, all the shares remaining in the hands of the bank are to be delivered to the purchaser. The vendors agree in paragraph 8 that upon the payment of the \$60,000 they will deposit with the Anglo-Californian Bank, Limited, in San Francisco, a good and sufficient deed conveying to the purchaser, his nominee or nominees, satisfactory title to all of said properties free and clear of all encumbrances whatsoever, together with a letter of instructions authorizing and directing said bank to deliver such deed upon receiving from the Anglo-Californian Bank, Limited, in London, a cablegram to the effect that the said 225,000 shares have been deposited with the said bank in London to be dealt with in accordance with the terms of the contract. It is provided that until the payment of the balance of \$340,000 the vendors may have a representative upon the properties, but that upon the payment of the \$60,000, possession of the properties is to be turned over to the purchaser. By the terms of paragraph 11 it is agreed that if the whole purchase consideration shall not have been paid at the expiration of four years, "then the balance of shares remaining in said bank shall, at such time thereafter as may be determined by said vendors, be divided between vendors and purchaser so that the purchaser receive such proportion of said shares as the whole amount of money ⁷⁴⁴ paid by him hereunder bears to the entire amount of said purchase consideration; and the ven-

dors shall receive the balance of shares in satisfaction of the purchaser's covenant to purchase." The agreement further provides that it is to be binding upon and inure in favor of the heirs, representatives, successors and assigns of the respective parties.

Upon the execution of said agreement of February 9, 1898, Van Ee paid to the plaintiff the sum of \$60,000, and plaintiff delivered up the possession of the said properties in accordance with the terms of the contract, which possession was held by Van Ee until the organization of the British corporation. At the same time plaintiff executed its deed of the properties to Van Ee, and deposited such deed in escrow with the Anglo-Californian Bank, Limited. In May, 1898, Van Ee and John Thomas Hodson, who was interested with him in the transaction, caused to be incorporated a company in London under the joint stock companies acts of Great Britain for the purpose of acquiring the property described in the contract. (The contract of February, 1898, had theretofore been assigned by Van Ee to Hodson.) This corporation, known as the Royal Consolidated Mines (California) Company Limited, is the one herein referred to as the British corporation. It was organized with a nominal capital of 250,000 shares of one pound each. Upon its organization it entered into a contract with Hodson, whereby Hodson agreed to sell and the British corporation to purchase, free from encumbrances, the properties here in controversy, for the sum of £225,000, to be paid and satisfied by the allotment to the vendor, or his nominee, of 225,000 fully paid shares in the company of one pound each. It was provided that the sale should be completed on the twentieth day of July, 1898, and that the company should before that time issue certificates for the said 225,000 shares as required by Hodson, and lodge the same with the Anglo-Californian Bank, Limited, at its London office. The 225,000 shares of capital stock of said British corporation were issued fully paid to Hodson, and were by him deposited with the Anglo-Californian Bank in London pursuant to the terms of the contract between plaintiff and Van Ee. Thereupon the deed from plaintiff to Van Ee, which had been deposited in escrow with the Anglo-Californian Bank, Limited, in San Francisco, ⁷⁴⁵ was, in accordance with the provisions of the contract of February 9, 1898, delivered to Van Ee. Van Ee executed his deed conveying the properties to the British corporation, and the latter took possession of the properties. It immediately commenced to work and improve the said property, and expended large sums in the operation of the mines and the placing of improvements thereon. Out of the proceeds there was paid to plaintiff, pursuant to the terms of its contract, the sum of \$29,479.96. With the exception of this sum, no part of the balance of \$340,000 of the purchase price

has been paid. The four years allowed for payment of the consideration of Van Ee's purchase expired on the ninth day of February, 1902. At that time and thereafter the plaintiff entered into several agreements with Van Ee, modifying the terms of the original agreement and extending the purchaser's time for performance. It is alleged in the complaint that all of these extensions were made without any consideration moving to the plaintiff, and that all the agreements made by it were executed and received on the part of Van Ee and of the British corporation without any intention upon the part of either of them of performing or fulfilling them. The court finds these allegations to be untrue, and, without prolonging the discussion by an examination of the evidence, we shall simply state that we think these findings, so far as they are material on this appeal, are fully sustained. The issue of the £75,000 of debenture stock and other transactions connected therewith are set out in the complaint, and charged to have been part of a fraudulent scheme concocted by Van Ee and the British corporation for the purpose of complicating and clouding the title to said property, and to prevent said plaintiff from being able to collect the balance of its purchase price. The findings are contrary to these averments, too, and there is, in fact, no substantial evidence tending to show any such fraudulent intent. It is found that the plaintiff has never at any time determined the time, as provided in the contract of February 9, 1898, when the balance of shares remaining in said bank should be divided between it (said plaintiff) and Van Ee, nor made demand therefor, but at all times since the expiration of the time provided for in the contract and the extensions thereof (except when the shares were, with the consent of the plaintiff, in the hands of third parties) the British corporation has ⁷⁴⁶ been ready to make such division and deliver to plaintiff the shares belonging to it under the contract.

With reference to plaintiff's claim of a vendor's lien the court finds that it was plaintiff's intention at the time of the execution of the contract of February 9, 1898, to sell and convey to Van Ee the properties in question absolutely for the purpose of conveying the same absolutely to the corporation to be organized, and plaintiff did not intend to nor did it have or retain in said property a vendor's lien or any lien for the unpaid balance of the said purchase price, and it was the intention of the said plaintiff to waive any lien, as vendor or otherwise, that it might have or claim on said property for said balance, and it did waive said lien.

On the question whether or not there was a lien the parties on both sides base their respective claims mainly on the terms of the contract of February 9, 1898. We think that contract, fairly construed, manifests, on the part of the vendor, an in-

tent plainly inconsistent with the reservation of a lien on the properties to be conveyed.

Section 3046 of the Civil Code provides that "one who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." But the lien does not find its origin in this statutory enactment. It has been generally recognized by courts of chancery. It is "not the result of any agreement or any intention of the vendor or vendee, but is a simple equity raised by courts for the benefit of vendors of real estate": *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919. Accordingly, where there is nothing to indicate an intention one way or the other, "the lien is presumed to exist, and is an incident of the transaction of sale": *Finnell v. Finnell*, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740. In the case last cited, the lien was upheld, although the vendor was unaware, at the time of the sale, of the fact that he was, under the law, entitled to a vendor's lien. On the other hand, the "right thus afforded of enforcing payment of the consideration against the property conveyed is a personal one, and it may be waived and relinquished without consideration and without a writing (see *Claiborne v. Castle*, 98 Cal. 30, 32 Pac. 807), and, when once waived, is gone forever. It is thoroughly settled that, if the vendor ⁷⁴⁷ do any act manifesting an intention on his part not to rely on the lien thus given by law for the payment of the purchase money, such as taking security therefor, without an express agreement that he may still have his vendor's lien, the lien will not exist": *Finnell v. Finnell*, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740, citing cases.

The respondents point to various elements of the transaction to support the contention that the plaintiff waived any lien. Without considering separately such arguments as that the plaintiff took security or that the contract did not make the vendee liable for any liquidated purchase price measurable in terms of money, we have no hesitation in declaring our conviction that the contract, viewed as a whole, evidences a scheme or plan of dealing which is inconsistent with the retention by the vendor of any lien on the properties. That scheme, briefly stated, was this: The mines, owned by plaintiff, were to be conveyed, free and clear of encumbrance, to Van Ee. Van Ee was to form a corporation, and to transfer the properties, likewise unencumbered, to it. Ninety per cent of the shares of stock of such corporation were to be deposited in a bank, to be dealt with in a given manner. These shares were to be subject to sale by the vendee or his associates, but a stated proportion of the sum realized on any sales was to go to the plaintiff in satisfaction of the considera-

tion stated in the agreement. Similar provision was made with reference to a percentage of the proceeds arising from the operation of the mines by the vendee or his assigns. The number of shares to be deposited was 225,000, of the par value of one pound each. Sales of these shares were to be made at not less than their par value. In other words, the agreement contemplated that a title apparently free and unencumbered should be conveyed to a corporation which should, upon the basis of such title, issue and sell its shares to an amount exceeding a million dollars. The plan called for a nominal capitalization of about three times the price which plaintiff was willing to take for its properties, and provided that the shares should be sold to the public at a rate which would bring in an amount equal to or exceeding their face value. What may fairly be supposed to have been in the contemplation of the parties to this agreement? Did the plaintiff and Van Ee intend to sell to prospective shareholders, at this price, an interest in ⁷⁴⁸ a property which was subject to a paramount, but unrecorded, lien for \$340,000, or did they propose to offer at par, shares in a corporation owning a clear title to the property? A reading of the agreement leaves no doubt that this question must be answered by saying that no secret lien in favor of the original vendor was intended to be retained. In *re Brentwood Brick & Coal Co.*, L. R. 4 Ch. D. 562, was a case in which property was conveyed to a corporation for a consideration of £6,000, to be paid by the payment to the vendor of fifty per cent of all money received by the company on the sale of shares, and a like fifty per cent of all money by way of capital to be at any time borrowed by the company, until the £6,000 should be paid. The transaction was held to be such as to exclude the idea of the retention of a vendor's lien. Referring to the provision for payment out of proceeds of shares sold or money borrowed, James, L. J., said: "To my mind it is clear that he intended to rely on that fund for payment, and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property." The reasoning applies with equal force to the provision here for the sale of 225,000 shares at not less than their par value. Neither the plaintiff nor Van Ee could have considered it feasible to market at par any part of an issue of 225,000 one pound shares of a corporation owning no assets beyond an equity of redemption (worth, perhaps, \$60,000) in a property subject to a lien of \$340,000. Again, the covenant that the plaintiff's conveyance to Van Ee and his subsequent transfer to the British corporation should be free and clear of encumbrances excludes the idea that a title subject to a lien in favor of the plaintiff was to be retained. It is true that in *Slide & Spur*

Gold Mines v. Seymour, 153 U. S. 509, 14 Sup. Ct. Rep. 842, 38 L. ed. 802, it was held that a somewhat similar covenant was to be construed as referring "to prior charges and encumbrances" and not to "any which arise out of the conveyance itself." But in that case there was but a single transfer directly from the vendor to a corporation organized by the vendee to take title. Here the property was to be conveyed to Van Ee, and by him to a corporation. Even if we give to the covenant for a transfer free of encumbrances the restricted meaning applied in the ⁷⁴⁹ *Slide & Spur* case, the vendor's lien claimed must have attached at the moment of the transfer to Van Ee. It would, therefore, have been prior to the conveyance by Van Ee to the British corporation, and was excluded by the provision that that transfer should be free of encumbrance.

But apart from this somewhat technical consideration, we prefer to rest our conclusion on the broader ground that the whole scope of this agreement, differing materially from that in the *Slide & Spur* case, is such as to make the existence of a vendor's lien inconsistent with the proper execution of the plan agreed upon.

We have not, in the foregoing discussion, given any attention to the attack made by appellant upon the finding to the effect that the purchaser had not defaulted in the matter of dividing the shares of stock of the British corporation with the plaintiff. If the court below was right, as we are satisfied it was, in holding that the plaintiff, at the time of executing the contract of February 9, 1898, intended to and did waive any lien on the properties, the alleged default had no bearing on its right to such lien. Failure to pay the purchase price cannot, of itself, create a lien, where none had theretofore existed: *Fisk v. Potter*, 2 Keyes (N. Y.), 76. But if it be claimed that the breach by Van Ee gave plaintiff the right to some kind of a personal judgment against him, we think the point is sufficiently answered by saying that the finding that he had not committed the breach alleged has adequate support in the evidence.

In accordance with these views, it must be held that the court below rightly determined that the plaintiff did not hold a vendor's lien and was not entitled to any relief. If this be so, the plaintiff is not concerned with the correctness of the findings with respect to the claims or liens of other parties, and it will not, on this appeal, be necessary or proper to consider any points made by plaintiff with regard to such matters.

The appeal of the cross-complainants Morris, Butler, and Hodson, trustees, No. 1744, is, as we have said, from the portions of the judgment which deny foreclosure of the deed of trust and give a money judgment for the sums advanced.

The refusal of the relief sought was based upon the proposition that the indenture of trust or mortgage was void for want of compliance with the terms of the act of 1880, as ⁷⁵⁰ amended in 1897, for "the further protection of stockholders in mining companies": Stats. 1880, p. 131; Stats. 1897, p. 96. This act (now repealed) was the one which required ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of any part of the mining ground owned or held by the corporation.

The findings are to the effect that on the second day of October, 1902, the board of directors of the British corporation determined to raise and borrow a sum of £50,000, and for that purpose to issue the debenture stock of the corporation to the amount of £75,000. In order to secure the redemption and payment of this stock, a certain indenture by way of mortgage of all the property described in the complaint was, on the second day of October, 1902, at London and as authorized by the directors of said corporation, made, executed and delivered by and between said directors and the original cross-complainants Morris, Butler and Hodson as trustees for the creditors of the corporation and the holders of said debenture stock. The instrument was acknowledged, and, on February 5, 1903, recorded in the office of the county recorder of Calaveras county. Thereafter the British corporation issued debenture stock to the amount of £75,000, and in consideration of a loan of £50,000 made to it by the British Transvaal and General Financial Company, Limited, delivered said stock to said British Transvaal and General Financial Company, Limited. The sum of £50,000 was actually received by the British corporation from said lender, and was the full and agreed consideration for said debenture stock. The same has always been, and now is, retained by the British corporation, and no part of it has ever been repaid. That out of said sum of £50,000 the British corporation expended in permanent improvements on the mining property the sum of \$206,791.50; that all of said improvements are now on and form a part of the property, and are of the reasonable value of said last-named sum.

It is further found, and these are the findings which are attacked by the appellant trustees, that at the time of the borrowing of said money and the making, delivery, certification and recording of said trust deed, all of the capital stock of said British corporation was owned in equal shares by the defendants ⁷⁵¹ Van Ee and Hodson, subject to the conditional ownership therein of the said plaintiff under and by virtue of the contract of February 9, 1898, and at no time during said period was said Hodson or any other person than Van Ee, the plaintiff, the owner or holder of more than one-half of the capital stock of said corporation; that the inden-

ture of October 2, 1902, was never ratified or authorized by the holders of two-thirds of the capital stock of the defendant corporation as required by the act of 1880.

The act in question provided that: "It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain in any way (except by location) any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the stock of such corporation then outstanding. Such ratification may be made either in writing, signed and acknowledged by such stockholders or by resolution duly passed at any regularly called stockholders' meeting."

That there was no ratification, either by a writing signed and acknowledged by the stockholders as such or by resolution passed at a stockholders' meeting, is conceded. The position of appellants is, however, that Hodson was in fact the holder of more than two-thirds of the stock of the corporation, that he authorized, executed and acknowledged the instrument on behalf of the corporation as one of its directors, and that such authorization, execution and acknowledgment was a sufficient ratification to comply with the requirements of the act. It appears that the 225,000 shares, which were the consideration for the conveyance to the British corporation, were by it issued fully paid to Hodson, and were by him deposited with the Anglo-Californian Bank in London as required by the terms of the agreement of February 9th. Thereafter Van Ee executed to the corporation a deed of said properties. The 225,000 shares so issued in the name of Hodson remained in the Anglo-Californian Bank until after the signing of the deed of trust in question, with the exception of a period during which they were, with plaintiff's consent, made subject to an option which was never exercised. So far as appeared from the books and records of the corporation Hodson was, at the date of the execution of the mortgage, the sole owner of this stock. The ⁷⁵² record does not disclose that he had ever transferred any part of it to any other person. The interest which the court found to be held by Van Ee was such interest as may have been vested in him by reason of the fact that he and Hodson were to share equally in the profits of the transaction. The interest of the plaintiff was the right which it had to receive a certain proportion of the shares remaining unsold at the expiration of the four year period designated in its agreement of February 9, 1898, with Van Ee.

The stock being in this condition, the deed of trust was signed under the seal of the British corporation by John T. Hodson and H. Percy Hood, directors, and J. K. Pray, secre-

tary of the corporation, and by the trustees named in the deed. Attached to the instrument is the certificate of acknowledgment of the consul-general of the United States at London, certifying that the instrument was acknowledged by John Thomas Hodson and Henry Percy Hood, directors, and J. K. Gray, secretary of the corporation, "who acknowledged to him that they were the officers of the said company who for and in the name of the said company have executed the foregoing instrument, they then and there severally acknowledged the same to be their respective free act and deed, and as and for the act and deed of the said company for the uses and purposes therein set forth."

The act of 1880 has been under consideration by this court several times. The earlier cases showed a disposition to give a very rigid and strict interpretation to the provisions of the law, but this strictness has been somewhat relaxed in the more recent decisions. The first case involving the act was *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178. That was a suit to enjoin an execution sale of mining property. The plaintiff claimed title through a conveyance from a mining corporation which had owned the property. The deed had not been ratified by the stockholders. The execution was issued on a judgment obtained against the corporation after the date of the deed. It was held that in the absence of ratification by the stockholders no title passed from the corporation. The court's view of the effect of the statute was stated in these words: "We think that the provision of said act goes to the power or authority of the directors. It cannot be construed to relate merely to their personal liability, for no penalty is imposed upon them; and to so construe would be to practically nullify ⁷⁵³ the act. In our opinion the directors of mining corporations have no power or authority to convey the mining ground without the consent of holders of two-thirds of the stock, given as prescribed by the act. And it follows without such consent that title does not pass. And if this be so, the question can be raised by anyone who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof. *Pekin etc. Min. Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679, followed soon after *McShane v. Carter*, and approved the holding of that case to the effect that a deed by a mining corporation of any part of its mining ground not shown to have been ratified by two-thirds of the stockholders did not pass the title. These cases declared the rule—and the declaration was necessary to the decision in each instance—that the assent of two-thirds of the stockholders was essential to the validity of the acts described in the statute. *McShane v. Carter* and *Pekin etc. Min. Co. v. Kennedy* were cited with approval in *Granite Gold Min. Co. v. Maginness*, 118 Cal.

131, 50 Pac. 269, although the particular transaction there involved was not shown to be within the purview of the statute. Again, in *Johnson v. California Lustral Co.*, 127 Cal. 283, 59 Pac. 595, the decision was that a mortgage of mining ground of a mining corporation not ratified by the stockholders could not be foreclosed, the court saying: "The statute declares unlawful a mortgage or other disposition by the directors of the whole or any part of the mining ground of a mining corporation, except upon the ratification of the holders of two-thirds of the stock, and it must be enforced according to its intent. Several instances of its application have occurred," citing *McShane v. Carter and Pekin etc. Min. Co. v. Kennedy*. With these decisions before it, the supreme court of the United States, in *Williams v. Gaylord*, 186 U. S. 157, 22 Sup. Ct. Rep. 798, 46 L. ed. 1102, was called upon to consider the effect of the statute. The suit was brought in the United States circuit court by Williams to foreclose a mortgage made to him as the trustee of bondholders by the Gold Hill Mining Company, a West Virginia corporation, upon mining ground in California. The corporation defaulted, but foreclosure was resisted by purchasers at execution sales, under judgments rendered against the corporation. The defense set up was the want of ratification of the mortgage by the stockholders. The defendants prevailed ⁷⁵⁴ in the circuit court (96 Fed. 454) and in the circuit court of appeals (102 Fed. 372, 42 C. C. A. 401). The case came to the supreme court on certiorari. That court, after deciding that the construction and effect of the statute were matters in which the federal courts would follow the decision of the state courts, proceeded to examine the cases above cited, and from them deduced the conclusion that this court had held (a) that without the consent of holders of two-thirds of the stock, title to property attempted to be conveyed does not pass; and (b) that that consent must be evidenced in the manner prescribed by the act, i. e., "either in writing signed and acknowledged by such stockholders or by resolution duly passed at a stockholders' meeting called for that purpose." With respect to the second proposition the court said: "This manner of ratification was held to be necessary, as we have seen, in *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178, and that case has not been limited or varied by any subsequent case, and we have no doubt of the power of the state to so prescribe. . . . Nor can we contest that power, though we might, if we were permitted to exercise an independent judgment, construe the statute as only illustrative and not as exhaustive of the manner of ratification."

In *Williams v. Gaylord*, 186 U. S. 157, 22 Sup. Ct. Rep. 798, 46 L. ed. 1102, the supreme court of the United States was not declaring its own view of the statute. It was merely

ascertaining and applying the construction given to a state statute by the highest court of the state. There is, therefore, nothing in the decision to prevent us from inquiring whether this court has not, by its decisions subsequent to *Williams v. Gaylord*, modified the strict interpretation given to the act by our earlier cases.

On the first point, i. e., that title does not pass in the absence of ratification by the stockholders, we think there is nothing in any later case which modifies the rule as declared in *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178. The appellants place great reliance upon *Galbraith v. Shasta Iron Co.*, 143 Cal. 94, 76 Pac. 901, in which it was held that one asserting a title in hostility to the corporation and to those claiming under it, was not in a position to object that the corporation's deed had not been ratified as required. But this goes no further than the declaration of the court in *McShane v. Carter*. In the opinion in that case, after stating that title does not pass, the court goes on to say that "the question can be raised by anyone who connects himself ⁷⁵⁵ with the title of the corporation which owned the property, as well as by the stockholders thereof." It was not there suggested that strangers to the title might raise the question, and we do not think the statement that the title did not pass was intended to convey the idea that the transaction could be treated as void by persons having no relation to the title of the corporation. Here, however, the objection is made by the corporation itself and by stockholders, and the question whether the mortgage was, in the absence of ratification, absolutely void as to all parties, has no significance in connection with the point now under discussion. The parties here objecting are certainly in a position to insist that the instrument, if unratified, passed no title and created no lien.

On the proposition that the ratification of the stockholders must be in the manner and form prescribed by the statute, the statement in the *McShane* case that the directors had no power or authority to convey without the consent of holders of two-thirds of the stock "given as prescribed by the act" has been materially modified by this court. In the first place, it should be noted that this declaration was not in strictness necessary to the decision in *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178, since in that case, as in the other decisions of this court above cited, there was no contention that there had been a ratification by stockholders in any manner. But whether or not the statement be viewed as dictum, it can no longer, in view of the decision in *Lacy v. Gunn*, 144 Cal. 511, 78 Pac. 30, be regarded as a correct statement of the law. This was an action to quiet title. Both parties claimed through the *Amalie Mining Company*, the plaintiff under an execution sale and deed of the corporate property, and the

defendant under a deed from one Ferris, to whom the company had made an assignment for the benefit of its creditors. The assignment antedated the judgment under which plaintiff was claiming. The property in question was mining property, and the deed from the corporation had not been ratified by the stockholders in the manner prescribed in the act. There was, however, evidence tending to show that the directors who authorized the making of the assignment were the actual owners of more than two-thirds of the stock. The court held that: "A previous consent or direction by two-thirds of the stockholders, although purported to have been made in the capacity of directors, is, as against creditors, ⁷⁵⁶ equivalent to a subsequent ratification." It is true that this rule was, in its application to the particular case, limited to the effect of a conveyance as against creditors, and that it was not in terms extended so as to affect stockholders. But we see no reason for any distinction in this regard. Under the rule of *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178, and the cases following it, any person connecting himself with the title of the corporation, as, for example, an execution creditor, was entitled to rely upon the provisions of the act, and no good ground suggests itself for saying that a conveyance, good as against a judgment creditor, would not be equally good as against a stockholder. Applying the doctrine, then, to stockholders, as well as to creditors, we think the rule declared in *Lacy v. Gunn*, 144 Cal. 511, 78 Pac. 30, to be sound and reasonable. The act was designed for the protection of stockholders and to guard them against the improvident action of directors. Where the persons holding the required two-thirds of the stock have in a formal and unequivocal way announced their assent to the proposed transaction, their rights are as fully safeguarded as if they had ratified the transfer, purchase or mortgage by subsequent writing or at a meeting. In other words, we think the proper rule is that suggested by the supreme court of the United States in *Williams v. Gaylord*, 186 U. S. 157, 22 Sup. Ct. Rep. 798, 46 L. ed. 1102—namely, that the statute should be construed "as only illustrative and not as exhaustive of the manner of ratification." If, then, Hodson was the holder of two-thirds of the stock of the British corporation at the time of the authorization and execution of the mortgage, his act in authorizing, executing and acknowledging the mortgage as a director of the corporation answered every requirement of the act.

There remains the question whether Hodson was the holder of two-thirds of the stock, and, as such, empowered to ratify the mortgage. The court below seems to have proceeded on the theory that it must go behind the legal title, as disclosed by the corporate books, and find the holders of stock to be the

persons who had the ultimate beneficial interest in the shares, and this, notwithstanding the fact that the record-holder was himself beneficially interested, and that the shares had been put in his name, for proper and legitimate purposes, with the approval of the other parties in interest. We cannot give our assent to this view. The statute of 1880 provides that the ratification may be made either in writing, "signed and acknowledged by ⁷⁵⁷ such stockholders or by resolution duly passed at any regularly called stockholders' meeting." It will, of course, not be questioned that, whichever of these methods be followed, the individuals authorized to ratify will be the same. If given persons form two-thirds of the stockholders authorized to vote at a stockholders' meeting, they may act as stockholders in signing and acknowledging a written ratification. The general rule is that the test of the right to vote as a stockholder at corporate meetings is the ownership of shares, as disclosed by the proper record books of the corporation: 3 Clark & Marshall on Private Corporations, sec. 653; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291; State v. Ferris, 42 Conn. 560; In re Argus Printing Co., 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. 347, 12 L. R. A. 781. In some jurisdictions the books furnish prima facie evidence of such right; in others, the showing of the corporate records is conclusive. In this state, so far, at least, as domestic corporations are concerned, the question seems to be definitely settled by statute. At the time of the enactment of the statute of 1880, and of the execution of the mortgage under consideration, section 312 of the Civil Code provided that "at all elections or votes had for any purpose . . . there must be a majority of the subscribed capital stock, or of the members, represented either in person or by proxy in writing. . . . Every person acting therein, in person or by proxy or representative, must be a member thereof or a bona fide stockholder, having stock in his own name on the stock-books of the corporation at least ten days prior to the election." Since the section covers not only elections, but all votes, we take it (although this precise point is not here involved, and is consequently not decided) that the words "ten days prior to the election" are to be read, in the case of a vote for a purpose other than an election, as referring to a period prior to the meeting at which the vote is had. The section is sufficiently broad to cover a vote taken at a meeting of stockholders called under the act of 1880. At such meeting, the right to vote would reside in every "bona fide stockholder, having stock in his own name on the stock-books of the corporation ten days prior to the" meeting, or, at least, at the time of the meeting. That Hodson was such stockholder is not to be doubted. In Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 56 Am. St. Rep. 119, 47 Pac.

582, 35 L. R. A. 309, this court held that the requirement of section 312 that ⁷⁵⁸ the person voting be a "bona fide" stockholder authorized an inquiry into the character of the holding. In that case the ruling was that where the real owners of stock had, for the sole purpose of avoiding statutory liabilities, caused the stock to be registered in the names of persons having no interest in it, the nominal holders were not entitled to vote at an election for directors. But the court observed that the right to vote is, by the code section, conferred upon "stockholders," not upon "owners" of stock, and recognizes that one may be a "bona fide" stockholder without having the sole, or, indeed, any beneficial interest in the shares. "One may," says the court, "be a bona fide stockholder without being the owner of the stock. He may have caused himself to be registered as a stockholder in the utmost good faith, both toward the corporation and also toward his fellow-stockholders, and yet he may not be the owner of the stock. . . . It may be placed in the name of one as trustee to hold under an express trust, without any interest in the stock, but for the sole purpose of applying the income or disposing of the proceeds of its sale according to the terms of the trust. It may be the property of an estate, and transferred into the name of the executor. In all such cases the transfer would be in good faith, and the person in whose name it was registered would be a 'bona fide' stockholder." The relations between the plaintiff Van Ee and Hodson were such as to make it entirely natural and proper that the stock should stand in Hodson's name. The plaintiff's interest in the shares was contingent and indefinite. Under the terms of the contract of February, 1898, the plaintiff might receive full payment in money, and, in that event, would not be entitled to any stock. Van Ee's agreement with Hodson was, that the two should be equally interested in any shares remaining after the payment of \$400,000 to plaintiff. At the time of the execution of the mortgage, neither Van Ee nor the plaintiff corporation had anything more than an uncertain, future, and contingent interest in an unascertainable number of shares of the stock. The existence of these equities, indefinite in extent, did not so affect the bona fides of Hodson's holding of the stock, as to deprive him of the rights vested by law in a stockholder: See *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225. The case is in no way analogous to that of a mere nominal holder, or "dummy." At the ⁷⁵⁹ date of the mortgage it would not have been possible for the plaintiff or Van Ee to show, as against Hodson, the right to a transfer of a single share.

We need not here consider whether section 312 of the Civil Code is applicable to the proceedings of foreign corporations. Even if the section be intended to prescribe a rule for the

management of California corporations merely, it may well be looked to for aid in ascertaining the legislative intent in the enactment of the statute of 1880, which, as has been held, governed foreign as well as domestic mining corporations in their dealings with mining property situate in California: *Pekin Min. etc. Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679; *Williams v. Gaylord*, 186 U. S. 157, 22 Sup. Ct. Rep. 798, 46 L. ed. 1102. The word "stockholder" is used in both the code section and the act of 1880, and the interpretation given to the word in the one enactment is presumably applicable to the other. If we were to hold that section 312 has no application here, the question would be, simply, whether Hodson was a stockholder. We have already stated our reasons for concluding that he was a "bona fide stockholder." A fortiori, he was, if the requirement of bona fides be omitted, a "holder" of two-thirds of the stock.

The contention that, under the act of 1880, a ratification must be made by the persons owning the ultimate beneficial ownership in two-thirds of the stock seems to be founded on a statement in *Lacy v. Gunn*, 144 Cal. 511, 78 Pac. 30. The opinion in that case contains this declaration: "It is the actual owners of the stock, and not those who appear to be so, who are under the protection of the statute, and whose ratification or consent is required." This expression, like all declarations made by a court in disposing of a controversy, is to be read in the light of the facts considered. The court was examining the validity of a transfer by a mining corporation of mining property, assented to by the actual owners of two-thirds of the stock. The transfer was upheld on the theory that, as the act was for the benefit of stockholders, the purpose of the law was satisfied if the transfer had the approval of the requisite proportion of those really having the beneficial interest in the stock. This was a liberal and broad construction, adopted with a view to the establishment of rights acquired and claimed in good faith. But there was no intention of declaring that the stockholders and the corporation would not be equally ⁷⁶⁰ bound by the ratification of those whom they had invested with the actual legal title to the stock. The latter are the persons authorized, under the statute, to act in the matter, although, in favor of parties claiming under the corporate conveyance, the courts may look behind the apparent ownership and sustain a ratification made by the beneficial owners.

It follows, from these views, that the findings against the validity of the mortgage or deed of trust are not sustained by the evidence. These findings furnish support for the conclusions that the cross-complainants are not entitled to a foreclosure, and that they are entitled to a money judgment for the amount actually advanced. If the mortgage be valid, the

judgment must direct a sale for the amount of the debentures and the charges secured.

The decree must, therefore, so far as it embodies these conclusions, be reversed, as must the order denying the cross-complainants' motion for a new trial. It is urged that, instead of awarding a new trial, this court should direct the court below to enter a decree of foreclosure on the findings made. This claim is put upon the ground that, regardless of the alleged want of ratification of the mortgage, and its consequent invalidity, the corporation is estopped, under the facts found, to deny the binding effect of its attempted act, under which it received and has retained large sums. If the mortgage in fact lacked the assent of the requisite number of stockholders, we think the doctrine of estoppel cannot be applied so as to give the instrument validity. The statute of 1880 makes the stockholders "a component part of the power to make a mortgage effective": *Curtin v. Salmon River etc. Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552. If the directors could, without the assent of the stockholders, so act as to bind the corporation in matters in which such assent is made necessary, the purpose of the statute, i. e., the protection of stockholders, would be nullified. We do not say that there may not be circumstances under which the stockholders could be held estopped to rely on the want of ratification, but merely that such estoppel cannot be predicated upon the acts of the corporation or the directors alone. The finding upon which appellants rely relates solely to the conduct of the corporation.

A further ground is urged by cross-complainants for directing a judgment in their favor, to wit, that the pleadings admit ⁷⁶¹ that Hodson was the record-holder of more than two-thirds of the stock and that he did acts amounting to a ratification of the mortgage. It would consume too much space to go into elaborate analysis of the pleadings. Suffice to say that we think the answers to the cross-complaint were clearly intended to raise issues on these points, and that an unduly strict construction would be required to justify an order of judgment based upon the theory that there were no such issues. Nor do we think the findings on this point such as to justify a judgment of foreclosure.

The respondents suggest, as a ground for upholding the judgment in as far as it denies foreclosure, the point that the mortgage should be held invalid for the reason that it was executed to Hodson as one of the trustees and that Hodson himself was a director whose vote was necessary to authorize the execution of the mortgage. A sufficient answer to the point is that this defense was not within the issues. All of the pleadings in effect admitted the authorization and making of the deed of trust, and based their objections to its validity

solely on the ground that it did not have the ratification of the stockholders as required by the statute of 1880.

The third appeal (No. 1764) may be briefly disposed of. That is the appeal of the British corporation and of Van Ee from that part of the judgment whereby the cross-complainants recover from the British corporation the amount of the advances made upon the faith of the debentures. It will be unnecessary to refer specifically to the grounds upon which this appeal is based. As we have shown in discussing the appeal of the cross-complainants (No. 1744), this part of the judgment must fall with the granting of a new trial upon the issues affecting the foreclosure of the mortgage.

Accordingly, the following orders will be entered upon the respective appeals.

In No. 1744: The portions of the judgment appealed from and the order denying a new trial are reversed.

In No. 1750: The portions of the judgment appealed from are affirmed.

In No. 1764: The portions of the judgment appealed from are reversed.

Shaw, J., Angellotti, J., Melvin, J., Henshaw, J., and Lorigan, J., concurred.

THE WAIVER OF THE VENDOR'S LIEN.

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I. An Appreciation of Two Recent California Cases.

The two cases, *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 737, ante, p. 165, 110 Pac. 123, and *Finnell v. Finnell*, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740, go hand in hand on the question of the waiver of vendor's lien—the one establishing, the other denying, a claim for it. In each the opinion is marked by the slow steps

of sound reason, whose measure is nearly throughout compelling. In the latter case, that of Mr. Justice Angellotti conveys much of the learning to be found in the case-law of the subject, while in the later case Mr. Justice Sloss supplies the complement, and yet—for it would be fulsome to call the opinions faultless—there appears to have been one aspect of the highly interesting discussion, which we should have liked to see decided, left untouched in both—namely, that while a vendor may avail himself of the vendor's lien on discovering that it was his right to do so or, in the language of one of the plaintiffs "it was a new trick to him," can he by his conduct or speech, while ignorant of his right under the code or other law, disentitle himself, by estoppel or otherwise, from the right to exercise it, or, in other words, can he take advantage of his own ignorance of the law? The question is fraught with doubt and difficulty commensurate with its importance, and we purpose by the light of the two cases referred to inquiring into the origin of the manner of the vendor's lien, its characteristics, its uses and abuses, how it may be exercised, and how it may be lost. A subject of such vast importance has not been hitherto neglected in this series of reports. To the case of *Lagow v. Badollet*, 1 Blackf. 416, 12 Am. Dec. 258, is appended a monographic note on the subject of vendor's lien, its waiver and its transfer; one to *Schnebly v. Ragan*, 7 Gill & J. 120, 28 Am. Dec. 195, on the same subjects; one to *Bizzell v. Nix*, 60 Ala. 281, 31 Am. Rep. 38, on the effect of the statutes of limitation on such liens; one to *Kent v. Gerhard*, 12 R. I. 92, 34 Am. Rep. 612, on the lien as against a married woman; and one to *Burgess v. Fairbanks*, 83 Cal. 215, 17 Am. St. Rep. 230, 23 Pac. 292, on the vendor's remedy and right of action. In dealing with the subject throughout we use the term "vendor" as implying the seller of land or some interest in it, and vendor's lien as the lien of the vendor for the unpaid purchase money, he having executed the conveyance of the land and delivered it to the vendee. As one of the main objects of these notes is to bring the learning on the whole area of the subject up to the present date, we shall see, first, what a vendor's lien is, how it is created, and what is the effect of waiving it.

II. The Vendor's Lien.

a. **Eliminatory.**—Our readers must be charitable in their appreciation if we begin to tell them what a vendor's lien is by showing first what it is not; but the process of elimination will save ultimately references to a so-called lien which we desire to remove from the present field of criticism. That which we desire to remove from the purview of the present note is that security which the vendor of real property has while he holds the legal title under an unexecuted contract for the conveyance of lands upon payment of the purchase money. This is very often styled a vendor's lien, but it is improperly designated. Where the vendor holds the legal title under such a contract for the conveyance of land upon the payment of the purchase money, the transaction shows upon its face that he holds it as security. In the case of *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. 708, 26 Pac. 789, 13 L. R. A. 187, this particular form of the transaction was discussed at length and satisfactorily disposed of; and although it is repeated there and on the authority of *Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72, the court was only too correct in saying that there is perhaps no subject of equity jurisprudence discussed in the

books upon which there is a greater diversity of opinion than exists in relation to the origin, nature and effect of a vendor's lien, against whom and in whose favor it avails, and how it may be discharged or waived. The definitions given and principles applied are not reconcilable. In the case of the so-called lien the vendee cannot prejudice the title or in any way divest it except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security: *Stevens v. Chadwick*, 10 Kan. 406, 15 Am. Rep. 340. The titles "imperfect" or "equitable" mortgage are more appropriate than "vendor's lien": *Moore v. Lackey*, 53 Miss. 85. We do not intend to consider it further here beyond pointing out that the operation of such a transaction is that the land is by express contract held in pledge for the payment of the purchase price, and the notes and contract are deemed an instrument in the nature of a mortgage. It is a lien by contract and an incident to the debt, and the assignee of notes given for the purchase money is entitled to the benefit of the security, just like the assignee of a note secured by mortgage: *Lowery v. Peterson*, 75 Ala. 109; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187; *Wright v. Troutman*, 81 Ill. 374; *Lagow v. Badollet*, 1 Blackf. 416, 12 Am. Dec. 258; *Bradley v. Curtis*, 79 Ky. 327; *Adams v. Cowherd*, 30 Mo. 458; *McClintic v. Wise's Admrs.*, 25 Gratt. 448, 18 Am. Rep. 694. The view we have taken has been strenuously resisted by a number of quite respectable authorities, among them Mr. Justice McFarland, who, in his dissenting opinion to *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187, says that he was aware that some recent text-writers spoke of the transaction as very similar to "mortgagee and mortgagor," and that although it "is often spoken of in the cases as a vendor's lien," yet, in their opinion, such language is a "misuse of terms"; and that, although "it has been said, in England and American decisions, that the vendor's lien may arise before conveyance as well as after," yet that this saying "confounds legal notions which are essentially different." The learned judge dissents from these views, and cites *Sparks v. Hess*, 15 Cal. 186, in his favor: "This is not a suit to enforce a vendor's lien after conveyance executed, but to enforce such lien when the contract of sale remains unexecuted." For the purposes of this note, however, we do not accept the learned judge's dissenting opinion.

b. Definitions.

1. **Vendor's Lien.**—A vendor's lien in the sense in which we are using it in this note is a lien implied by law in favor of a vendor who has parted with the legal title and taken no security for the purchase money. It is the creature of the courts of equity, founded upon the equitable presumption that where the vendor has parted with his title and taken no security for the purchase money, the parties intended that the property itself should remain as a pledge for the payment of the purchase price of the land. The lien thus created by implication is not a specific, absolute charge upon the property; it is personal to the vendor, and does not pass by a transfer of his claim for the purchase money. The fee is in the purchaser, and he may defeat the lien by a conveyance to a bona fide purchaser for value

without notice: *Sparks v. Hess*, 15 Cal. 186; *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187; *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505. The definition of the term seems to have attracted more attention in California than in other states, and we find careful expressions of opinion running through the cases. In a very early case—*Porter v. Brooks*, 35 Cal. 199—*Sawyer, C. J.*, in concurring specially with the court on a question of a writ of attachment against the property of the defendant to whom the purchaser had conveyed property, the whole of the purchase money not being paid on the original sale, said that so shadowy a right as the claim of the vendor of land to have the unpaid purchase money after default charged upon the land by a court of equity was not a lien within the provisions of the practice act, which precluded the right to attach. "It is not a lien acquired by express contract, but is one of a very imperfect character, at least inchoate, not recognized at all in a court of law, where attachments are enforced, but fastened upon the land by a court of equity," which "seems to proceed upon the sole ground that it is inequitable for a party to retain the land without paying the consideration. . . . It is a right in posse, rather than in esse, which may be divested by the acts of the vendee without the fault of the vendor, before he can be in a position to render it available. It is a mere contingent privilege, personal to the vendor himself. . . . The vendor has no present indefeasible right to have his debt charged upon the land. It is not a present specific lien." This language is practically adopted in *Fitzel v. Leaky*, 72 Cal. 477, 14 Pac. 198; *Claiborne v. Castle*, 98 Cal. 30, 32 Pac. 807.

Section 3046 of the California Civil Code provides that "one who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid, and unsecured otherwise than by the personal obligation of the buyer"; and section 3048 says that the lien so described in section 3046 is valid against everyone claiming under the debtor, except a purchaser or encumbrancer in good faith and for value. The lien, however, does not owe its origin to statutory enactment. It has been generally recognized by the courts of chancery: *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 737, ante, p. 165, 110 Pac. 123. It is not the result of any agreement or any intention of the vendor or vendee, but is a simple equity raised by courts for the benefit of vendors of real estate: *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; and where there is nothing to indicate an intention one way or the other, the lien is presumed to exist, and is an incident of the transaction of sale: *Finnell v. Finnell*, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740. In the last-named case a very full definition may be found, which has been summarized to read that one who sells and conveys real property to another acquires at the time of the sale, unless he waives it, a vendor's lien on such property, for so much of the purchase price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, which lien is valid against all persons except purchasers and encumbrancers in good faith and for value.

These definitions have been adopted with more or less slight deviations which do not affect the interpretation, but all of them emphasizing that the lien is lost where any security is taken on the land or otherwise for the whole or part of the purchase money, unless, of

course, there is an agreement to the contrary: *Stephens v. Shannon*, 43 Ark. 464; *McKeown v. Collins*, 38 Fla. 276, 21 South. 103; *Johnson v. McKinnon*, 45 Fla. 388, 34 South. 272; *Blomstrom v. Dux*, 175 Ill. 435, 51 N. E. 755; *Lewis v. Shearer*, 189 Ill. 184, 59 N. E. 580; *Shrimsher v. Newton*, 3 Ind. Ter. 555, 64 S. W. 534; *Pierson v. David*, 1 Iowa, 23; *Balow v. Teutonia Farmers' Mut. Fire Ins. Co.*, 77 Mich. 540, 43 N. W. 924; *Graham v. Moffett*, 119 Mich. 303, 75 Am. St. Rep. 393, 78 N. W. 132; *Servis v. Beatty*, 32 Miss. 52; *Jones v. Rush*, 156 Mo. 364, 57 S. W. 118; *Morgan v. Dalrymple*, 59 N. J. Eq. 22, 46 Atl. 664; *Tiernan v. Beam*, 2 Ohio, 383, 15 Am. Dec. 557; *Gee v. McMillan*, 14 Or. 268, 58 Am. Rep. 315, 12 Pac. 417; *Fulton v. National Bank of Denison*, 26 Tex. Civ. App. 115, 62 S. W. 84; *Parlin & Orendorff Co. v. Davis' Estate* (Tex. Civ. App.), 74 S. W. 951; *Wilson v. Davisson*, 2 Rob. (Va.) 384; *Chilton v. Braiden*, 2 Black, 458, 17 L. ed. 304; *Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509, 14 Sup. Ct. Rep. 842, 38 L. ed. 802; *Venner v. Farmers' Loan & Trust Co.*, 90 Fed. 348, 33 C. C. A. 95.

A vendor's lien is superior to any encumbrance taken on the land with knowledge that the purchase price has not been paid: *Bennett v. Murphy*, 123 App. Div. 102, 108 N. Y. Supp. 231. In the principal case (ante, p. 165), we find it expressed that the right of lien afforded to the vendor of enforcing payment of the consideration against the property conveyed is a personal one, but may be waived and relinquished without consideration and without a writing, and once waived, it is gone forever.

2. **Waiver.**—Having defined the object of the waiver, it is highly important to have an accurate understanding of the judicially interpreted term "waiver" as distinguished from "equitable estoppel." The terms are so frequently misused and substituted, the one for the other, that it is little wonder they creep into text-books, and opinions uncorrected. In *Maloney v. North Western Masonic Aid Assn.*, 8 App. Div. 575, 40 N. Y. Supp. 918, Ward, J., says that "waiver" belongs to the family of "estoppel" and often, in such cases, they are convertible terms. If the distinction is observed by the light that waiver is active and estoppel is passive, these terse attributives will act as unfailing guideposts. The distinction is well marked by Goode, J., in *Fairbanks, Morse & Co. v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113. The learned judge points out that an equitable estoppel arises when the purpose or natural consequence of a person's representations or conduct is such as to induce another person to do or to omit some act, the doing or omission of which would turn out to his detriment, and to the inducing party's benefit if the latter were permitted to take advantage of it, and such an estoppel more often carries the implication of fraud than waiver does: *Bales v. Perry*, 51 Mo. 449; *St. Louis v. Schulenberg & Boeckler Lumber Co.*, 98 Mo. 613, 12 S. W. 248; *Galbreath v. Newton*, 30 Mo. App. 380. (We have already furnished notes dealing with equitable estoppel so recently as to the case of *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88, and in this volume, to *Flowers v. Logan County*, 138 Ky. 59, post, p. 347, 127 S. W. 512.) The opinion in *Fairbanks, Morse & Co. v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113, continues: "Waiver depends on what one intended to do himself; estoppel rather on what he caused his adversary to do. There may be a valid waiver of rights of a certain kind (that is, formal as distinguished from substantial rights) without

consideration, showing that waiver differs from contract. . . . But where substantial rights are involved, we apprehend that a waiver must be supported by a consideration, to be valid: *Haseltine v. Ausherman*, 87 Mo. 410; *Fulkerson v. Lynn*, 64 Mo. App. 649."

The generally adopted definition of a waiver is that it is an intentional abandonment or relinquishment of a known right: *First Nat. Bank v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980; *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116, 7 Am. St. Rep. 288, 13 Atl. 673, 17 Atl. 411; *Ward v. Metropolitan Life Ins. Co.*, 66 Conn. 227, 50 Am. St. Rep. 80, 33 Atl. 902; *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571, 18 N. E. 747, 2 L. R. A. 336; *Bucklen v. Johnson*, 19 Ind. App. 406, 49 N. E. 612; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Warren v. Crane*, 50 Mich. 300, 15 N. W. 465; *Supreme Lodge K. P. v. Quinn*, 78 Miss. 525, 29 South. 826; *Michigan Savings & Loan Assn. v. Missouri, K. & T. Trust Co.*, 73 Mo. App. 161; *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *Masons' S. Co. v. Jones*, 58 App. Div. 231, 68 N. Y. Supp. 806; *Liverpool & L. & G. Ins. Co. v. T. M. Richardson Lumber Co.*, 11 Okl. 585, 69 Pac. 938; *Dale v. Continental Ins. Co.*, 95 Tenn. 38, 31 S. W. 266; *Reed v. Union Cent. Life Ins. Co.*, 21 Utah, 295, 61 Pac. 21; *Christenson v. Carleton*, 69 Vt. 91, 37 Atl. 226; *Dey v. Martin*, 78 Va. 1; *Peninsular Land Transp. etc. Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237; *Fraser v. Aetna Life Ins. Co.*, 114 Wis. 510, 90 N. W. 476; *United Firemen's Ins. Co. v. Thomas*, 82 Fed. 406, 27 C. C. A. 42, 47 L. R. A. 450; *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427, 43 C. C. A. 270; *Cable v. United States Life Ins. Co.*, 111 Fed. 19, 49 C. C. A. 216; *Sidway v. Missouri Land & Livestock Co.*, 116 Fed. 381.

We have selected the following as among the best of the longer definitions: A waiver, in a general sense, is the voluntary and intentional abandonment, renunciation or relinquishment of a known legal right: *Caulfield v. Finnegan*, 114 Cal. 39, 21 South. 484.

In *Walker v. Wigginton's Admr.*, 50 Ala. 519, a waiver, as the word is employed in section 1779 of the code, was defined by Peters, C. J., as follows: "To waive, is to give up, to abandon and relinquish. It leaves the thing abandoned as though it had never been."

A waiver is but a neglect or omission to insist upon a matter of which a party may take advantage at the time when it ought to be done, so that it must operate as a trap to the other party to insist upon it afterward: *Lyman v. Littleton*, 50 N. H. 42.

Bishop, in his work on Contracts, says, at section 792: "Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistently with the existence of the right or of his intention to rely upon it: thereupon he is said to have waived it; and he is precluded from claiming anything by reason of it afterward": *Smiley v. Barker*, 83 Fed. 684, 28 C. C. A. 9.

"A waiver of the right to rescind, or an election not to rescind, is either a matter of express declaration, or, as is more frequently the case, arises as a matter of necessary inference from the acts or conduct of the person against whom it is asserted. Where, after the discovery of the fraud, the person claiming the right to rescind continues to deal with the property as if he were the owner, and does acts which are consistent only with an affirmation of the transaction attacked, he

must be held to have elected not to rescind": *Hallahan v. Webber*, 15 Misc. Rep. 327, 37 N. Y. Supp. 613.

An English definition will serve to conclude these illustrations. In *Clough v. London & N. Ry. Co.*, L. R. 7 Ex. 26, 41 L. J. Ex. 17, 25 L. T. 708, 20 W. R. 189, as cited in *Hallahan v. Webber*, 15 Misc. Rep. 327, 37 N. Y. Supp. 613, the court, in referring to cases of rescission of contracts for fraud, says: "In such cases the question is, Has the person on whom the fraud was practiced, having notice of the fraud, elected not to avoid the contract? Or has he elected to avoid it? Or has he made no election? We think that, so long as he has made no election, he retains the right to determine it either way, subject to this: that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position, even of the wrongdoer, is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and, when the lapse of time is great, it probably would, in practice, be treated as conclusive evidence to show that he has so determined."

c. *Intention of the Vendor.*—Having in view the definitions given and that the vendor's lien lives in suspense until such time as the vendor calls it rightly into existence, the state of the vendor's mind with regard to it is of the first importance. The main principle that governs courts of equity in enforcing the vendor's lien is the implied agreement between the vendor and the vendee that the vendor shall hold a lien on the land sold for the payment of the balance of the price. Until recent years the vendor's lien was not recognized by statute and is not known to the common law at all. By some writers its origin is ascribed to the Roman law, whence it was imported into England, there to take root in the system of equity jurisprudence and since entirely governed by equitable principles. Assuming, then, the lien ready to the hand of the vendor, if he chooses to renounce it, as he may, if he makes it appear that he does not rely upon it, the implied agreement for the lien is obliterated, and the court will hold it waived: *Kirkham v. Boston*, 67 Ill. 599; *Moshier v. Meek*, 80 Ill. 79. He may make his intention known by express agreement to waive his lien or by his conduct impliedly release it: *Conover v. Warren*, 1 Gilm. 498, 41 Am. Dec. 196; *McLaurie v. Thomas*, 39 Ill. 291. The latter is more frequently the case, and the larger number of cases dealing with the waiver of the lien will be found based upon the legal effect of the vendor's acts. Any act or declaration of the vendor which shows he does not rely upon or has abandoned the lien operates to destroy it or prevent its attaching to the land. Its creation and deletion are alike unique. It is created without the express agreement of the parties, and even when they do not know that such a lien exists or is created by operation of law, or rather of equity. *Pomeroy*, in his *Equity Jurisprudence*, thus states the rule, section 1259: "The grantor may, of course, waive his lien. Whether he does so is a matter of intention, which must appear either expressly, or by acts directly inconsistent with its existence and indicating a clear intent to waive." The intention need not be expressed in writing. The sensitive nature of the equitable production makes fatal to it the inference that the vendor does not place reliance upon it. "As it is inferred to exist, anything that indicates that it is not relied on or is

waived may be shown to rebut the inference": *Moshier v. Meek*, 80 Ill. 79. Not being in writing, nor created by contract, it does not require writing to release it: *Hightower v. Rigsby*, 56 Ala. 126; *Moshier v. Meek*, 80 Ill. 79; *Anderson v. Donnell*, 66 Ind. 150; *Stuart v. Harrison*, 52 Iowa, 511, 3 N. W. 546; *Pillow v. Helm*, 7 Baxt. 545. The fact alone that words constituting the lien were struck out of the document evidencing the sale does not show an intention to abandon the lien: *Springman v. Hawkins* (Tex. Civ. App.), 113 S. W. 966. In *McKinnon v. Johnson*, 54 Fla. 538, 45 South. 451, the subject of intention is clearly defined by the court, which says that the equitable lien for the purchase money which the law implies in the absence of an express lien or other remedy, is for the benefit of the grantor of land, and it may be waived. Such waiver may be expressly made, or it may be inferred from facts and circumstances. Any conduct on the part of the grantor tending to show that he does not rely solely upon the legal implication in his favor may operate as a waiver of the grantor's lien. In the principal case, Sloss, J., puts it that if the vendor does any act manifesting an intention on his part not to rely on the lien given by law for the purchase money, such as taking security therefor without an express agreement that he may still have his lien, it will cease to exist. To the same effect is *Finnell v. Finnell*, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740, which adds that mere absence of knowledge on the part of the vendor, that he has a lien, or the absence of any intention to rely upon it, though he knows it exists, is not equivalent to a waiver of the lien.

d. **Express Waiver.**—The case of *Moshier v. Meek*, 80 Ill. 79, may be regarded as a leading authority on express waiver, and there are comparatively few authorities from which may be gathered further information on that part of the subject. It almost follows that there should have been less litigation in cases where the waiver was express, and in what litigation did take place the proof was correspondingly easier. Any direct statement—any act manifesting a clear intention not to rely on the lien will be sufficient to extinguish or discharge it. The authorities increase when the question of the waiver cannot be proven by express words, and is left to be inferred from the behavior of the claimant with regard to the subject matter of the lien.

In a very recent case—*In re V. & M. Lumber Co., Inc.*, 182 Fed. 231—the vendor expressly waived his lien in part; but understood at the time of signing the deed that it operated only as to innocent purchasers, and he then intended to insist on his lien as between the original parties, with certain exceptions as to the right to cut lumber on the part of such purchasers or a corporation to be formed by and composed of them to operate a mill. The court held that he had not waived his lien against his vendees, and inasmuch as the corporation formed consisted of the vendees and their wives, there was no waiver as to them nor as to the estate in bankruptcy of the corporation, and the vendor had expressly retained his lien in a manner entirely fair and consistent with the transaction. Where a vendor has expressly agreed to waive his lien, he cannot assert it afterward against a subsequent mortgagee: *Wilson v. Shocklee* (Ark.), 126 S. W. 832.

e. **Implied Waiver.**—As we have indicated, the implication that the vendor has waived his lien may arise from his speech or conduct wherever it evidences an intention on his part to pursue what may appear to him a better method of obtaining his purchase money. We

shall proceed to examine those acts which in the eyes of the courts of equity amount to the manifestation of an intention inconsistent with the life of the lien. In *re Brentwood Brick & Coal Co.*, L. R. 4 Ch. D. 562, 46 L. J. Ch. 554, 36 L. T. 343, 25 W. R. 481, is an interesting English case wherein the court were unanimously of opinion that where a vendor's acts showed that he intended to rely on other funds for payment of his debt, and did not rely on the security of the land sold by him, the lien was waived. For example, in *Franklin v. McDonald*, 163 Ill. 139, 45 N. E. 212, a vendor whose purchase money was still unpaid allowed the deed of the land sold to be recorded for the purpose of the vendee obtaining a loan on it. No other conclusion could be arrived at than that such an act was a waiver of his lien. Mere absence of knowledge on the part of the vendor that he has a lien, or the absence of any expressed intention to rely upon it, though he knows it exists, is not equivalent to a waiver: *Finnell v. Finnell*, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740.

1. **Waiver not Presumed.**—While, as we shall show, the waiver of the vendor's lien will not be presumed, it is interesting to note the abundant caution with which the doctrine on which the lien is founded was received in this country, and the history of a principle is often of invaluable assistance to its expounder. So far back as 1822 the case of *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. ed. 393, is to be regarded as one of the first, if not the first, to deal with it, and the opinion of Chief Justice Marshall lends additional importance to the record which discloses the discussion of the efficacy of a vendor's lien on its assertion against creditors. The learned judge opens the question by saying that though the lien of the vendor be established as "a natural equity," still it is a secret, invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. "To the world the vendee appears to hold the estate, divested of any trust whatever; and credit is given to him, in the confidence that the property is his own in equity, as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of bona fide creditors." After reviewing the English cases, the opinion concludes with the status of creditors in this country. "In the United States the claims of creditors stand on high ground. There is not, perhaps, a state in the Union, the laws of which do not make all conveyances not recorded, and all secret trusts, void as to creditors as well as subsequent purchasers without notice. To support the secret lien of the vendor against a creditor who is a mortgagee, would be to counteract the spirit of these laws." The natural distrust by the courts of these secret liens as they are properly called did not, however, as might have been expected, raise any presumption against them. We could as easily have understood a judicial attitude betokening that where the vendor had executed the usual form of conveyance reciting that in consideration of a certain named amount of money duly paid to the vendor, the vendor conveyed the land to the vendee, the presumption should be that the vendor had been paid the purchase price, and that no such

secret lien existed. It would be a different thing if the deed expressed, as in *De Cordova v. Hood*, 17 Wall. 1, 21 L. ed. 587, that the consideration was yet "to be paid," because in such case he who subsequently deals with the land has been put upon notice. In such cases as *Garson v. Green*, 1 Johns. Ch. 308, and *Camp v. Gifford*, 67 Barb. 434, we find that it lies on the vendee to show that the lien does not exist; in *Dubois v. Hull*, 43 Barb. 26, that the party disputing the lien must show that the vendor agreed to rest on other security and to discharge the lien. In *Binghampton Sav. Bank v. Binghampton Trust Co.*, 85 Hun, 75, 32 N. Y. Supp. 657, it is clearly laid down that the law presumes an intention on the part of the vendor to retain his lien for the purchase money, and imposes upon the purchaser the burden of proving the contrary. In *Hubbard v. Buck*, 98 Ala. 440, 13 South. 364, the presumption is again stated in these words: "In every sale and conveyance of lands, when the purchase money is not paid, although the deed may recite the payment of the purchase money, without any special contract to that effect, upon principles of equity and good conscience, the law presumes the reservation of the vendor's lien, unless the terms of the contract of sale, or the attendant circumstances of the transaction, satisfactorily show it was purposely excluded, and the vendor relied upon the personal credit of the vendee, or other security was taken and relied upon by the vendor."

Ogden v. Thornton, 30 N. J. Eq. 569, is a very strong case in favor of the presumption, in that the plaintiff did not, in her bill, pray for the enforcement of her lien, but for the setting aside of a deed, the consideration money expressed in it not having been paid. The court of its own motion made the necessary amendments to the pleadings, so that the enforcement of her lien should be within the court's power, and decreed the lien accordingly. Notwithstanding the dislike of the courts to secret dealings, once the vendor's lien is in evidence, the burden of disproving it rests on the objector, and if the proof of the abandonment of the lien is not decisively clear, the lien will stand: *Selna v. Selna*, 125 Cal. 357, 73 Am. St. Rep. 47, 58 Pac. 16; *Wilson v. Lyon*, 51 Ill. 166. In *Fisher v. Shropshire*, 147 U. S. 133, 13 Sup. Ct. Rep. 201, 37 L. ed. 109, Chief Justice Fuller puts it that while the vendor's lien may be defeated if the grantor or vendor do any act manifesting an intention not to rely on the land for security, yet this must be an act substantially inconsistent with the continued existence of the lien, and cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance. The onus of proving the waiver, therefore, is on the party alleging it, and he must prove it by a preponderance of evidence: *Crampton v. Prince*, 83 Ala. 246, 3 Am. St. Rep. 718, 3 South. 519; *Wilson v. Lyon*, 51 Ill. 166; *Hays v. Horine*, 12 Iowa, 61, 79 Am. Dec. 518; *Dodge v. Evans*, 43 Miss. 570; *Campbell v. Baldwin*, 2 Humph. 248; *Briscoe v. Bronaugh*, 1 Tex. 326, 46 Am. Dec. 108; *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60; *Coles v. Withers*, 33 Gratt. 186. The evidence by which the waiver is established may be circumstantial: *Henderson v. Samuels*, 7 Tex. Civ. App. 351, 25 S. W. 470. Although the acceptance of collateral security is sufficient to raise the presumption of an intention to give up the lien, this presumption may be rebutted by evidence: *Griffin v. Blanchard*, 17 Cal. 71; *Lord v. Wilcox*, 99 Ind. 491; *De Cordova v. Hood*, 17 Wall. (U. S.) 1, 21 L. ed. 587. But it is always open to the vendee to show an agreement or settlement evidencing an intention to waive the lien: *McCarty v. Williams*, 69 Ala. 174. The nonexistence

of the lien is not inferable from the mere fact that the parties did not contemplate its assertion in the first instance. The act manifesting an intention to waive it must be one substantially inconsistent with its continued existence: *Finnell v. Finnell*, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740. There can be no suggestion of the waiver of the lien where the parties have dealt in full knowledge of the fact that the vendor's lien exists: *Eisman v. Whalen* (Ind. App.), 79 N. E. 514, 1072.

III. Operation and Effect.

a. Taking Security from a Third Person.—Before recording the judicial conclusions on the effect of taking security for a vendor's lien, let us take what we may call a business man's view of the facts. A vendor sells his land and receives from his vendee one-half of the purchase price. He executes and delivers a conveyance to him, relying on his vendor's lien for the balance. At this stage we do not concern ourselves at all with the rationale of this transaction, but the business man's view must be that it is essentially a stupid one. Why a sane vendor should put it in the power of a shrewd vendee to record the deed and sell to a bona fide purchaser without notice and thus defeat the lien, we cannot understand. The law affords several safe and this one unsafe method of dealing, and why should it ever be chosen, and having been chosen be supported by the countenance given to the presumption in favor of the vendor's lien, is one of those eccentricities which in the eyes of some lend charm to the practice of the legal profession. However, such being the condition of affairs, and the vendee not having dealt with the land, the vendor demands the balance of the purchase price, and the vendee, we will assume, is unable to pay it, but offers the security of some third person. At this stage the vendor can enforce his lien, but in lieu of so doing he chooses to accept the third person's security in its stead. Business and common sense alike characterize this acceptance as a waiver of his vendor's lien. In the words of the old saying, the vendor cannot eat his cake and have it, and if he prefers the extra security, then he must reasonably be supposed to have waived that which the law had previously created for him. Let us now see how far this view has commended itself to the United States courts, leaving out of consideration the English authorities which, when not in conflict, are to the effect that the taking of such security from a third person does not create a waiver of the vendor's lien.

In *Gilman v. Brown*, 1 Mason, 191, Fed. Cas. No. 5441, Mr. Justice Story says that how far the taking of a distinct security for the purchase money shall be held to be a waiver of the vendor's implied lien was at that time a vexed question. And the learned judge clearly shows that there existed no good reason for the doubt, which appears to have been raised chiefly by Lord Eldon in *Mackreth v. Symmons*, 15 Ves. 329, 10 R. R. 85, an English leading case. In that justly celebrated decision Lord Eldon gives a fine historical review of all the cases, but with his characteristic inclination to doubt, hesitated to come to a definite conclusion, and left the law in England in a most distressing uncertainty. Story is as pronounced as Eldon was reticent. He says: "On a careful examination of all the authorities, I do not find a single case in which it has been held, if the vendor takes a personal collateral security, binding others as well as the vendee, as, for instance, a bond or note with a surety or an indorser, or a collateral security by way of pledge or mortgage, that under such circumstances a lien exists

on the land itself." The learned judge then puts the case, that if the original contract is, that the purchase money shall be paid at a future day, and acceptances of third persons are taken for it, payable at such future day, or a bond with surety payable at such future day, he cannot perceive how it is possible to assert that the acceptances or bond are not relied on as security. A venerable judge in equity in Virginia, in 1795, gave utterance to the same doctrine. He said: "The doctrine that a vendor of land not taking security, nor making a conveyance, retains a lien upon the property, is so well settled as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land in the possession of the vendee, or of a purchaser with notice. But if he hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost": *Cole v. Scott*, 2 Wash. (Va.) 141. Mr. Justice Story concludes his opinion with equal emphasis, by saying that having regard to the principle upon which the original doctrine of lien is established, he has no hesitation in declaring that taking the security of a third person for the purchase money ought to be held a complete waiver of any lien upon the land. At all events, he says, it is *prima facie* evidence of a waiver, and the onus is on the vendor to prove, by the most cogent and irresistible circumstances, that it ought not to have that effect: *Gilman v. Brown*, 1 Mason, 191, Fed. Cas. No. 5441. On appeal Chief Justice Marshall said: "This is a collateral security, on which they relied, and which discharges any applied lien on the land itself for the purchase money": *Brown v. Gilman*, 4 Wheat. (17 U. S.) 255, 4 L. ed. 564. The discovery that the security taken is worthless does not resuscitate the lien: *Kendrick v. Eggleston*, 56 Iowa, 128, 41 Am. Rep. 90, 8 N. W. 786. Further reference to federal cases seems unnecessary, and in the state courts the doctrine now enunciated has been approved in *Hubbard v. Buck*, 98 Ala. 440, 13 South. 364; *Acree v. Stone*, 142 Ala. 156, 37 South. 934; *Springfield & M. R. Co. v. Stewart*, 51 Ark. 285, 10 S. W. 767; *Gard v. Gard*, 108 Cal. 19, 40 Pac. 1059; *Austin v. Pulschen*, 112 Cal. 528, 44 Pac. 728; *McKeown v. Collins*, 38 Fla. 276, 21 South. 103; *McKinnon v. Johnson*, 54 Fla. 538, 45 South. 451; *Richards v. Leaming*, 27 Ill. 431, 81 Am. Dec. 239; *Franklin v. McDonald*, 163 Ill. 139, 45 N. E. 212; *Haskell v. Scott*, 56 Ind. 564; *Robbins v. Masteller*, 147 Ind. 122, 46 N. E. 330; *Porter v. Dubuque*, 20 Iowa, 440; *McGonigal v. Plummer*, 30 Md. 422; *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; *Sears v. Smith*, 2 Mich. 243; *Fonda v. Jones*, 42 Miss. 792, 2 Am. Rep. 669; *Stevens v. Rainwater*, 4 Mo. App. 292; *Dickason v. Fisher*, 137 Mo. 342, 37 S. W. 1114; *Hazeltine v. Moore*, 21 Hun, 355; *Yeomans v. Bell*, 79 Hun, 215, 29 N. Y. Supp. 502; *Follett v. Reese*, 20 Ohio, 546, 55 Am. Dec. 472; *Palmer v. Deslauriers*, 19 R. I. 505, 34 Atl. 1108; *Campbell v. Baldwin*, 2 Humph. 248 (*Marshall v. Christmas*, 3 Humph. 616, 39 Am. Dec. 199, and *Jobe v. Chedister*, 5 Lea, 346, which are not in conflict as is sometimes averred); *Zwingle v. Wilkinson*, 94 Tenn. 246, 28 S. W. 1096; *Cresap v. Manor*, 63 Tex. 485; *Baker v. Collins*, 4 Tex. Civ. App. 520, 23 S. W. 493; *De Cordova v. Hood*, 17 Wall. (U. S.) 1, 21 L. ed. 587; *Fisher v. Shropshire*, 147 U. S. 133, 13 Sup. Ct. Rep. 201, 37 L. ed. 109; *Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509, 14 Sup. Ct. Rep. 842, 38 L. ed. 802. In a late case—*Bennett v. Murphy*, 123 App. Div. 102, 108 N. Y. Supp. 231—the principle is strongly supported that the acceptance of the note of a third person destroys the lien. In the above list of authorities two

Kentucky cases—*Burrus v. Roulhac*, 2 Bush, 39, and *Tiernan v. Thurman*, 14 B. Mon. 277—were excluded, not that they were in conflict, but the circumstances do not allow of their being cited as supporting the rule. In the former the character of the action may be gathered from the syllabus, which reads: "Two notes due to different parties, secured by a lien reserved in the same conveyance of land—neither has the priority of the other unless it is so expressed in the deed; and if the land is subjected to the payment of both notes, they share equally pro rata. But if the land is subjected to pay one note, the holder of the other not being a party to the suit, the purchaser of the land is not an innocent purchaser without notice." In the latter case—*Tiernan v. Thurman*, 14 B. Mon. 277—the doctrine is not attacked, but molded to suit the special circumstances, which were that one Thurman sold land to Harris and executed the conveyance, part of the purchase money being represented by a note. Harris sold to one Simmerman, who assigned to Tiernan, making known all the facts, and in place of taking Simmerman's note to himself, took it direct to Thurman and obtained his own note from Thurman. The lien was not extinguished, the court properly holding that the acquittance of Harris by Thurman could not prevent the lien in favor of Thurman as against Simmerman and his vendee Tiernan.

The taking of negotiable notes of a third party is, of course, a distinct and independent security, which extinguishes any implied lien for the purchase money: *Conover v. Warren*, 1 Gilm. 498, 41 Am. Dec. 196; *Boynton v. Champlin*, 42 Ill. 57; but an inchoate agreement to accept such security does not extinguish the lien. The lien is not released or waived by the taking of collateral security in every case. In *Spears v. Taylor*, 149 Ala. 180, 42 South, 1015, 13 Ann. Cas. 167, the vendor sought to enforce a lien, although the note on which his suit was based had upon it the indorsement of a surety. The court, after dealing with the question from the standpoint of intention and holding that where there is a doubt about the intention, the doubt is in favor of the lien attaching, and that the onus of proof was on the one seeking to establish a waiver, held that as the note contained these words, "It is understood that this note is given in part payment on the S. A. Spears land, better known as W. M. Sheppard Place," and also contained a description of the land, such recitals were cogent facts indicating an intention not to waive or abandon the lien, but to retain it: *Tedder v. Steele*, 70 Ala. 347; *Chapman v. Peebles*, 84 Ala. 283, 4 South. 273; *Hood v. Hammond*, 128 Ala. 569, 86 Am. St. Rep. 159, 30 South. 540.

b. **Vendee's Payment to a Third Person.**—It is competent for the vendor and vendee of land to contract that the latter shall pay the purchase price, or a part of it, to some other designated person, and, when it is so agreed, such other person may enforce against the vendee such rights as it was intended he should have. So where land is sold by title bond which provides that the whole or a part of the consideration shall be paid to a third person named, the legal title retained by the vendor inures to the benefit of that person, and he has a lien on the land for the sum required to be paid to him. Therefore, when the note of the vendee is made to one other than the vendor, the vendor's lien is not affected the same as if he had taken the note and assigned it with any intention of abandoning his lien: *Zwingle v. Wilkinson*, 94 Tenn. 246, 28 S. W. 1096; *De Bruhl v. Maas*, 54 Tex. 464; *Joiner v. Perkins*, 59 Tex. 300.

c. Transfer of the Vendee's Notes.—As has been clearly demonstrated, any act or declaration of the vendor indicating that he does not rely upon or hold the lien is sufficient to discharge it. One of the commonest of such acts is the transfer of the vendee's notes. When he transfers the notes, he is regarded as having received his pay, and the lien is gone and does not pass to the assignee: *Snyder v. Snyder*, 115 N. Y. Supp. 993. And in case the vendee sells to a person who has no notice of the lien, or is not chargeable with notice, the purchaser takes the land free from the lien of the first vendor: *Moshier v. Meek*, 80 Ill. 79. But the lien of a vendor of land, sold and conveyed, for his unpaid purchase money, evidenced by the unsecured note of the vendee on long time, is not waived by a mere conditional transfer of the note by the vendor for collection, without intention of the vendor to part with the ownership of the note, the transferee being a mere agent for collection, where it appears that the vendor, after nonpayment of the note at maturity, resumed control of it as his own, and sought foreclosure of the lien: *Nolan v. Nolan*, 155 Cal. 476, 132 Am. St. Rep. 99, 101 Pac. 520, 17 Ann. Cas. 1056.

d. Revival of Lien.—To a certain extent the question of the vendor's liability on the note which he may assign does not appear to have received the authority of a direct decision. He sells his property, executes and delivers the deed, and takes the vendee's note for so much of the purchase price as remains unpaid. His vendor's lien springs into being. He negotiates the note by indorsement. Is his lien dead or only sleeping? It is clear the indorsee has no right in the lien, and if the vendee's note is paid, there is an end to the whole transaction. But supposing that the vendee fails to meet his engagement, and the holder of the bill has recourse to the vendor as the immediate indorser, does the payment of the bill by the vendor revive the lien whose animation has been simply suspended, or is the lien judicially dead? It has been suggested, in *Lindsey v. Bates*, 42 Miss. 397, that the contingent liability of the vendor, arising from his indorsement of the note, preserves the lien, and authorizes the indorsee, in conjunction with the vendor, to enforce it by bill in equity. The court in that case appear to have received the suggestion with judicial caution, for they said that they apprehended the course suggested, and which finds authority in *Briggs v. Hill*, 6 How. (Miss.) 362, 38 Am. Dec. 441, applied more appropriately to a case where the note is transferred by the vendor to his creditor as collateral security for his debt, and where he does not part with his entire interest in the note. As we have said, this caution merely begs the question, for in the illustration given by the court the vendor has not transferred his interest in the note absolutely. He still retains it, and therefore holds the lien. In *Briggs v. Hill*, 6 How. (Miss.) 362, 38 Am. Dec. 441, however, the court was more pronounced, and said that it seemed to be admitted that the vendor, if he takes up the assigned note, may maintain his original lien, and that his indorsee, by joining his name in a suit in equity, might enforce the lien. In *White v. Williams*, 1 Paige Ch. 502, Chancellor Walworth said: "The claim of the complainant for a specific lien on the premises upon the ground that his judgment was obtained on a note given for a part of the purchase money cannot be sustained. At the time he bought the note of Kingsbury, the latter unquestionably had such a lien; but it is not pretended there was any agreement that such lien should be transferred to the complainant. If Kings-

bury could be considered as still retaining any such claim after the transfer of the note, it must be on account of his liability as indorser thereof. . . . In a recent case where the vendor had negotiated the note but was obliged to take it up himself when it fell due, Lord Eldon sustained the claim of the original vendor to a lien on the land: *Ex parte Loaring*, 2 Rose Cas. 79." In *Iglehart v. Armiger*, 1 Bland (Md.), 519, after reciting that where there has been a bond or promissory note given for the payment of the purchase money, which does not impair the equitable lien, the assignment of the security must operate as a tacit relinquishment of the equitable lien, because the assignee and vendee are thereby placed in the relationship of debtor and creditor, the opinion proceeds: "And the vendor having thus finally waived the right to enforce his equitable lien, it can never again be revived in his favor; unless his privilege as vendor has been kept up and continued by the holding of him answerable as assignor of the securities given for the payment of the purchase money." On the whole, therefore, and on such authority as we have been able to place before our readers, we should say that if the vendor is legally called upon to pay an assigned note of his vendee, his lien is called into existence, and that if he has no such liability on assigning the vendee's note to another person, the lien is absolutely gone.

In *Bennett v. Murphy*, 123 App. Div. 102, 108 N. Y. Supp. 231, the vendor, vendee, and another person all knew that the purchase money was to be paid on the consummation of the sale, the third person to provide it. On meeting for the purpose of closing the transaction the third person explained he could not produce the money, and thereafter he gave a due-bill as a memorandum of the sum to be paid, which due-bill he did not honor, and the court held the vendor's lien was not waived by the acceptance of the bill. The case discloses, however, that the giver of the due-bill was an agent of the vendee, so that even if he had given his note for the amount, he would not have been a "third person giving security" in the sense of destroying the lien, and moreover the circumstances disclose the intention to retain the lien.

a. Conveyance to Other Than the Purchaser at His Request.—For the reason that decisions do exist on this point, room is made for it in this note, although it hardly needed judicial interpretation of a condition which must rest so firmly on the maxim, "*Qui facit per alium facit per se.*" If the purchaser requests the vendor to execute the conveyance to some other person named by the purchaser, the vendor's lien is unaffected by the fact of the vendor taking the purchaser's note for the purchase money, because it is not in the nature of any collateral security. In *Moore v. Worthy*, 56 Ala. 163, the lien was held so unaffected, although the conveyance was to the purchaser's wife at his request. Certainly in that case there was a stipulation that the vendor's lien was not to be disturbed. In the language of the opinion, the purchaser's wife was a mere volunteer—the voluntary donee of her husband—and bound by all the equities charging the estate in his hands. She derived her title from the vendor, without herself paying anything for it. By no contrivance, and the court might have well added, by no chicanery, could she keep the vendor's land without he received his money. She stood in no other attitude than she would have occupied if the deed had been made to the husband and by him conveyed to her without valuable consideration. So that in either aspect the vendor's lien was paramount: Up-

shaw v. Hargrove, 6 Smedes & M. 286; Campbell v. Henry, 45 Miss. 326.

This was followed in Crampton v. Prince, 83 Ala. 246, 3 Am. St. Rep. 718, 3 South. 718, which also utilized an older case, Still-Pylant v. Reeves, 53 Ala. 132, 25 Am. Rep. 605. The fact that part of the purchase money is the wife's does not affect the lien. In Davis v. Smith, 88 Ala. 596, 7 South. 159, as Somerville, J., put it, whether Davis, the purchaser, acted in his own behalf, or as agent of his wife, the taking of his note by the vendor, instead of the note of one not sui juris, would not, according to the more just and reasonable view, be interpreted into an intention to rely exclusively upon the personal credit of the husband, as the maker of the note, to the exclusion of the vendor's lien. In Bakes v. Gilbert, 93 Ind. 70, the circumstances and ruling were practically the same, though in that case the vendor was induced to accept with the note a mortgage purporting to be signed by both man and wife, but which she had never executed in fact, and as her signature to the note created no liability, she being a married woman, the lien was unaffected. The same ruling appears in Davenport v. Murray, 68 Mo. 198, Williams v. Crow, 84 Mo. 298, and Davis v. Pearson, 44 Miss. 508, in which latter case the principle is expressed plainly, as follows: "If the husband negotiates a purchase of land, and gives his written promise to pay the price, but has the title made to the wife, the lien will be implied. His promissory note or bond for the purchase money will not be considered as such independent, collateral security as will amount to a waiver." And even where both husband and wife sign the note, the husband is not regarded as "security" in the sense which makes taking security an implication of an intention to waive the lien of the vendor on the land: Parker v. McBee, 61 Miss. 134. A word of caution is needed here, and these decisions must be read by the light of such legislation as has affected the status of married women. We express the opinion, however, that no alteration of status will affect the lien where one of the parties, husband, wife or stranger, is in the position of agent for the other, and the presumption of intending to waive the lien can be successfully rebutted. In Majors v. Maxwell, 120 Mo. App. 281, 96 S. W. 731, where the contract was assigned and the conveyance executed direct to the subvendee, who gave his note for the unpaid purchase money, the lien was retained unimpaired by the suggestion of novation. This case is referred to later on in subdivision g, "Novation or Substitution of Securities."

f. **The Personal Security of the Vendee.**—It almost necessarily follows from what has already appeared in this note that where the vendor takes no other form of security than the purchaser's note, bond or bill, as a recognition of the amount owing on the purchase, the lien remains of full force and value, unless the intention to the contrary is expressed: Moore v. Worthy, 56 Ala. 163; Fields v. Drennen, 115 Ala. 558, 22 South. 114; Acree v. Stone, 142 Ala. 156, 37 South. 934; Lavender v. Abbott, 30 Ark. 172; Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Austin v. Pulschen, 112 Cal. 528, 44 Pac. 788; Royal Con. Min. Co. v. Royal Con. Mines, 157 Cal. 737, ante, p. 165, 110 Pac. 123; McKeown v. Collins, 38 Fla. 276, 21 South. 103; Koch v. Roth, 150 Ill. 212, 37 N. E. 317; Franklin v. McDonald, 163 Ill. 139, 45 N. E. 212; Pennington v. Martin, 146 Ind. 635, 45 N. E. 1111; Robbins v. Masteller, 47 Ind. 122, 46 N. E. 330; Thornton v.

Knox's Exr., 6 B. Mon. 74; Hooper v. Central Trust Co., 81 Md. 559, 39 Atl. 505, 29 L. R. A. 262; Davenport v. Murray, 68 Mo. 198; Dickason v. Fisher, 137 Mo. 342, 37 S. W. 1114; Acton v. Waddington, 46 N. J. Eq. 16, 18 Atl. 356; White v. Williams, 1 Paige, 502; Maroney v. Boyle, 141 N. Y. 462, 38 Am. St. Rep. 821, 36 N. E. 511; Palmer v. Deslauriers, 19 R. I. 505, 34 Atl. 1108; Zwingle v. Wilkinson, 94 Tenn. 246, 28 S. W. 1096; Meyer v. Smith, 3 Tex. Civ. App. 37, 21 S. W. 995; Madden v. Barnes, 45 Wis. 135, 30 Am. Rep. 703. The renewal of the note given is not regarded as other security than a substitution for the original one: Walker v. Struve, 70 Ala. 167; Honore's Exr. v. Bakewell, 6 B. Mon. 67, 43 Am. Dec. 147; Reeder v. May, 95 Ind. 164; Helm v. Weaver, 69 Tex. 143, 6 S. W. 420; or the substitution of one for several notes: Baker v. Collins, 4 Tex. Civ. App. 520, 23 S. W. 493. In like manner checks and certificates of deposit are not effectual to injure the lien: Mims v. Macon & Western R. R. Co., 3 Ga. 333; Honore's Exr. v. Bakewell, 6 B. Mon. 67, 43 Am. Dec. 147; Madden v. Barnes, 45 Wis. 135, 30 Am. Rep. 703; nor the receipt or acknowledgment of the payment of the purchase money even though contained in the deed: Agnew v. McGill, 96 Ala. 496, 11 South. 537; Koch v. Roth, 150 Ill. 212, 37 N. E. 317; Hooper v. Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262.

g. Novation or Substitution of Securities.—The greatest danger that threatens the vendor's lien is the form in and the circumstances under which he receives the obligation of the vendee for the purchase price, or so much of it as is unpaid and represented by his personal security. The mere taking of some penal undertaking from the vendee to pay the purchase money will not destroy the lien unless it appears that it was intended to be substituted for the purchase money. Such instruments will be considered as intended only to countermand the receipt for the purchase money which may be contained in the deed, or to define the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the lien; but the lien will be considered as waived whenever any distinct and independent security is taken, such as a mortgage on the land, or pledge of things or personal responsibility of third persons, and the like. If a new debt is created and substituted for the old one, then the doctrine of novation is brought into play, the old debt is extinguished and with it the vendor's lien. The test of the English courts of equity in such cases is very reliable. Did the vendor intend to trust to the estate as his security, or did he intend to abandon that and rely on something else? If he relied on the estate, that is to say, on the land sold to the vendee, then he retains his lien; if he did not, but took other security on other property or from some other person, then the process of novation was complete and the lien is lost: Thames v. Caldwell, 60 Ala. 644; Williams v. McCarty, 74 Ala. 295; Moshier v. Meek, 80 Ill. 79; Keith v. Wolf, 5 Bush, 646; Acton v. Waddington, 46 N. J. Eq. 16, 18 Atl. 356; Wasson v. Davis, 34 Tex. 159. In the last-named cases the novation consisted in substituting the note of a subpurchaser for the original indebtedness of the vendee. It does not, however, follow that every case of substitution is one of novation. In the consideration of the question of waiver of the vendor's lien each case must be judged on its own particular circumstances. In Pouns v. Gartman, 29 Miss. 133, one Pendleton sold land to Pouns, and Pouns died shortly there-

after leaving part of the purchase price unpaid. Pendleton and a relative of the decedent, one Samuel Pouns, administered on Pouns' estate, his heirs being anxious to relieve his personal estate from the payment of the unpaid purchase money. An agreement was made whereby the land was sold to one Sones, who assumed the payment of the unpaid balance, the heirs of Pouns concurring in it. Sones, having executed his notes to Pendleton, one of them was sued upon and judgment thereon recovered by the administrators of Pendleton who had died, and the administrators sought to enforce this judgment by bill against the land, and the defense of novation was set up. Sometime after the sale to Sones, the heirs of Pouns brought suit and obtained a decree against Sones declaring the sale to him void. It was, nevertheless, contended in support of it that the original notes were discharged and the land released from the lien.

The court found no difficulty in disposing of the contention, according to the well-settled rules of equity jurisprudence. Pendleton's lien being in full force at the time of the sale to Sones, he took the title to the land subject to such lien in succession to Pouns. The sale being declared void on the application of the heirs of Pouns, the lien was in statu quo as at the time of the sale which was challenged, and when the heirs claimed that Sones purchased under a void contract and demanded a surrender of the land, that they might enjoy it under their legal title, the court held them as offering to discharge the obligations which Sones assumed to Pendleton on account of the lien, which bound the land both before and after the sale. This case was followed in *Cummings v. Moore*, 61 Miss. 184, the court adding: "We think by the case above noted it is settled in this state that the substitution of the note of the subvendee of the land in lieu of that of his vendor does not discharge the lien held by the first vendor." It will be noted that the addendum creates a conflict on that point between the Mississippi decision and those cases cited, ante, subdivision f.

In *Boyd v. Jackson*, 82 Ind. 525, the negotiation could hardly be styled a novation, because, although there was a new liability substituted, the lien was taken over and expressly re-created. And there is no novation or waiver of the vendor's lien, by reason of the conveyance to the vendee containing a provision that the vendee shall assume, as part of the purchase price, the payment of a certain mortgage made by the vendor: *Binghampton Savings Bank v. Binghampton Trust Co.*, 85 Hun, 75, 32 N. Y. Supp. 657. One of the latest cases—*Buffalo Oolitic Limestone Quarries Co. v. Davis* (Ind. App.), 90 N. E. 327—is a direct authority that the taking of collateral security waives the lien. In *Shelton v. Cooksey*, 138 Mo. App. 389, 122 S. W. 331, a unique case was presented to the court. A had conveyed land to B, and only part of the purchase price was paid. B, being unable to pay it, agreed to orally convey it to A, which promise was of course void, and it was claimed that A's lien was gone. The court upheld the lien on the ground that nothing had been done whereby the lien was endangered, and it appears from the opinion that A had received nothing from B but the "oral conveyance."

In *Schmidt v. Gaukler*, 156 Mich. 243, 120 N. W. 746, the vendor subsequently to the contract for sale extended the time for payment under additional agreements executed by the parties, but without imposing other obligations on the vendee or taking other security

and expressly providing for the retention of the lien, and he was not precluded thereby from enforcing his lien.

In *Majors v. Maxwell*, 120 Mo. App. 281, 96 S. W. 731, the vendee of land resold it, and receiving a check from the subvendee passed it on to the vendor. The check not being paid, the subvendee on request paid a portion of it and gave his note for the balance to the vendor, who had previously executed a conveyance direct to the subvendee. The court took the view that the contract of sale being assigned and the note given by the subvendee, the transaction was as to him original, and the vendor's lien could not be held waived, more especially as all the dealings subsequently appeared to be with notice of the unpaid purchase money.

h. The Taking of Additional Security from the Vendee.—Slightly distinguishable from novation, which implies the substitution of a new obligation for the original one, is the taking of separate security from the vendee, and the general rule appears to be that where the vendor has carved out his own security, the law will not create another in his aid. Such was the English practice. In *Nairn v. Prowse*, 6 Ves. 752, 6 R. R. 37, Sir William Evans said that if the security were totally distinct and independent, he regarded it as substitution for the lien, and not as credit given because of the lien. He illustrates this by the case of a mortgage on another estate for the purchase money, which he holds is a discharge of the lien, and asserts that the same rule must hold with regard to any other pledge for the purchase money. We ourselves see nothing to object to in this doctrine, and only add to the conclusions that if the other security is not distinct and independent, but contractually additional, the lien is not only not discharged, but strengthened. True, such cases of additional and not independent security must always be the result of contract, and the evidence in each case will disclose the circumstances. We can quite understand that if the whole or the greater part of the purchase money were unpaid, the distinct security stipulated for would raise the natural presumption of additional safety for the vendor, while, on the other hand, if the major portion of the purchase money had been paid, the taking of other security would raise an equally natural presumption that it was a substitution to enable the vendee to deal with the purchased property unhampered by the lien. For the proposition, however, that the lien is waived by the vendor taking other security of the vendee, authority will be found in *Walker v. Struve*, 70 Ala. 167; *Johnson v. Godden*, 33 Ark. 600; *Lewis v. Covillaud*, 21 Cal. 178; *Austin v. Pulschen*, 112 Cal. 528, 44 Pac. 788; *McKeown v. Collins*, 38 Fla. 276, 21 South. 103; *Franklin v. McDonald*, 163 Ill. 139, 45 N. E. 212; *Robbins v. Masteller*, 147 Ind. 122, 46 N. E. 330; *Stuart v. Harrison*, 52 Iowa, 511, 3 N. W. 546; *Ducker v. Gray*, 3 J. J. Marsh. 163; *McGonigal v. Plummer*, 30 Md. 422; *Dickason v. Fisher*, 137 Mo. 342, 37 S. W. 1114; *Dudley v. Dickson*, 14 N. J. Eq. 252; *Yeomans v. Bell*, 79 Hun, 215, 29 N. Y. Supp. 502; *Follett v. Reese*, 20 Ohio, 546, 55 Am. Dec. 472; *Palmer v. Deslauriers*, 19 R. I. 505, 34 Atl. 1108; *Denny v. Steakly*, 2 Heisk. 156; *McDonough v. Cross*, 40 Tex. 251; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; *Brown v. Gilman*, 4 Wheat. (U. S.) 290, 4 L. ed. 564. Some of the cases above cited are also authorities for the parallel rule that there may be an agreement that the lien shall not be waived; notably *McKeown v. Collins*, 38 Fla. 276, 21 South. 103; *Robbins v. Masteller*, 147 Ind. 122,

46 N. E. 330; and *Yeomans v. Bell*, 79 Hun, 215, 29 N. Y. Supp. 502; while additional authority may be found in *Napier v. Jones*, 47 Ala. 90; *Daughaday v. Paine*, 6 Minn. 443; *Fonda v. Jones*, 42 Miss. 792, 6 Am. Rep. 669, and *Briscoe v. Callahan*, 77 Mo. 134.

If the vendor takes a mortgage for the whole or the balance of the unpaid purchase money, his lien, except specially preserved, is waived: *Fields v. Drennen*, 15 Ala. 558, 22 South. 114; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Chicago & Great Western R. L. Co. v. Beck*, 112 Ill. 408; *Robbins v. Masteller*, 147 Ind. 122, 46 N. E. 330; *Akers v. Luse*, 56 Iowa, 346, 9 N. W. 306; *Young v. Wood*, 11 B. Mon. 123; *Hummer v. Schott*, 21 Md. 307; *Winn v. Lippincott Invest. Co.*, 125 Mo. 528, 28 S. W. 998; *Gaylord v. Knapp*, 15 Hun, 87; *Palmer v. Deslauriers*, 19 R. I. 505, 34 Atl. 1108.

In Ohio a different ruling exists. *Birchard, C. J.*, in *Boos v. Ewing*, 17 Ohio, 500, 49 Am. Dec. 478, takes the view that taking a mortgage is not a substitution of another security, and the opinion is both plausible and persuasive, and he makes his best point when he says: "But aside from all authorities, what is there in the effort to secure an absolute binding lien upon the property itself, the whole property sold, which should in conscience be held to destroy the vendor's equity? The act of taking a mortgage deceives and defrauds no one." He makes his worst when, after citing Chancellor Walworth in *Fish v. Howland*, 1 Paige, 20, he says: "If, however, as counsel contend, the chancellor's intention was to hold that the taking of a mortgage to secure the purchase money, no other security being relied on than the property sold, is either a merger, waiver or substitution or other destruction of the lien, we think it is not right to follow him." The Texas courts follow the same line as Ohio in the view that the mortgage is not inconsistent with the lien. We confess we cannot reconcile the two positions. The vendor has his lien, and seeks other and better security. He gets, in fact, a security considerably better than the equitable lien, for while, with the lien as his only security, the vendee having the title can defeat it by a sale to a bona fide buyer without notice, in lieu of that precarious security he obtains a legal mortgage, which being on record warns all of his encumbrance. For this reason alone we agree with the great weight of authority.

In *Bradbury v. Donnell*, 136 Mo. App. 676, 119 S. W. 21, the court, after adopting *Winn v. Lippincott Investment Co.*, 125 Mo. 528, 28 S. W. 998, express a qualification of the proposition that a mortgage waives the lien. "In the proper sense a mortgage for a part of the purchase money does not waive the vendor's lien, . . . but merely merges it in the mortgage as the higher security, and only waives the right to enforce it as such. That it is not meant in that class of cases to say that the lien itself becomes extinct by taking a mortgage is made manifest by the fact that it is recognized in contests for priority between a mortgage taken by a vendor and one taken by a third person. . . . The vendor's mortgage will prevail on the idea that his lien, as vendor, has not been extinguished by the mortgage, but has merely been transferred to or set up in the mortgage—merged therein—and through which it will, practically, be upheld." This sweeping assertion is not borne out by any of the several cases cited in support of it. It is quite accurate for the opinion to say the mortgage was given priority, but in each case there were special circumstances to warrant that priority—in one, that the rival mortgages were executed the same day; in another, that at the time the mort-

gage to secure an ordinary creditor was given the mortgagor had no title, and that when he did acquire the title, *eo instanti*, he gave the mortgage in which the lien was undoubtedly preserved. We have no hesitation in challenging the proposition to this extent, that if there are rival mortgages, one to the vendor and the other to an ordinary creditor, and that to the creditor is dated earlier than the vendor's and recorded *bona fide* earlier than the vendor's, the vendor's will not take priority. He will get no help from equity, for he should have protected himself by seeing that his grant of conveyance and his mortgage were dated and recorded on the same day. *Vigilantibus, non dormientibus, aequitas subvenit*. The mere taking of a note for interest due on the purchase money will not affect the lien, notwithstanding that the interest note is silent as to its purpose and the intention to preserve the lien: *Honaker v. Jones* (Tex. Civ. App.), 115 S. W. 649.

IV. The Effect of Fraud.

We do not purpose dealing at any length with this aspect of the subject, because the rule of equitable interference where the petitioner seeks relief from fraud is too well known and has been too frequently discussed to be considered here. Not only is the rule of waiver futile where a vendor has been fraudulently deceived, but we might generalize and say that as against fraud, the whole battery of equitable strongholds will be trained on relief being sought. Where worthless stock was palmed off on the vendor as in *Yeomans v. Bell*, 79 Hun, 215, 29 N. Y. Supp. 502, a valueless mortgage, as in *Kent v. Gerhard*, 12 R. I. 92, 34 Am. Rep. 612, the lien of the vendor was held scathless from the attacks of the fraudulent vendee. Where one mortgage was substituted for another improperly, as in *Gilbert v. Bakes*, 106 Ind. 558, 7 N. E. 257, *Huff v. Olmstead*, 67 Iowa, 598, 25 N. W. 784, and *Jones v. Rush*, 156 Mo. 364, 57 S. W. 118, or where there was a conspiracy to defraud, as in *Brown v. Byam*, 65 Iowa, 374, 21 N. W. 684, the lien stood its ground, and came out of the conflict victorious and safe under the protecting wing of Mother Equity. In the comparatively recent decision in *Hotfil v. Deweese's Trustee* (Ky.), 112 S. W. 1095, in which the plaintiff alleged he was induced by fraud to waive his lien, the evidence disclosed a voluntary abandonment of a lien and the rescission of the plaintiff's contract in the hope of bettering his condition, a throwing away of the substance for the shadow, and he failed to re-establish the lien.

V. The Effect of Laches and Estoppel.

As we have already pointed out, the reliable interference of the equity courts to relieve against fraud is at the disposal of the defrauded, and it is equally available when the one entitled to the privileges of the vendor's lien abuses them by improper or lax conduct. The lien is in the nature of a privilege created by equity and intrusted to the vendor practically during good behavior. If equity finds that he is careless or fraudulent in regard to its safekeeping, she will deprive him of it. The every-day doctrines of estoppel will resolve all the questions which may arise on the attempted assertion of the vendor's lien. Where the vendor has stood by and seen the land dealt with, when it was his moral and legal duty to speak, and to give notice of his claim and rights, "his silence, when in good conscience he ought to speak, shall close his mouth when he would speak."

The law says that in such case the vendor shall be estopped to say that the real facts were other than he wrongfully allowed a purchaser to believe them to be, on the familiar doctrine, that where one, knowing, suffers another to purchase property subject to willfully concealed claims, that one will be regarded as having waived them, and will not be subsequently heard to assert them: *Lindsay v. Cooper*, 94 Ala. 170, 33 Am. St. Rep. 105, 11 South. 325, 16 L. R. A. 813, 109 Ala. 338, 19 South. 379; *Larscheid v. Kittell*, 142 Wis. 172, 125 N. W. 442. Where a vendor has once agreed to waive his lien, he is estopped from claiming it against a subsequent mortgagee: *Wilson v. Shocklee* (Ark.), 126 S. W. 832. A vendor is estopped from claiming that the release of his lien was without consideration, when his promise to release it was the moving consideration of a subsequent purchase of the land by another purchaser, who would not have bought the land without it: *Claiborne v. Castle*, 98 Cal. 30, 32 Pac. 807; and the same case points out that the acts and conduct of a vendor which indicate a waiver of his lien may be shown by parol: *Moshier v. Meek*, 80 Ill. 79; *Jarman v. Farley*, 7 Lea, 141. In *Barrett v. Baker*, 136 Mo. 512, 37 S. W. 130, one Roy, the maker of a note, gave a deed of trust of land not his own, but the property of the payee, one Baker, who thereupon sold the note which so purported to be secured to the plaintiff Barrett. Baker was estopped from denying the validity of the so-called trust deed, and the purchaser of the note was decreed an equitable lien for the amount due to him as against Baker and one to whom he had sold with notice. In *Hoots v. Williams*, 116 Ala. 372, 22 South. 497, where the vendor was present at a foreclosure sale of the land sold by him to the vendee and by the latter mortgaged, and disclaimed his lien, he was estopped afterward from asserting it. Once the occasion on which the vendor should have disclosed his lien is allowed by him improperly to pass, he cannot recover his right to the detriment of those misled by his silence, if he has falsely spoken, by his misrepresentations: *Burns v. Taylor*, 23 Ala. 255; *Henson v. Westcott*, 82 Ill. 224; *Atkinson v. Lindsey*, 39 Ind. 296; *North v. Rogers*, 25 Ky. Law Rep. 1542, 78 S. W. 165; *Reily v. Miami Exporting Co.*, 5 Ohio, 333; *Thompson v. Dawson*, 3 Head (Tenn.), 384. The laches of delay are on the same plane. If the vendor is so careless of his right as to leave it unasserted for a long while, it is at his peril, although in one case—*Lucy v. Hopkins* (Ky.), 13 S. W. 518—thirteen years was not held unconscionable, as the statutory limitation was fifteen years. In *Trustees of Schools v. Wright*, 11 Ill. 603, ten years was held sufficient to bar the assertion of a vendor's lien. In *Duffield v. Butler*, 34 W. Va. 624, 12 S. E. 776, a party holding a title bond for a tract of land assigned it to another party in consideration of the assignment of a debt of three hundred dollars on a third party, two hundred and twenty-five dollars of which had been paid. The assignor lived seventeen years after the assignment without asserting any claim for the balance, and after her death, her administrator sued to enforce the vendor's lien for the balance. The court treated the debt as paid, and refused the relief sought for, quoting from *Trader v. Jarvis*, 23 W. Va. 100, where Snyder, J., said: "Delay in the assertion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in equity as an evidence of assent, acquiescence or waiver; and especially is such the rule in suits to set aside transactions on account of fraud or infancy. A court of equity, which is never active in relief against stale demands,

will always refuse relief where the party has slept upon his right and acquiesced for a great length of time. Nothing can call into activity this court but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing."

VI. The Effect of Recovery of Judgment for the Purchase Money.

The law on the subject was exhibited at excellent length in *Dickason v. Eby*, 73 Mo. 133, and followed in *Dickason v. Fisher*, 137 Mo. 342, 37 S. W. 1114. The court referred to the precise question as laid down in *Outton v. Mitchell*, 4 Bibb (Ky.), 239. From the case first cited, a vendor who has conveyed the land absolutely and has his lien unimpaired may resort either to a court of equity, and ask for the enforcement of his lien by a sale of the land to pay the debt, or he may procure his judgment at law for so much of the purchase money as remains unpaid, and subject the land to sale by execution. "A sale of the land is the result, whether one or the other of these remedies is adopted; and if the vendor elects to adopt the latter remedy, and the land is sold, he must stand by his election; for it necessarily implies a waiver of his right to effect a sale by means of the other remedy. The vendor by his own act having brought about and directed a sale under execution of all the right, title and interest of his vendee, will be presumed to have waived the right he had to go into a court of equity and accomplish the same by having a decree directing the sale of the land for the specific purpose of paying the purchase money, and will be estopped from asserting against a purchaser at such sale a right to enforce a vendor's lien by a resale of the land: *McArthur v. Porter*, 1 Ohio, 99; *Grubb v. Crane*, 4 Scam. 153." The rule is supported further by *Palmer v. Harris*, 100 Ill. 276; *Nutter v. Fouch*, 86 Ind. 451; *McArthur v. Porter*, 1 Ohio, 99, and *McAlpin v. Burnett*, 19 Tex. 497. But it is imperative, according to these cases, that the land shall have been actually sold; merely bringing the action and prosecuting it to judgment is not sufficient: *Chapman v. Lee*, 64 Ala. 483; *Graves v. Coutant*, 31 N. J. Eq. 763; *Waldrom v. Zacharie*, 54 Tex. 503; *Zwingle v. Wilkinson*, 94 Tenn. 246, 28 S. W. 1096. There is a slight conflict as to whether the suit must be prosecuted to judgment or to sale, a California case—*Fitzell v. Leaky*, 72 Cal. 477, 14 Pac. 198—holding that the lien is waived "by taking a general judgment, which, if docketed, was a lien on all the real property of the plaintiff"; and in *Crans v. Board of Commissioners of Hamilton County*, 87 Ind. 162, the court says: "These facts show that the appellants as vendors by and through their guardians, with the sanction and approval of their proper court, took distinct and independent securities for the unpaid purchase money, by procuring judgment therefor to be entered by the court in their favor and against the vendee, and that they, and each of them, thereby waived and abandoned their vendors' liens." We are not inclined to the view taken by the California courts. If the taking of a distinct security is to be evidence of the vendor's intention, which is the ruling element, the mere fact of his taking proceedings at law on the identical notes or claim is surely the strongest evidence that he, having no other security and seeking none, relies on his equitable protection ultimately, and we therefore incline to the opinion that pursuing his judgment to sale of the land is essential to complete the annihilation of his equitable remedy. These views are substantially

adopted in *Borrer v. Carrier*, 34 Ind. App. 353, 73 N. E. 123, the court therein saying that regarding substance rather than form, the fact remains that it is the same old debt for purchase money, whether in the form of a judgment or evidenced by notes, and in either form it will be recognized and preserved by equity to prevent injustice. And in *Elswick v. Matney*, 132 Ky. 294, 136 Am. St. Rep. 180, 116 S. W. 718, the court, after saying that they have repeatedly held that the taking of personal security is not a waiver of the vendor's lien, unless there be an actual intention to waive it, continued: "Nor does the recovery of a personal judgment and an attempt to make the debt by execution ordinarily waive a lien that may exist as security for the debt: *Roberts v. Bruce*, 91 Ky. 379, 15 S. W. 872; *Moriarity v. Vessey*, 6 Bush, 115; *Bondurant v. Owens*, 4 Bush, 662." In *Zeigler v. Valley Coal Co.*, 150 Mich. 82, 113 N. W. 775, 13 Ann. Cas. 90, we find that "The predominant authority establishes the rule that he [the lienor] may enforce his lien, whether he has proceeded at law and exhausted his remedy there or has exclusively proceeded in equity"; citing, among other authorities, *Dowdy v. Blake*, 50 Ark. 205, 7 Am. St. Rep. 88, 6 S. W. 897.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

PARKS v. WILKINSON.

[134 Ga. 14, 67 S. E. 401.]

WILLS—Construction—Vesting and Devesting of Estate.—It appears from the petition that item 3 of a will was as follows: "I hereby give and bequeath unto my well-beloved nephew, Thomas Bird Parks, all the remainder or remainders of my property of every description, both real and personal, to him and his heirs forever, on this express condition and limitation, to wit: if the said Thomas Bird Parks shall survive the present war, and after my decease, my house his home and usual dwelling-place, then and in that case he is to have all the property named in this 3rd item, and not otherwise," and that "Item 4 of said will provides that on failure of the said Thomas Bird Parks to comply with item 3, then all property therein mentioned is to go to Joseph C. Parks and Dudley Parks." Held, that if the devisee named in the third item survived the war referred to in the will, and after the death of the testator made the house referred to in the will "his home and usual dwelling-place," title to the property devised in the third item vested in such devisee, and his subsequent removal from the house and abandonment thereof as "his home and usual dwelling-place" would not divest him of such title. (p. 212.)

(Syllabus by the court.)

Dorsey, Brewster, Howell & Heyman, W. G. Post and W. P. Bloodworth, for the plaintiffs.

W. C. Wright, for the defendants.

¹⁵ **HOLDEN, J.** Bird Parks died seised and possessed of the tract of land described in the petition, leaving a will, which was duly probated. One item of the will was as follows: "I hereby give and bequeath unto my well-beloved nephew, Thomas Bird Parks, all the remainder or remainders of my property of every description, both real and personal, to him and his heirs forever, on this express condition and limitation, to wit: the said Thomas Bird Parks shall survive the present war, and after my decease, my house his home

and usual dwelling-place, then and in that case he is to have all the property named in this 3rd item, and not otherwise." It was alleged: "Item 4 of said will provides that on failure of the said Thomas Bird Parks to comply with item 3, then all property therein mentioned is to go to Joseph C. Parks and Dudley Parks. Petitioners show that the said Thomas Bird Parks, under the terms of said will, entered into possession of the premises hereinbefore set out. That after having so entered into possession of said premises, the said Thomas Bird Parks failed to comply with the terms of item 3 of said will, in that the said Thomas Bird Parks did not make the house of said Bird Parks, deceased, his home and usual dwelling-place, but abandoned said house as his home and usual dwelling-place, and moved from said county and resided in the county of Fulton for more than seven years during the subsequent term of his life. Petitioners show that the said Thomas Bird Parks having failed to carry out the terms of item 3 of said will, that the property bequeathed to him thereunder passed out of said Thomas Bird Parks, and that your petitioners, under the terms of said will (petitioners being the Joseph C. Parks and Dudley Parks referred to in said will), became the legatees under said will, and became entitled to the property hereinbefore described. ¹⁶ Petitioners show that the said Thomas Bird Parks, although he had lost all rights to said property by his conduct as hereinabove described, undertook, on September 26, 1904, to convey said property to Mrs. Lillie T. Wilkinson as life tenant, with remainder interest in fee simple to such of her children as might be in life at her death." It was further alleged that Mrs. Wilkinson entered into possession of the property, and is now in possession and occupying the same with her children under said pretended claim of right. The only consideration set out in the deed is love and affection. The children claim to have a remainder interest in the property under the deed. This deed and the claim of Mrs. Wilkinson and her children is a cloud upon the title of petitioner. Plaintiffs prayed that the title to the property be decreed to be in them; that the deed above referred to be declared to be a cloud upon their title and be decreed to be null and void and ordered canceled; that Mrs. Wilkinson be ordered to surrender possession of the premises to the plaintiffs; that a guardian ad litem be appointed for the minor children; and for general relief. Part of the abstract of title attached to the petition was as follows: "About the year 1890 the said Thomas Bird Parks moved to Fulton county, Georgia, and resided in said county for a number of years. Upon his doing this, the property described in the foregoing complaint reverted to and vested in your petitioners." To the order

of the court sustaining a general demurrer to the petition and dismissing the same the plaintiffs excepted.

1. One of the items of the will of the testator was: "I hereby give and bequeath unto my well-beloved nephew, Thomas Bird Parks, all the remainder or remainders of my property of every description, both real and personal, to him and his heirs forever, on this express condition and limitation, to wit: the said Thomas Bird Parks shall survive the present war, and after my decease, my house his home and usual dwelling-place, then and in that case he is to have all the property named in this 3rd item, and not otherwise." The petition alleges: "Item 4 of said will provides that on failure of the said Thomas Bird Parks to comply with item 3, then all property therein mentioned is to go to Joseph C. Parks and Dudley Parks." The plaintiffs contend that under the fourth item of the will they are entitled to the property referred to ¹⁷ therein. It is proper to construe pleadings most strongly against the pleader; and in considering the petition as a whole, properly construed, it means that Thomas Bird Parks survived the war, and that after the death of the testator he made the house of the testator, referred to in the will, "his home and usual dwelling-place." The petition does not allege any facts showing that this was not done, but alleges that Thomas Bird Parks "abandoned said home as his usual home and dwelling-place." The burden is on the plaintiffs to allege facts showing title in them. Counsel for the plaintiffs in their brief contend that when Thomas Bird Parks removed from the house he forfeited his legacy, under the conditions upon which it was given to him under the will. They contend that by reason of this removal he ceased to have his home and usual dwelling-place in the house referred to in the will, and they contend that by the terms of the will he had title to the property therein bequeathed to him only so long as he should make the house referred to in the will his home and usual dwelling-place. In construing the provisions of the will and determining this question, the main object in view should be to determine the intention of the testator. When this intention is ascertained, it should be given effect, unless it contravenes some rule of law. Under the allegations of the petition, the only event in which the plaintiffs, under the will, were entitled to the property was "on failure of the said Thomas Bird Parks to comply with item 3" of the will. There is no contention that he did not survive the war referred to in the will. What further was he to do in order to comply with item 3? It was only necessary that he make the home of the testator, "his home and usual dwelling-place," after the death of the testator. Under the allegations of the petition, Thomas Bird Parks, after the death of the testator, did make the house referred to his

home and usual dwelling-place; and, under our view, when he did this the title to the property vested in him, and his failure to continue to make the house his home and usual dwelling-place did not work a forfeiture of the legacy and divest him of title. It was not the intention of the testator that the title to the property was to be in Thomas Bird Parks only so long as he made the house referred to his home and usual dwelling-place. After the death of the testator, if Thomas Bird Parks survived the war, he had a right to acquire title to the property by making the house referred to in the will his ¹⁸ home and usual dwelling-place. After having thus acquired title, it would not be lost simply because he subsequently ceased to make the house his home and usual dwelling-place. Upon the subject of losing title by abandonment, see *Tarver v. Deppen*, 132 Ga. 798, 65 S. E. 177, 24 L. R. A., N. S., 1161. Conditions subsequent, working forfeitures of title, are not favored by the law: *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682. It was not provided that Thomas Bird Parks should have title to the property only in the event he should permanently make the house his home and usual dwelling-place, or only so long as he did this. The title to the property vested in him and became absolute when he fulfilled the conditions named in the will, by surviving the war and making the house referred to in the will his home and usual dwelling-place: *Lowe v. Cloud*, 45 Ga. 481. And see *Crumpler v. Barfield & Wilson Co.*, 114 Ga. 570, 40 S. E. 808; 1 *Underhill on Wills*, secs. 482, 483.

Items of the will other than the one copied in the petition were set out in the answer and were referred to in the briefs of counsel; but it is not proper to consider the contents of the answer in passing upon a demurrer to the petition: *Hicks v. Beacham*, 131 Ga. 89, 62 S. E. 45.

The court committed no error in sustaining the general demurrer and dismissing the petition.

Judgment affirmed.

All the justices concur.

A Clause in a Will, Following a Devise to the Testator's Wife for life, "To my son Joseph I allow the house on Poplar Alley ; if he is living or societing with his divorced wife, he shall never inherit that property," creates a condition precedent; and if the son does not violate it before the testator's death, the estate vests absolutely in him, and is not defeated by his living with the divorced wife between the time when the will goes into effect and the termination of the life estate: McKinley v. Martin, 226 Pa. 550, 134 Am. St. Rep. 1076.

MOBLEY v. LYON.

[134 Ga. 125, 67 S. E. 668.]

EVIDENCE.—The Expression “Burden of Proof” has been Used in two senses, viz.: 1. The necessity which rests upon a party at any particular time during a trial to create a prima facie case in his favor, or overthrow one when created against him; 2. The necessity of establishing the existence of a fact, or state of facts, by evidence which preponderates to a legally required extent. (By the editor.) (p. 216.)

WILL CONTEST—Forgery—Burden of Proof.—Where a will was offered for probate in solemn form, and a caveat was filed, raising only contentions that the will was not signed by the purported testatrix and executed as provided by law, but was a forgery, and that if she signed it she had no knowledge of its contents, and where the evidence was conflicting as to whether she signed the instrument and whether the attesting witnesses whose names appear on it in fact signed it, two of them being dead, and testimony being introduced as to their handwriting, it was error for the presiding judge, after instructing the jury that before they could set up the will and before a case was made out on the part of the propounders, it must be shown to their satisfaction that the alleged testatrix signed the instrument in the presence of all three of the witnesses whose names appeared thereon, to add that when this was done the burden of proving that the instrument was a forgery or was not the last will and testament of the alleged testatrix and that it had not been proved as the law required was shifted to the caveator, and that in order to carry this burden it was upon him “to satisfy the jury of the truth of his contentions” before they would be authorized to find in his favor. (pp. 217, 218.)

FRAUD—Evidence and Burden of Proof—Instructions.—Under the pleadings and evidence there was no error in failing to charge that fraud could not be presumed, but that slight circumstances might carry conviction of its existence, or in refusing to give to the jury a requested charge upon that subject. (p. 218.)

NEW TRIAL—Grounds not Requiring Reversal.—None of the other grounds of the motion for new trial require a reversal. (p. 218.)

WILL CONTEST—Forgery—Attesting Witnesses.—Where a will was offered for probate in solemn form, and was caveated as being a forgery, and it appeared that two of the three attesting witnesses were dead at the time of the trial, and evidence was introduced to prove their handwriting, and evidence was offered pro and con as to the genuineness of the signatures of such witnesses, especially as to one of them, it was competent, in resistance of the implication arising from his signature if it were genuine, to show that after the date of the instrument he had made statements tending to show that the alleged testatrix had not made any will. (p. 218.)

(Syllabi by the court except when stated to be by the editor.)

F. C. Foster, W. S. Upshaw, E. P. Upshaw and J. H. Green, for the plaintiff in error.

Walker & Roberts and Rosser & Brandon, for the defendant in error.

¹²⁵ ATKINSON, J. Mrs. Lula T. Lyon and Mrs. Mary M. Austin filed a petition to the court of ordinary of Walton

county to probate in solemn form a paper alleged to be the last will and testament of Mary L. Spencer, deceased. M. L. Mobley, as administrator upon the estate of H. L. Spencer, deceased, appeared in response to the citation issued by the ordinary and filed a caveat, in which it was alleged: "1. The instrument offered for probate is not the will of said Mary L. Spencer, and if it was signed by her, it was not drawn by her, was not read over to her, and she was ignorant of its contents ¹²⁶ at the time of signing same, and remained ignorant of it during the remainder of her life and died ignorant of its contents; 2. It is not the will of said Mary L. Spencer, because she never signed it, she knew nothing of it, said instrument was prepared and signed long after her death, and the same is a pure and unadulterated forgery, both as to her name and the names of the two witnesses, J. O. Stover and I. C. Campbell." The decision of the ordinary was in favor of the propounders, and the case was appealed to the superior court. It was there tried, and the verdict of the jury was in favor of the propounders. The caveator made a motion for a new trial, which was overruled, and he excepted. Other facts sufficiently appear in the opinion.

1. Two of the grounds of the motion for new trial were as follows: "9th. The court, having correctly charged the jury as to the propounders' contention that the instrument purporting to be the last will and testament of Mary L. Spencer is, as a matter of fact, her last will, and having correctly charged the contention of caveator that said instrument is not, as a matter of fact, her last will and testament, but, on the contrary, a forged paper and a forged will, proceeded to charge as follows: 'The propounders hold the affirmative, and the burden of proof is on them to prove that Mary L. Spencer herself signed the instrument which is alleged to be her will, and that it has been proven as the law requires. When this is done, the burden is shifted to the caveator to make good his contentions as set up in his caveat.' Movant alleges that the language in the charge above quoted, 'when this is done, the burden is shifted to the caveator to make good his contentions as set up in his caveat,' is error, for the reason that the parties had arrived at an issue and proposition, as to the paper being the will of Mary L. Spencer—whether she signed it or not; this proposition was affirmed by propounders and denied by caveator, and on the issue thus made both sides had introduced evidence; and the jury should not have been instructed that when propounders prove that Mary L. Spencer signed the instrument which is alleged to be her will and that it has been proven as the law requires, then the burden is shifted to caveator, and it devolved on ¹²⁷ him to make good his contentions that the paper was a forgery. Movant says that the burden in a case like this never shifts,

and it is not obligatory on the jury to divide the evidence into two parts, and determine their belief provisionally by one of the parts only, but they may consider the evidence for both sides as a whole in all the stages of their deliberations, and are not bound to distinguish the effect of propounders' evidence separately considered. 10th. The court charged the jury as follows: 'Before you can do this' (set up the instrument presented as the last will and testament of Mary L. Spencer), 'and before the case is made out on the part of the propounders, it must be shown to your satisfaction that Mary L. Spencer herself signed the instrument which is alleged to be her will, and signed it in the presence of all three of the witnesses whose names appear thereon, and that they signed it in her presence.' Movant says the foregoing charge is correct, but the court immediately proceeded to charge as follows: 'When this is done, the burden of proving that said instrument is a forgery or that the said instrument is not the last will and testament of Mary L. Spencer, and that it has not been proven as the law requires, is shifted to caveator. It is then upon the caveator to carry this burden and to satisfy the jury of the truth of his contentions, before you would be authorized to find in his favor. Whether caveator has carried this burden and established his contentions to the satisfaction of the jury that said instrument is a forgery and that it is not the last will and testament of Mary L. Spencer, is for the jury under the evidence to determine, which, if done to your satisfaction, would authorize at your hands a finding in favor of the caveator.' Movant alleges that the charge last quoted above is error. For that, as he contends, the parties had arrived at an issue and proposition, affirmed by propounders on one side and denied by caveator on the other, and the burden, under the law, of establishing the affirmative of that proposition by a preponderance of evidence was on propounders, and never shifted during the course of the trial, but remained with them to the end. That the proof on both sides applies to the affirmative or negative of the issue of facts, and the propounders, whose case requires the proof of that fact to the satisfaction of the jury, had all along the burden of the proof. The burden was not upon caveator to establish to the satisfaction of the jury that the alleged will was a forgery; all the law required of him was, ¹²⁸ that his evidence, taken with that for propounders and all the circumstances surrounding the case, should be sufficient to render the affirmation that Mary L. Spencer signed the will unsatisfactory to the jury, they, the jury, being the judges of whether or not all the evidence and circumstances satisfactorily settled the proposition that she did sign it, or whether it was insufficient to establish that proposition to their satisfaction. It was not incumbent on caveator to

establish to the satisfaction of the jury that Mary L. Spencer did not sign the alleged will. If the evidence for propounders and caveator and all the surrounding circumstances were sufficient to prevent the jury from being sufficiently satisfied that Mary L. Spencer did in fact sign the will, then that was all the law required for the caveator to prevail. Caveator did not have to prove to the satisfaction of the jury that it was not the will of Mary L. Spencer, as the charge complained of required him to do. Propounders had to prove to the satisfaction of the jury that it was the will of Mary L. Spencer, and all that was required of caveator was to prevent the propounders from doing this to the satisfaction of the jury. The jury should have been told that they must be satisfied from the whole case, the evidence for the propounders and for caveator and all the surrounding circumstances, that Mary L. Spencer did actually sign the will, and if they were not so satisfied from the whole case, then propounders had failed to establish their contention and caveator was entitled to a verdict."

Much confusion has arisen out of the fact that the expression "burden of proof" has been used in two senses. viz.: 1. The necessity which rests upon a party at any particular time during a trial to create a *prima facie* case in his own favor, or overthrow one when created against him; 2. The necessity of establishing the existence of a fact, or state of facts, by evidence which preponderates to a legally required extent: 16 Cyc. 926. In the charge complained of in the ninth ground of the motion, the judge instructed the jury that the propounders held the affirmative, and the burden of proof was upon them to prove that the alleged testatrix herself signed the instrument propounded, and that "it has been proven as the law requires." In another part of the charge this expression was explained so as practically to mean proved by the attesting witnesses. He then informed them that when this has been done the burden is shifted to the caveator "to make good" his contention as ¹²⁹ set up in his caveat. In the charge complained of in the tenth ground, the judge first instructed the jury that before the case was made out on the part of the propounders, it must be shown to the satisfaction of the jury that the alleged testatrix herself signed the will propounded, in the presence of all three attesting witnesses, and that they signed in her presence. He then added that when this was done the burden of proving that the instrument was a forgery or was not the last will and testament of the alleged testatrix shifted to the caveator. He described the burden which the caveator carried on the subject of whether the will was signed by the alleged testatrix or not, by saying, "whether the caveator has carried this burden and established his contentions to the satisfaction of

the jury" was for the jury to determine under the evidence, "which if done to your satisfaction would authorize at your hands a finding in favor of the caveator." This clearly informed the jury that certain things would shift the burden of proof to the caveator, and in order to successfully carry the burden thus placed upon him he must satisfy the jury of the truth of his contentions. It is also true that in describing what was necessary on the part of the propounders to make out a prima facie case the judge used the expression "to your satisfaction." But this did not relieve the fact that to meet a prima facie case the caveator must satisfy them of his contention. This placed upon him a greater burden than that required by law. The propounders alleged that the will was executed by the purported testatrix. This was an inherent part of their case. The burden was on them to establish that fact by a preponderance of evidence. The caveator could, of course, undertake to rebut the evidence on the subject of the factum or execution of the instrument introduced by the propounders, but he did not undertake an affirmative burden of satisfying the jury that the will was not signed by the alleged testatrix. In the final determination of the issue, the jury should take into consideration all of the evidence introduced both by the propounders and the caveator, and from a consideration of it arrive at a conclusion in regard to that issue. In several cases which have been before this court, where the caveat was based on the ground of insanity, undue influence, fraud or the like, there have been discussions as to what evidence was necessary to be introduced by the propounder, in addition to proof of the factum of the will, in order to make out a ¹³⁰ prima facie case, and when the burden of proof to establish grounds of the character just indicated devolves upon the caveator. In none of them which have come to our attention was there involved the question of the duty of establishing by a preponderance of the evidence the signing of the will: *Freeman v. Hamilton*, 74 Ga. 317; *Slaughter v. Heath*, 127 Ga. 747 (9), 57 S. E. 69, 27 L. R. A., N. S., 1, and cases cited. It is unnecessary to enter into a discussion of what will make out a prima facie case, or in regard to the duty to rebut such a case, or as to the quantum of evidence necessary to be introduced by a propounder in regard to sanity and voluntary action on the part of a testator. The issues here raised were merely in regard to whether the will was executed by the alleged testatrix as by law required or was a forgery, and, if her signature was actually placed on the instrument by her, whether it was in ignorance of its contents. If in a trial the question is whether a certain person signed a certain instrument or not, the party who asserts that it was so signed and to whose case this is essential carries the burden of proving it. If he makes out

a prima facie case, that would authorize the jury to find in his favor, if nothing further appeared. But if the defendant introduces evidence tending to disprove the prima facie case thus made, all the evidence should be considered by the jury in finally determining where the preponderance lies, the burden being upon the person who alleged the fact of the signature, in the sense that such allegation must be supported by the preponderance of the evidence in order for the party making it to have a verdict in his favor. This being so, it was misleading to charge, on an issue of whether the alleged testatrix signed the instrument propounded as her will, that the caveator carried the burden of establishing his contention "to the satisfaction" of the jury, although previously the court had charged that at the outset the propounders must show that the alleged testatrix signed the instrument in the presence of the three witnesses whose names appear thereon, and that they signed in her presence. There was a sharp conflict in the evidence, and we cannot say that this error was harmless.

2, 3. The rulings announced in the second and third headnotes do not require discussion.

4. The defendants in error filed a cross-bill of exceptions, assigning error upon the admission of certain evidence. One of the ¹³¹ witnesses whose name appeared to be signed to the will was J. A. Stover. The evidence showed that he was dead, and the propounders introduced testimony to prove his handwriting. The caveator introduced counter-testimony for the purpose of proving that the purported signature of Stover was not genuine. On this question there was much conflict in the evidence. The caveator offered evidence of the son of Stover that he had several conversations with his father, occurring after the death of the testatrix, in which his father said that it seemed very strange that Mrs. Spencer did not make a will, and asked the son if he had heard Mrs. Spencer say anything about a will. He also offered a letter written by J. A. Stover to Spencer, the husband and sole heir of testatrix, whose administrator was the caveator, in which Stover stated that if Spencer wished to sell his farm and would make a price and terms with regard to it, and the writer could afford to pay for the home for himself and family, he would consider the proposition. The will was dated in 1891, and Mrs. Spencer died in 1892. The letter was written in 1905. The proceedings to probate the will were not begun until 1907. Evidence was introduced tending to show that the farm referred to in the letter was land covered by the will. Under the terms of the will a life estate only was left to Spencer, with remainder over to the propounders. This evidence was admitted over objection upon the part of the propounders.

The objections may be reduced to two substantial points: (1) Was the evidence inadmissible as hearsay? (2) Was it inadmissible on the ground that the attesting witness being dead he could not be asked touching conflicting statements, and therefore could not be impeached by their introduction? We do not think either reason sufficient ground for excluding the evidence. In several earlier English cases evidence of this character was admitted, but in *Stobart v. Dryden*, 1 Mees. & W. 116, which was decided in 1836, declarations of a deceased attesting witness to a mortgage deed whose handwriting had been proved were offered as amounting to an acknowledgment of forgery, and were rejected by the court of exchequer. Parke, B., declared that the evidence of the handwriting in the attestation was not used as a declaration of the witness, but to show the fact that he put his name in that place and manner in which in the ordinary course of business he would have done if he had seen the deed executed. This case stood for some ¹³² time as a leading case, and has been referred to approvingly by some eminent text-writers: 1 Greenleaf on Evidence, 15th ed., sec. 226; 1 Redfield on Wills, 4th ed., *270. In the United States a doctrine different from that asserted in the *Stobart* case was early announced. In 1819 it was said by Kirkpatrick, C. J., in the case of *Newbold's Exrs. v. Lamb*, 5 N. J. L. 499: "The only reason why proof of the handwriting of a witness is taken as sufficient proof of the execution of a deed is founded upon the presumption that what an honest man has attested under his hand is true": See, also, *Crouse v. Miller*, 10 Serg. & R. 155; *Clark v. Boyd*, 2 Ohio, 56; *Losee v. Losee*, 2 Hill (N. Y.), 609; *Kirk v. Carr*, 54 Pa. 285; *Boyeus' Will*, 23 Iowa, 354; *Egbert v. Egbert*, 78 Pa. 326; *Neely v. Neely*, 17 Pa. 227; *Reformed Dutch Church v. Ten Eyck*, 25 N. J. L. 40; *M'Elwee v. Sutton*, 2 Bail. (S. C.) 128; *Colvin v. Warford*, 20 Md. 357. In *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459, and *Baxter v. Abbott*, 7 Gray, 71, some of the reasoning apparently conflicts with the authorities above recited; but in the Ohio case, on the trial of an appeal from the probate of a will, the testimony of a subscribing witness taken on the original probate was read in evidence under a statute of that state, the witness being dead. Evidence was offered to show declarations of the witness respecting the capacity of the testator, for the purpose of impeaching his testimony. It was held that before such statements could be given in evidence the witness must be interrogated as to them, and the fact that he died after giving his original testimony, and that thus the opportunity for such examination had been cut off, did not form an exception to the general rule. In the *Massachusetts* case it was said that no inference as to the

opinion of an attesting witness to a will could be drawn from the mere fact of his signing it, and that therefore evidence of a contradictory opinion expressed by him was inadmissible. The subject is considered at some length in 2 Wigmore on Evidence, sections 1505-1514.

In *Deupree v. Deupree*, 45 Ga. 415, it was held that if the testamentary paper be proved by the witnesses to have been subscribed by the testator in their presence, and they further state that they signed as witnesses immediately thereafter, but they are unable from want of recollection to state affirmatively whether the testator remained in the room or not whilst they were signing, and seven ¹³³ or eight years have elapsed, there is a presumption of law arising from the attestation that it was duly attested; and that it was error in the court to charge the jury that this presumption did not arise unless the attestation clause recited the presence of the testator during the subscription of the witnesses. In the opinion it was said: "In 2 Redfield on Wills, 35, it is said that even where there is no attestation clause, or it is defective, there still remains the presumption that all which appears upon the paper occurred in the order stated, and as the law requires it shall be done." The proof of attestation, therefore, carries with it something more than the mere fact that the witness signed the paper. If the witnesses are placed on the stand, they can be cross-examined and can be asked if they have not made statements conflicting with other testimony as given. If one or more of them is dead, and evidence is introduced to prove his signature, the purpose and effect is not solely to prove that such witness or witnesses signed the paper, but from that fact to derive inferences largely dependent upon the presumption that when they purported to sign properly they did so. When this added effect is to be used, it cannot be counteracted, it not being possible to cross-examine such attesting witness or to lay the foundation for impeachment. If proof of the handwriting of the attesting witness is to carry with it the force of an assertion by him that the instrument was executed because he witnessed it, this implied assertion should be impeachable by showing that he had made statements conflicting with it. The rule as to making a preliminary examination and calling the attention of the witness to conflicting statements before introducing them cannot be applied in such a case. Nor is it like the Ohio case, above cited, where a witness testified and then died, and it was desired to show subsequent statements conflicting with his former testimony. A somewhat similar relaxation as to the requirement of preliminary examination before introducing impeaching conflicting statements was recognized in *Battle v. State*, 74 Ga. 101. It was there held that where dying declarations

were proved, it was admissible to show that after the deceased was wounded he made statements concerning the transaction conflicting with such dying declarations. We recognize the fact that there may be some danger arising from the admission of such impeaching testimony, but there is also danger in admitting dying declarations, statements claimed to be ¹³⁴ part of the *res gestae*, opinions of witnesses, and proof of the signature of an attesting witness itself as having probative value in lieu of the introduction of the witness. But the danger of abuse arising from the admissibility of the evidence cannot destroy such admissibility or outweigh the counter-danger arising from admitting mere proof of the handwriting of a witness to have evidential value of the execution of a will without the introduction of the witness, and at the same time absolutely shutting off any practical mode of impeaching or destroying such evidential value, thus in effect relaxing the rule requiring the production of the witness in favor of one person without relaxing the rule that the witness, when produced, must be asked about the conflicting statements before proving them.

Judgment reversed on main bill of exceptions and affirmed on cross-bill.

All the justices concur.

EVANS, P. J., and HOLDEN, J. We concur in the various rulings, except those embraced within the fourth division of the opinion. On an issue of forgery of a will, we do not think the declarations of an attesting witness, made subsequently to the attestation, are admissible to impeach the *factum* of attestation.

The Burden of Proof Rests upon the Propounders of a Will, in the first instance, to show that it was executed, and the capacity of the testator. A *prima facie* case must be made out, after which the onus is changed, and the burden of proof is on the caveators to make their grounds of objection good: *Credille v. Credille*, 123 Ga. 673, 107 Am. St. Rep. 157. See, also, *In re Sullivan's Estate*, 40 Wash. 202, 111 Am. St. Rep. 895; *In re Shapter's Estate*, 35 Colo. 578, 117 Am. St. Rep. 216; *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386.

Subscribing Witnesses to Wills, Their Competency, and the Effect of their evidence supporting or opposing the will, are considered in the note to *Stevens v. Leonard*, 77 Am. St. Rep. 459.

The Attestation and Witnessing of Wills is the subject of a note to *Lane v. Lane*, 114 Am. St. Rep. 209.

TOLBERT v. LONG.

[134 Ga. 292, 67 S. E. 826.]

ELECTIONS—Jurisdiction of Equity to Intervene by Injunction.—Equity will entertain jurisdiction of a petition by a citizen and taxpayer to enjoin against the declaration of the result of an election held under a special act establishing a board of commissioners for a named county, defining their duties, etc., which act provides that it shall not become operative in the county unless ratified by a vote of the people, where it is charged that the whole act is unconstitutional or infected with other illegality frustrating the legislative plan of ratification. (p. 224.)

ELECTIONS—Second Injunction Against Same Act.—Where an injunction against the calling of an election has been denied, an amendment or second petition to enjoin the declaration of the result of the election does not seek to restrain the same act, and may be granted. (By the editor.) (p. 225.)

INJUNCTION—Second Application to Enjoin Same Act.—Under the facts of this case, the amendment and the second petition did not amount to a second application for injunction to restrain the performance of the same act. (p. 225.)

ELECTIONS — Referendum—Qualified Voters.—The act approved August 16, 1909 (Acts 1909, p. 425), providing for the creation of a board of commissioners for Madison county, defining their duties, etc., and which further provided that the act should not go into effect until ratified by the people of the county, clearly discloses the legislative plan to be that all persons voting at such election should be constitutionally qualified voters; and as the designation of such voters in the twenty-first section of the act totally disregarded the added suffrage qualifications prescribed by the constitutional amendment of 1908, the legislative plan of referendum to the constitutionally qualified voters was defeated. (p. 226.)

REVIEW ON APPEAL.—For the reason given above, it becomes unnecessary to decide the other constitutional objections raised against the act. (p. 227.)

(Syllabi by the court except when stated to be by the editor.)

John J. Strickland, John E. Gordon and George C. Thomas,
for the plaintiffs.

Cobb & Erwin and Henry C. Tuck, for the defendant.

²⁹³ **EVANS, P. J.** On August 16, 1909 (Acts 1909, p. 425), an act was approved, creating a board of county commissioners for the county of Madison, and providing that the same should not go into effect until ratified by the people of the county. H. H. Tolbert, who held the office of county commissioner under a prior act (Acts 1906, p. 441), in his capacity as holder of that office, as well as a citizen and taxpayer of the county, applied for an injunction to restrain A. H. Long, ordinary, from calling the election provided for in the act. The injunction was refused, and Tolbert excepted. The bill of exceptions of Tolbert was dismissed by the supreme court, because it appeared that no supersedeas had been granted, and the election had been

held prior to the hearing in this court. Before the judgment of the supreme court was made the judgment of the superior court, Tolbert amended his petition, alleging that the election had been held, and that a majority of those voting thereat had voted in favor of adopting the act, and also that an election had been held under the act for the three commissioners therein provided for, and that White, Davis and Fitts had received the highest number of votes, and claimed to be elected as commissioners. The attacks made upon the validity of the act in the original petition were renewed in the amendment, and the prayers were that the ordinary be enjoined from declaring the result of the two elections, and that the persons elected as commissioners at the latter election be enjoined from performing any duties as such by virtue of their election. A rule nisi was granted for a hearing on January 8, 1910. S. C. O'Kelley and others, alleging themselves to be citizens and taxpayers of the county, also filed their petition to enjoin the ordinary from declaring the results of the two elections²⁹⁴ held under the act of 1909, and to enjoin the three new commissioners from acting as such, and to enjoin Tolbert from turning over the papers in his possession as county commissioner to the new commissioners. The same attack made upon the validity of the act of 1909 in the petition of Tolbert against Long, ordinary, was made in this petition. A rule nisi was granted, requiring the ordinary and the three new commissioners to show cause on January 8, 1910. Agreeably to these orders the defendants showed cause by demurrer and by answer, and after hearing the evidence the court refused a temporary injunction; and the plaintiffs in the two suits sued out their respective writs of error.

1. By demurrer it was urged that the court was without jurisdiction to interfere in any way with the holding of the election. This court on several occasions has adverted to and recognized the general principle that a court of equity ordinarily will not interfere with the holding of elections by virtue of the exercise of the political power for the determination of the choice of public officers or other matter submitted to a popular vote. The general rule has been applied in the case of persons who claimed that they would be deprived of their right to engage in a particular business if the special law was made effective by a popular vote. In such cases it was held that the attack on the law on the ground that its operation is destructive of property, or property rights, in advance of the election declaring it operative, was premature, and that the courts will wait until the law is attempted to be put into operation before the person who claims injury to, or destruction of, his property will be heard to complain of the unconstitutionality or illegality

of the law: *Scoville v. Calhoun*, 76 Ga. 263; *Clayton v. Calhoun*, 76 Ga. 270. Nor will a court of equity entertain original jurisdiction in the contest of an election: *Caldwell v. Barrett*, 73 Ga. 604; *Ogburn v. Elmore*, 121 Ga. 72, 48 S. E. 702; *Harris v. Sheffield*, 128 Ga. 299, 57 S. E. 305. But an exception has been recognized to the general principle where the constitutional rights of a citizen and taxpayer are sought to be invaded by an attempt to make an unconstitutional or inapplicable law operative through the means of popular election: *Mayor etc. of Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247; *Town of Roswell v. Ezzard*, 128 Ga. 43, 57 S. E. 114; *Town of Maysville v. Smith*, 132 Ga. 316, 64 S. E. 131; *County of De Kalb v. Atlanta*, 132 Ga. 727, 65 S. E. 72. The ²⁹⁵ equitable jurisdiction in those cases arises out of the necessity of adequate protection of the constitutional rights and guaranties of citizenship, which constitutional rights can be more effectually protected by restraining any attempts upon their encroachment through the medium of an election than by waiting until the election has been held. If the legislative enactment proposed in the present case to become operative through the medium of a popular election be violative of the organic law of the land, it is the right of a taxpayer of the territory to be affected to say that the public funds shall not be used to defray the expenses of an illegal election. Besides, no adequate remedy at law occurs to us to which the taxpayer might resort after the election had been duly declared in favor of the ratification of the enactment, wherein he could assert the unconstitutionality of the law. Certainly the remedy to enjoin the holding of the election would be more direct, and better calculated to avoid complications, than to remain passive until the law had been declared before beginning a proceeding to test its constitutionality. An instance is conceivable where a majority of the voters included within the limits of the territory to be affected might be decidedly of the opinion that the enactment was opposed to the constitution, and for this reason abstain from voting. If they refrained from voting, the law must be adopted, if at all, by a minority vote, or, if those voters take part, they must do so with the consciousness of participating in an illegality and running the risk of estopping themselves from thereafter calling in question the constitutionality of the act under which the election was held. There is a wide difference between a court of equity interfering under such circumstances and holding aloof where the issue is that of a contest of an election. We think there was equity in the petition.

2. It is insisted that the effect of the amendment, as well as the new petition, is but a second application for an injunction; that, although a second petition was filed by other

plaintiffs than appeared in the first, inasmuch as in the former case the plaintiff claimed relief as a taxpayer, and the plaintiffs in the latter case base their right to relief as belonging to the class represented by the plaintiff in the former suit, the effect of the rule in reference to granting a second application for injunction cannot be evaded by merely changing the representatives of the class. We recognize the ²⁹⁶ rule that a second application for injunction should only be granted in the exercise of a sound discretion, and ordinarily would be denied unless the petition set up facts which were unknown at the time of the first application; but we do not think that this rule has application to the present causes. The twentieth section of the act approved August 16, 1909, provides "that this act shall not become operative until it has been submitted to a vote of the people on the first Saturday of October next, the election to be called by the ordinary of the county and to be held by managers appointed by the ordinary, and said managers shall hold the election under the same rules as apply to regular county elections and report the ballots cast in the election, and the result thereof, to the ordinary, who shall immediately declare the result." When the case was before the court on the former writ of error, it appears from the opinion therein rendered that the reason given for its dismissal was that the prayer of the petition was limited to enjoining the calling of an election, and that, inasmuch as the election had been held and no supersedeas had been taken, the act sought to be enjoined had been fully performed. It was specially pointed out that there was no prayer that the ordinary should be enjoined from canvassing the returns, nor that he should be enjoined from declaring the result of the election, nor any prayer for general relief: See *Bond v. Long*, 133 Ga. 639, 66 S. E. 778. The rule which the defendant in error invokes is applicable only where the second application for injunction is to operate upon the same act sought to be enjoined in the first application. The plaintiffs in error did not seek to enjoin anything further than the calling of the election in their first application. In the amendment to the first petition and in the second petition, the prayer is to enjoin the declaration of the result of the election.

3. The act provides for two elections. The first one is to determine whether the act itself shall have the force of law. The twentieth section thereof declares that the act shall not become operative until it has been submitted to a "vote of the people." Manifestly, the referendum by the legislature is to the people who, under the organic law, are entitled to vote. It would be the wildest vagary to impute to the legislature an intention to permit people of all ages

and sexes, without any regard to suffrage qualifications, to participate in an election called for the purpose of determining whether ²⁹⁷ its enactment should become law in that particular locality. The election shall be held (so the twentieth section of the act reads) "under the same rules as apply to regular county elections." At such an election only voters constitutionally qualified to vote may legally participate. The legislative scheme is, therefore, plain that the act is to operate as law only in the event it is ratified by a majority of the constitutionally qualified voters of Madison county. The second election referred to in the act is contingent upon the adoption of the act by the qualified voters of the county. When the act becomes operative as law as the result of the first election, then it is declared that the commissioners to fill the office provided in the act "shall be elected by the people at an election to be held in said county on the fourth Wednesday in October, 1909." Again, we see the legislative purpose to be that the commissioners shall be elected in a legal manner and at a legal election, and the "people" referred to as the electorate means the voters constitutionally qualified to participate in an election of county officers. A contrary construction would ascribe to the legislature an intent to provide for an election which would not be legally effective.

After declaring that the act shall be effective only when adopted by a majority of the qualified voters of the county, in the twenty-first section it is undertaken to define who are such qualified voters. This section provides "that in the elections called by this act all persons eligible to vote in the last general election for governor and other state officers shall be eligible to vote in this election." Since the last general election referred to in the act the constitution of the state had been amended, by which the qualifications of voters had been changed in many vital respects. Other and very stringent qualifications were added, and the constitutional amendment had been duly promulgated, and was an integral part of the organic law at the time of the passage of the local act. By allowing all voters in the last general election to participate, without regard to the newly added constitutional qualifications, the legislative plan of a referendum to the constitutionally qualified voters would be frustrated. We cannot think that the legislature intended that the act should become operative, except upon a majority vote of such voters as were constitutionally qualified to vote, and the inclusion of other voters as eligible to vote made it impossible to effectuate this intention.

²⁹⁸ 4. There are many other attacks made upon the constitutionality of the act; but these questions become academic under our holding that no valid election can be held under

the local act, for the reason given in the foregoing division of the opinion. It would be idle to enter into a discussion of their merits.

Judgment reversed.

All the justices concur, except Fish, C. J., absent.

A Court of Equity will Enjoin the Canvass of a Vote at a local option election, which election is invalid because not ordered as prescribed by law, if no provision for a contest is made by statute: *Marsden v. Harlocker*, 48 Or. 90, 120 Am. St. Rep. 786. And the state, through its attorney general, has a right to an injunction to restrain the commission of a conspiracy to violate the election laws by padding election lists, permitting repeating and falsifying returns: *People v. Tool*, 35 Colo. 225, 117 Am. St. Rep. 198. An application for an injunction to restrain election officers from committing election frauds presents a purely judicial, and not a political, question: *People v. Tool*, 35 Colo. 225, 117 Am. St. Rep. 198.

SOUTHERN EXPRESS COMPANY v. HANAW.

[134 Ga. 445, 67 S. E. 944.]

CARRIER—Receipt Limiting Liability for Goods.—The mere insertion, in a printed form of receipt used by an express company, of terms limiting its liability, and the delivery of such a receipt to a shipper, without more, will not in this state suffice to make an express contract for the purpose of limiting its liability as a common carrier. (p. 230.)

CARRIER—Limitation of Liability—Value of Goods.—Where no value is put upon goods shipped by an express company, and no effort is made to arrive at a valuation, the mere fact that in the prepared form of receipt used by the company and issued to the shipper there is contained a statement that "the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein," will not suffice to limit the liability of the company to fifty dollars, regardless of the value of the property shipped. Such a statement in the receipt is not a valuation, but an arbitrary limitation sought to be placed upon the extent of the liability of the common carrier. (p. 231.)

CARRIER—Limitation of Liability—Value of Goods.—While a bona fide agreement may be made as to the value of property to be transported, as a basis for fixing the charges, and may be valid, yet a common carrier cannot, even by express contract, put an arbitrary limitation upon its liability for damages arising from negligence of its agents. Such a contract is contrary to public policy. (pp. 231, 235.)

CARRIER—Contract of Shipment—Conflict of Laws.—If goods are shipped in one state on a through contract, to be transported by a common carrier and delivered in another (omitting any question of public policy), the general rule is, that, in the absence of anything to show a contrary intent, the validity, form and effect of the con-

tract of shipment will be determined by the laws of the state where the contract was made and partly to be performed. (p. 235.)

CARRIER—Contract of Shipment—Conflict of Laws.—If goods are shipped for transportation by connecting common carriers from New York to a point in this state, and suit is here brought for damages arising from delay in delivering them by the final carrier after arrival, whether or not the delivery and taking of the shipping receipt constituted a contract by the shipper with the initial carrier will be determined by the laws of New York, if they be shown. (pp. 235, 238.)

CARRIER—Limitation of Liability—Conflict of Laws.—In so far as stipulations of such contract (if it be such) limit the common-law liability of the carrier as an insurer, or for losses occurring by unavoidable accident, they will be enforced by the courts of this state; but in such a case, it being contrary to the public policy of this state to allow a common carrier, even by express contract, to make an arbitrary limitation upon its liability for negligence of its agents or servants, stipulations to that effect will not be enforced. (pp. 235, 238.)

CARRIER—Limitation of Liability—Conflict of Laws.—The mere fact that an express company to which is delivered goods for shipment gives to the shipper a receipt which contains a stipulation that, in the absence of valuation, the company's liability shall be limited to a certain amount, and the taking of such a receipt by the shipper, without more, does not constitute a fraud on his part which will relieve the carrier from liability for damages. (p. 239.)

CARRIER—Contract of Shipment—Foreign Laws.—Where a party seeks to rely on the law of another state as furnishing the basis for a right of recovery or defense different from what it would be under the laws of this state, or the common law, the law of such foreign state should be pleaded and proved. (pp. 239, 240.)

CARRIER—Limitation of Liability—Interstate Commerce Law. If the point were distinctly made for decision, it would seem that the federal interstate commerce law could not be held to render valid an arbitrary limitation upon the liability of a common carrier for damages arising from negligence of its servants, stated in a shipping receipt given when the shipment commenced, so as to be binding in the state where the goods were to be delivered, and where suit was brought, although contrary to public policy and void according to the laws of such state. (p. 240.)

CARRIER—Damages for Delay—Loss of Profits.—In an action for damages on account of delay by a common carrier in delivering goods, it was error to admit evidence of the profit which the plaintiff would have made by selling such goods if he had received them promptly, after proof only of the shipment and the delay in delivery. (p. 240.)

CARRIER—Measure of Damages for Delay in Delivery.—The general rule is that the measure of damages for unreasonable delay by a common carrier in delivering goods is the difference between their market value when they should have been delivered and their market value when they were delivered, with interest from the former date, less the freight, if unpaid. (p. 240.)

CARRIER—Damages for Delay—Special Expense.—No special expense was shown to have been incurred by the shipper or consignee on account of the delay. (p. 240.)

CARRIER—Delay in Delivery—Remedy of Consignee.—Delay in the delivery of goods by a common carrier will not authorize the consignee to reject them upon their arrival and recover their full

value from the carrier. His remedy is to sue for the damages he has sustained by reason of the delay. (p. 241.)

(Syllabi by the court.)

J. H. Merrill and McDaniel, Alston & Black, for the plaintiff in error.

Theodore Titus and W. H. Hammond, contra.

⁴⁴⁶ LUMPKINS, J. L. B. Hanaw brought suit against the Southern Express Company for a delay in delivering certain goods which were sent by express from New York to Thomasville. The initial carrier was the Adams Express Company. The plaintiff bought the goods and had them shipped to him. The receipt given in New York had at its head the statement: "The company's charge is based upon the value of the property, which must be declared by the shipper." It contained the following: "Received from _____ One Co Pa Valued at \$_____. Marked L. B. Hanaw, Thomasville, Ga., which the company agrees to carry upon the following terms and conditions, to which the shipper agrees, and, as evidence thereof, accepts this bill of lading. 1. In consideration of the rate for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of ⁴⁴⁷ said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein. 2. If the express company has not an agency at the point of destination, it shall carry the property to its agency nearest or most convenient thereto, and there notify the consignee or deliver the property to some other carrier to continue the transportation. The Adams Express Company shall not be liable for loss or damage occurring after such delivery, nor for detention after having tendered the property to a connecting carrier. . . . 9. The terms and conditions of this contract shall apply to any forwarding or return of said property, and shall inure to the benefit of every carrier to whom the same may be intrusted to complete the transportation." Following the signature of the company's agent at the bottom of the receipt were these words: "Liability limited to fifty dollars unless a greater value is declared." The defendant demurred to the petition, and also filed an answer. It admitted that the goods were shipped on September 13th, and reached Thomasville on September 19th, and alleged that they were tendered to the plaintiff early in December, but he refused to receive them. In explanation of the delay the defendant

alleged that the goods were insufficiently and improperly packed, and it became necessary to repack them for their protection; that this was done by placing them in a box, but the direction was so defective on the package that the person making the transfer thought the name was S. B. Howard instead of L. B. Hanaw, and so marked the box; that the weight of the box was seventy-six pounds, while the weight of the package alone was only fifty pounds; that by reason of this the box was not recognized on arrival as being the shipment called for by the way-bill, and the delay in identifying the package and making delivery resulted therefrom. Defendant alleged that the stipulation in the receipt limiting liability to the sum of fifty dollars was binding under the laws of New York, where the contract of shipment was made, and there could be no recovery for any greater sum. It is unnecessary to set out the evidence. The jury found for the plaintiff two hundred and fifty-seven dollars and fifty-three cents. Defendant moved for a new trial, which was refused, and it excepted.

⁴⁴⁸ This was a suit against the Southern Express Company to recover damages for delay in delivering goods shipped from New York to Georgia, the Adams Express Company being the initial carrier, and issuing the receipt. The goods reached the point of destination, but there was delay in delivering them. It appears from the record that, during the charge, the court inquired of counsel for defendant if he admitted liability to the extent of fifty dollars, and counsel replied that he did, and tendered that amount and the goods, which were in the defendant's hands. The court thereupon charged on the basis that some liability was admitted. The question was thus one as to the effect of the stipulation in the express receipt, and as to the measure of damages. It did not appear at what point or in what condition the goods were delivered to the defendant, nor was any question made as to that, the defendant relying on the terms of the receipt.

1-3. It is declared by the Civil Code, section 2276, that "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract and will then be governed thereby." It is well settled that a mere inclusion by a common carrier, in a bill of lading or receipt for goods, of a provision for limiting his liability, and the reception thereof by the shipper, will not serve in this state to create an express contract within the meaning of the section of the code quoted. In some states it has been ruled that the shipper's acceptance of a receipt which contains a limitation of liability will suffice to show an assent to its terms and constitute an agreement, whether he reads the

receipt or not. But such is not the law in Georgia: *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Southern Express Co. v. Barnes*, 36 Ga. 532. In one or two of the cases such expressions were used as that the carrier must make an express contract, independent of his receipt, or outside of his receipt. This negatived the idea that the inclusion of limitations on liability in the receipt delivered to the shipper and his mere acceptance of it constituted an express contract; but it did not hold that the parties might not use the terms set out in the receipt as a basis on which an express contract could be made. Thus where a special contract was incorporated in a bill of lading, which was signed by both parties, upon a consideration this ⁴⁴⁹ was held to be sufficient: *Georgia R. R. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81. At last, however, it must be an express contract: *Purcell v. Southern Express Co.*, 34 Ga. 315; *Central R. Co. v. Hasselkus*, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838; *Georgia R. Co. v. Gann*, 68 Ga. 350; *Central of Georgia Ry. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673. In *Kavanaugh & Co. v. Southern Ry. Co.*, 120 Ga. 62, 47 S. E. 526, 1 Ann. Cas. 705, the expression was used that if the contract had been executed in Georgia, it would not be binding unless "signed" by the shipper. This was doubtless an inadvertence, meaning that there must be an express agreement by the shipper, the most ordinary method of showing such agreement being by signing. Considered as a limitation upon liability, it is clear that the provision contained in the receipt now before us, that, in the absence of valuation by the shipper, the liability should be limited to fifty dollars, would not be valid or binding as a Georgia contract. If it be contended that this provision in the receipt amounted to an actual valuation of the property shipped, it will not suffice for that purpose in this state. A common carrier may, as a basis for fixing its charges and limiting the amount of its corresponding liability, make with the shipper a contract of affreightment embracing an actual and bona fide agreement as to the value of the property to be transported; and in such case the latter, when loss, damage or destruction occurs, will be bound by the agreed valuation. But it must be a bona fide agreement as to valuation, not a mere insertion in a receipt by a carrier, that, in the absence of such agreement or valuation, an arbitrary limitation is fixed by the carrier.

It will be noted that by the terms of the receipt the express company does not even concede that the valuation is fifty dollars, or fix that amount as the value, but declares that, in the absence of a valuation, it shall not be liable "for more than fifty dollars if no value is stated herein." Whether it will admit liability to that extent or claim that the goods were worth less is left open. At the bottom of the receipt is

also an entry stating: "Liability limited to \$50 unless a greater value is declared." In the place prepared for inserting an actual valuation are the words, "Valued at \$———." Taking these portions of the prepared form of receipt together, it seems quite clear that a place was left blank for inserting an actual valuation, but this was not used; and instead of relying on an ⁴⁵⁰ actual valuation, the carrier declared in the receipt that, in the absence thereof, its liability should be limited so as not to be more than a certain amount, regardless of the value of the goods or articles shipped. How could this be said to be a bona fide effort to value, or arrive at the value of the particular goods which were shipped in the present case? The decision in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, 28 L. ed. 717, and cases following it, are relied on. In that case horses were shipped by a railroad company under a bill of lading, signed by the shipper, which stated that the horses were to be transported "upon the following terms and conditions, which are admitted and accepted by me as just and reasonable." Among these was to pay the freight at a specified rate "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation, if a chartered car, on the stock and contents in same, twelve hundred dollars for the carload." Such a bill of lading, signed by both parties, and in which the carrier assumed liability to the extent of an "agreed valuation," made a much stronger case in regard to fixing an actual valuation than the mere statement in the receipt now under consideration. But this court, in *Central Ry. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720, discussed the case of *Hart v. Pennsylvania R. Co.*, and differentiated it from a case involving a bill of lading which stipulated that, "In consideration of the reduced rates specified above, it is mutually agreed that the value of fruit shipments under this bill of lading shall be taken at not exceeding five hundred dollars per carload; vegetable shipments, two hundred dollars per carload; melon shipments, eighty-five dollars per carload; and the carrier shall in no event be liable for any greater sum in case of total loss or destruction." It was doubted whether the additional provision involved in the *Hart* case created an actual agreement as to valuation. It will be seen that the stipulation in the bill of lading considered in the case of *Central Ry. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 93 L. R. A. 720, just cited, undertook to declare an agreement in the absence of a mutual agreement, as does the express receipt now before us. In *Georgia S. & F. Ry. Co. v. Johnson, King & Co.*, 121 Ga. 231, 48 S. E. 807, shippers sent candy to a railroad for transportation. It was in boxes and the contents were unknown to the company.

Candy could be shipped in either of two classes, having different freight rates. The shippers classified that which they were ⁴⁵¹ shipping as of a lower grade, and thus prepared shipping tickets, using a form containing the words "candy released six cts. per pound valuation," and on this the railroad received the goods and the shippers obtained a lower rate of freight. After damage or loss, they were estopped from claiming to recover at a higher valuation than that thus fixed by them. In *Central of Georgia Ry. Co. v. City Mills Co.*, 128 Ga. 841, 58 S. E. 197, the principles announced in this opinion were recognized; but where a shipper, which did a large amount of shipping over a railroad, with the assent of the railroad company prepared and had printed for itself a blank form of shipping receipt which included the words, "as per conditions of company's bill of lading," and the shipper's agent who prepared the form intended to make it subject to the conditions in the company's regular bill of lading, and the meal which was involved in the controversy was loaded on a car by the shipper, and the receipt was made out by its agent and presented to the agent of the railroad company for signing, it was held that this amounted to an express agreement by the shipper to the terms thus prepared by its agent and tendered to the railroad company's agent for signature as containing the contract. No question was made or discussed as to a consideration or as to any term of the contract being contrary to public policy. Neither of the two cases last cited at all conflicts with what has been said above.

A common carrier cannot, even by express contract, limit its liability for damages arising from negligence of its agents. The section of the code quoted at the beginning of this opinion has not been construed as intending to authorize such a limitation: *Central of Georgia Ry. Co. v. Hall*, 124 Ga. 322, 110 Am. St. Rep. 170, 52 S. E. 679, 4 L. R. A., N. S., 898, 4 Ann. Cas. 128. It was there said that "The requirement of diligence on the part of a common carrier is one involving public policy, and it would be contrary to such policy to allow him to relieve himself from his duty in this regard by contract. A common carrier cannot, therefore, by special contract, exempt himself from liability for loss of goods intrusted to him, where the loss arises from his own negligence." A number of previous decisions of this court were cited in support of this statement, including *Georgia R. R. Co. v. Gann*, 68 Ga. 350, and *Georgia R. R. & Banking Co. v. Keener*, 93 Ga. 808, 44 Am. St. Rep. 197, 21 S. E. 287. In the latter case the distinction ⁴⁵² between actual valuation of the property to be shipped and an arbitrary limitation upon value, amounting to an effort to limit liability for negligence, was clearly recognized.

In *The Kensington*, 183 U. S. 263, 22 Sup. Ct. Rep. 102, 46 L. ed. 190, involving a transportation of baggage from Antwerp to New York, with stipulations in the passenger's ticket for limitation of liability for damages arising from negligence, which would have been valid by the Belgian law, Mr. Justice White said: "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy." The doctrine of public policy as applicable to such a case was fully discussed (pp. 269 et seq.): See, also, *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Grogan v. Adams Express Co.*, 114 Pa. 523, 60 Am. Rep. 360, 7 Atl. 134; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; 5 Am. & Eng. Ency. of Law, 2d ed., 308, 333.

It has been held in Pennsylvania that a carrier has a right to make inquiry, and to have a true answer as to the nature and character of goods, but that if he makes no inquiry and no artifice is used to mislead him, he is responsible for any loss, however great the value may be; and the duty to state the nature and value of property is not on the shipper, in the absence of inquiry, and in the absence of fraud or artifice on his part: *Camden & Amboy R. Co. v. Baldauf*, 16 Pa. 67, 55 Am. Dec. 481; *Relf v. Rapp*, 3 Watts & S. 21, 37 Am. Dec. 528; *Story on Bailments*, 567. Our own code (Civil Code, section 2290) declares that "The carrier may require the nature and value of the goods delivered to him to be made known, and any fraudulent acts, sayings, or concealment by his customers will release him from liability." This contemplates a requirement by the carrier, not a general duty on the part of the shipper to disclose, without such requirement. In the *Keener* case (93 Ga. 808, 44 Am. St. Rep. 197, 21 S. E. 287), weight seems to have been given to the fact that no inquiry was made by the carrier.

4, 5. It was contended that if the insertion in the receipt of the express company of the clause in regard to limiting the value in the absence of actual valuation did not amount to an express contract ⁴⁵³ in Georgia, nevertheless it was a valid contract in New York, where the shipment originated and where the receipt was issued, and should therefore be enforced in this state. The doctrine that the *lex loci contractus* will generally determine the validity and effect of a contract is well recognized. Cases of shipments beginning in one state and terminating in another have given rise to many conflicting adjudications. Sometimes the contract is partly to be performed in one state and partly in another where the delivery takes place. Sometimes goods are transported

through several different states before reaching the point of delivery. Sometimes the initial carrier contracts for a through shipment; sometimes only to deliver to the next carrier. Without entering into a discussion of the many varying decisions, or of peculiar circumstances making exceptional cases, the general rule may be said to be that if the contract is one of through shipment entered into in one state where its performance begins, although a delivery is to be made in another state, in the absence of anything to show a contrary intent, the law of the state where the contract was made and the carriage begun will be treated as the *lex loci contractus*, and the contract will be governed by it. This rule, however, is subject to the limitation that a state will not enforce a contract which is contrary to its public policy. By the Civil Code, section 8, it is declared: "The validity, form, and effect of all writings or contracts are determined by the laws of the place where executed. When such writing or contract is intended to have effect in this state, it must be executed in conformity to the laws of this state, excepting wills of personalty of persons domiciled in another state or country." Section 9 declares that "The laws of other states and foreign nations shall have no force and effect of themselves within this state, further than is provided by the constitution of the United States, and is recognized by the comity of states. The courts shall enforce this comity, until restrained by the General Assembly, so long as its enforcement is not contrary to the policy or prejudicial to the interests of this state." Section 3668 declares that "A contract which is against the policy of the law cannot be enforced." Under section 8, if the contract were to be wholly performed in this state, it would have to be made in accordance with the laws thereof. Considering this as a contract originating in another state, and there to be partly performed, the laws of that state must be considered in respect to ⁴⁵⁴ its validity as a contract. But under the other two sections cited, the doctrine of comity in applying the law of another state to such a contract is limited by the fact that this state will not enforce the law of another state giving validity to a contract of a common carrier there made, but with part performance and delivery to be made here, which is contrary to the public policy of this state.

In *Alabama Great Southern R. Co. v. Little*, 71 Ala. 611, it was said that a common carrier may, by special contract, limit or qualify his liability as an insurer, or his common-law liability for losses occurring by unavoidable accident; "but public policy and every consideration of right and justice forbid that a common carrier should be allowed to stipulate for exemption from, or limitation of, his liability for losses or injuries occurring through the want of his own skill or

diligence, or that of the servants or agents he may employ, or through his or their willful default or tort." This was said in a case where a shipment was made from Cincinnati, Ohio, to a point in Alabama, and where the bill of lading was issued by the initial carrier. Such was also the shipment involved in *Louisville & Nashville R. Co. v. McGuire*, 79 Ala. 395. In *Union Locomotive etc. Co. v. Erie Ry. Co.*, 37 N. J. L. 23, it was said: "A contract valid elsewhere will not be enforced if it is condemned by positive law, or is inconsistent with the public policy of the country, the aid of whose tribunals is invoked for the purpose of giving it effect": See, also, *Thomson v. Taylor*, 65 N. J. L. 107, 46 Atl. 567. In *Southern Express Co. v. Rothenberg*, 87 Miss. 656, 112 Am. St. Rep. 466, 40 South. 65, goods were shipped from New York to Mississippi, and were destroyed in a wreck. Suit was brought in the latter state. It was held that a limitation similar to that now involved was contrary to public policy and would not be enforced. The ground for holding that even an express contract seeking to relieve a common carrier from liability for negligence will not be enforced, being that it is contrary to public policy, comity, which is at last the foundation of the doctrine of enforcing the *lex loci contractus*, will not compel the courts of this state to violate its public policy and to enforce a contract which would have such effect, as to property to be brought into this state by a common carrier and here delivered, certainly not as to injury resulting from negligence here committed, merely because the contract was made beyond its borders. A contract of carriage, as to shipments ⁴⁵⁵ into Georgia, which is not contrary to the public policy of this state can be enforced here, if valid under the laws of the state where it was made and the carriage was begun, although it might not have been a complete or binding contract if executed in Georgia.

We are aware of the fact that there are rulings contrary to that here made. But in some of the decisions the question of public policy was apparently not raised or considered. The supreme court of Massachusetts differs directly with the supreme court of the United States on the subject of public policy, and holds that a contract of a common carrier, valid at the *lex loci contractus*, will be enforced in Massachusetts, where the carriage terminates, although contrary to the public policy of that state: *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665, 12 L. R. A. 340. The same court has, however, held that whether the receipt, by the shipper, of a contract signed only by the carrier will show an assent by the shipper to its terms is to be determined by the *lex fori*—a ruling which cannot be reconciled with the current of authority: *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106. In Ohio

a contract made in another state in regard to a shipment into that state was held not to relieve the carrier from the result of its negligence, although it would have had that effect in the state where it was made. The decision was, perhaps somewhat inaccurately, placed upon the ground that the law of the place of delivery generally would be applied, rather than on the distinct ground that the contract was contrary to public policy. The question whether the inclusion of certain terms in a bill of lading or express receipt and its delivery to the shipper is sufficient to constitute a contract between him and the carrier is one thing; the question whether, if it be conceded that according to the *lex loci contractus* this is sufficient to make a contract, it is violative in all or some of its terms of the public policy of the state where the delivery is to be made, and the contract is sought to be enforced, is quite another thing. Apparently in New York the extent of the liability of a common carrier, though arising from negligence, may be limited: *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475. But contrast *Curtis v. Delaware etc. R. Co.*, 74 N. Y. 116, 30 Am. ⁴⁵⁶ Rep. 271, where baggage was delivered at Scranton, Pennsylvania, for carriage to the city of New York and delivery there, and was lost after arriving in New York. It was said by the supreme court of Alabama, in regard to the New York ruling in *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608: "The case belongs to that class of cases in the New York courts reviewed in *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, which holds that common carriers may stipulate for exemption from liability for the negligence of themselves or their servants. That rule has not prevailed in this court; on the contrary, we have adhered to the doctrine that a contract by which a carrier undertakes to limit his common-law responsibility cannot be employed to relieve him from losses or damages resulting from his negligence": *Alabama Great Southern R. Co. v. Little*, 71 Ala. 611.

The distinction between contracts relieving a common carrier from liability not arising from negligence and those which seek to relieve it in whole or in part from liability arising from negligence has been recognized in this state. In *Western & Atlantic R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102, machinery was shipped from Massachusetts to a point in this state. In the bill of lading it was stipulated that the railroad company should not be held liable for "any loss or damage arising from the following causes, viz., fire from any cause, on land or water, explosions, accidents to boilers and machinery, insufficiency of package in strength or otherwise, rust, damp-

ness," etc. It appeared that, while this stipulation in the bill of lading would not have constituted an express contract with the common carrier under the Georgia law, it was a good contract in Massachusetts. In so far as it sought to relieve the carrier from liability other than that arising from its own negligence, it was held enforceable in Georgia. But Simmons, J., said: "Of course none of the carriers could exempt themselves from liability arising from their own negligence. Although the goods were shipped at the owner's risk, and the carriers were not to be liable for damages caused by weather or rust, still if the damage was caused by the weather or rust, occasioned by the negligence of the carrier or by unreasonable delay upon the road, the carrier guilty of the negligence would be liable. . . . The carrier should be held liable only for his own negligence, or for the damage caused by its unreasonable detention on the road." ⁴⁵⁷ In *Wood v. Southern Express Co.*, 95 Ga. 451, 22 S. E. 535, the express receipt involved contained a stipulation that if the value of the property was not stated at the time of the shipment, and specified in the receipt, the holder thereof would not demand of the company a sum exceeding fifty dollars for loss or damage to the shipper. No value was specified in the receipt, but the actual value shown by the evidence was more than fifty dollars. A recovery was had. The presiding judge ordered that a new trial should be granted unless the plaintiff would write off from the verdict an amount sufficient to reduce it to fifty dollars. It was held that, "Treating this stipulation as an attempt to limit the liability of the carrier, it was ineffectual, because it does not appear that the shipper expressly assented to it; . . . and even if he had agreed to it, the stipulation would not be valid as to loss involving negligence on the part of the carrier." It was said that in no view of the case, therefore, was the court warranted in the direction given as to the amount of the verdict. It does not appear in the published report where the shipment originated and what was the point of delivery. But the record on file in the office of the clerk of this court shows that the package was shipped at Selma, Alabama, to be delivered at Macon, Georgia. While the supreme court of Alabama holds that a common carrier cannot limit its liability for negligence, the decision was not based on the law of that state, but solely on the ground that such a contract was not allowed to be enforced by the law of Georgia. The terms of the contract which were held valid under the New York law, and enforceable in this state, in *Kavanaugh v. Southern Ry. Co.*, 120 Ga. 62, 47 S. E. 526, 1 Ann. Cas. 705, did not limit liability arising from negligence. No question of public policy was raised, and the receipt of the bill of lading in New York, containing certain stipulations, was only treated as having the

same effect as if the shipper had expressly assented thereto. In *Wallace v. Sanders*, 42 Ga. 486, the question of public policy was not considered; and that case was one involving loss growing out of the disorganized condition of affairs during the Civil War, and damage claimed to have been done by members of an army. (See p. 491.) Nor is the decision in *Southern Ry. Co. v. Parramore*, 119 Ga. 690, 46 S. E. 822, in conflict with the ruling now made. The suit there was brought on a special contract signed by the shipper. There was no question of public policy as to any of its terms; See, ⁴⁵⁸ also, *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; *The Kensington*, 183 U. S. 263, 22 Sup. Ct. Rep. 102, 46 L. ed. 190; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. ed. 872; *United States Express Co. v. Kountze*, 8 Wall. 342, 19 L. ed. 457; *Conover v. Pacific Express Co.*, 40 Mo. App. 31; *Louisville etc. N. Ry. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *United States Lace Curtain Mills v. Oceanic Steam Navigation Co.*, 145 Fed. 701; *Northern Pac. Ry. Co. v. Kempton*, 138 Fed. 992, 71 C. C. A. 246; *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508; *Southern Express Co. v. Seide*, 67 Miss. 609, 7 South. 547; 42 Am. & Eng. R. R. Cas. 398; *Hughes v. Pennsylvania R. Co.*, 202 Pa. 222, 97 Am. St. Rep. 713, 51 Atl. 990, 63 L. R. A. 513; *Southern Express Co. v. Briggs*, 1 Ga. App. 294, 57 S. E. 1066; Story on Conflict of Laws, 8th ed., sec. 244; Wharton on Conflict of Laws, 2d ed., sec. 490; 4 Elliott on Railroads, 2d ed., sec. 1506, p. 212.

6. It was urged that the shipper was guilty of a fraud upon the carrier. But we fail to see how the mere acceptance of a receipt containing printed words by which the carrier sought to limit its liability in the absence of valuation would constitute fraud on the part of the person to whom it was delivered. In some jurisdictions it would be held to create a contract. But we have found no case in which it has been held to constitute a fraud by the shipper. In the cases in this state where the shipper was held to be guilty of fraud there was either some direct misrepresentation made, or artifice employed, or something done which was calculated to mislead the carrier or throw him or his agent off his guard as to the nature or character and value of the property.

7. The court was requested to charge that the contract of shipment was made in New York, and ought to be construed as to its validity and effect by the laws of that state; that the Georgia courts were bound, in construing contracts made in another state, by the construction placed upon the common law even, by the highest courts in that state, as shown by its published reports; and that, as the contract under consideration limited the amount of liability of the carrier to fifty dollars, as shown in the receipt sued on, this limitation

was binding upon the shipper. It does not appear from the brief of evidence that it was proved what was the law of New York. Probably we might have dismissed this contention for the reason that the presiding judge is not required to ⁴⁵⁹ charge as to matters not in evidence, and if a law of another state is relied on as a basis for the finding of a jury, it ought to be proved. But, as the question of the effect of the laws of different states on the subject of limiting liability has been discussed above, and is also argued under the general grounds of the motion for a new trial, we have preferred to consider the subject more broadly.

8. It was contended in the brief of counsel for plaintiff in error that the interstate commerce law of the United States had the effect of abrogating the ruling that limitations of liability stated in a receipt given by an express company for an interstate shipment would not relieve it from full liability resulting from negligence. We do not find that this point was distinctly made or passed on by the trial court. At any rate, it seems to be without merit: *Chicago etc. Ry. Co. v. Sloan*, 169 U. S. 133, 18 Sup. Ct. Rep. 289, 42 L. ed. 688; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. Rep. 132, 48 L. ed. 268; *In the Matter of Released Rates*, 13 I. C. C. 550.

9-11. The presiding judge admitted evidence as to the profit which the plaintiff would have made if he had received the goods and sold them. He also charged the jury, in reference to the measure of damages, as follows: "If you believe that the goods remained in the office of the Southern Express Company here about three months by reason of the negligence of the Southern Express Company to notify the consignee and deliver these goods to him, they are liable to him for the market value of the goods at the time they ought to have been delivered in Thomasville, if the failure was the result of their negligence in not making this delivery." He refused to charge a different measure of damages. These rulings were erroneous. There was no evidence of any special damages, such as expenses incurred. The case rested on the general rule as to damages for delay by a common carrier in delivering goods. The general rule is that the measure of damages for unreasonable delay by a common carrier in the delivery of goods shipped is the difference between their market value when they should have been delivered and their market value when they were delivered, with interest from the former date, less the freight, if unpaid: *East Tennessee etc. Ry. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809; *Goodin v. Southern Ry. Co.*, 125 Ga. 630, 54 S. E. 720, 6 L. R. A., N. S. 1054, 5 Ann. Cas. 573; 5 Am. & Eng. Ency. of Law, ⁴⁶⁰ 2d ed. 384. The plaintiff was not entitled to recover estimated profits: *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502. Mere

unreasonable delay in transporting does not amount to conversion, so as to authorize the consignee, upon the arrival of the goods, to reject them and sue for their full value. His remedy is to sue for the damages he has sustained by reason of the delay. There may be a possible case where the property has ceased to be of any value at all, such as wholly decayed perishable goods. But the present case is not of that character. There was a mere delay and depreciation in value: 4 Elliott on Railroads, 2d ed., sec. 1710; 2 Hutchinson on Carriers, 3d ed., sec. 651. For the reasons last indicated the presiding judge erred in overruling the motion for a new trial. Otherwise there was no error in any of the rulings complained of.

Judgment reversed.

All the justices concur.

Limitation of Carrier's Liability in bills of lading is the subject of a note to Chicago etc. Ry. Co. v. Calumet etc. Farm, 88 Am. St. Rep. 74. A carrier cannot limit its liability for the negligence of itself or its agents by an agreed valuation upon consideration of reduced charges for the carriage of goods, where such valuation is disproportionate to the real value of the goods, although neither the contents of the package nor its value is disclosed to the carrier: Southern Express Co. v. Gibbs, 155 Ala. 303, 130 Am. St. Rep. 24; Southern Express Co. v. Owens, 146 Ala. 412, 119 Am. St. Rep. 41. A stipulation in the contract of carriage of an express company that its liability shall be limited to a nominal amount, no matter how great the value of the package lost, is opposed to public policy and void: Southern Express Co. v. Marks, Rothenberg & Co., 87 Miss. 656, 112 Am. St. Rep. 466.

As to What Law Governs a Stipulation Limiting a Carrier's Liability, see the note to Chicago etc. Ry. Co. v. Calumet etc. Farm, 88 Am. St. Rep. 125. See, also, Southern Express Co. v. Owens, 146 Ala. 412, 119 Am. St. Rep. 41; Southern Express Co. v. Gibbs, 155 Ala. 303, 130 Am. St. Rep. 24. If a contract containing a stipulation limiting liability for negligence by a common carrier is made in one state, but with a view to its performance by transportation through or into one or more other states, it must be construed in accordance with the law of the state where its negligent breach, causing injury, occurs. Such contract, though valid in the state where made, must be declared void in the state where the injury occurs, if contrary to the policy of the law of the latter state: Hughes v. Pennsylvania R. R. Co., 202 Pa. 222, 97 Am. St. Rep. 713.

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**FARMERS' BANK OF NASHVILLE v. JOHNSON,
KING & COMPANY.**

[134 Ga. 486, 68 S. E. 85.]

BANKING.—A Check is a Draft or Order upon a Bank or banking-house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand. (By the editor.) (p. 245.)

BANKING—Directing Payment of Check Through Certain Bank.—Where a check was drawn on a bank located in another town than that in which the drawer resided, and immediately following the direction to the drawee bank, which was in the lower left-hand corner of the check, there were stamped, at the time when the check was drawn, the words, "Payable through [a named bank in another city of the same state] at current rate," this was a material part of the direction; and the drawee bank was not required to pay the check when not presented through the bank thus named, but directly by a third bank. (pp. 247, 248.)

BANKING.—Check Payable Through Certain Bank—Protest.—Under such circumstances, if the third bank, which held the check, presented it to the drawee bank, and the latter indorsed on it the statement that it would be paid when presented through the named bank, this did not authorize the bank holding the check to have it protested. (p. 249.)

WORDS AND PHRASES.—The Word "Payable," as commonly employed in paper or contracts in stating the time or manner of payment, does not give the debtor an option or privilege of paying at such time or in such manner, but signifies that payment is to be thus made. A direction in a check to the drawee bank that it is "payable" through another named bank means that it is to be paid in that way. (By the editor.) (p. 248.)

BILLS AND NOTES—Liability for Wrongful Protest.—For the holder of a check to unlawfully cause a protest of it to be made, and notice to be given to the drawer and indorsers, without proper presentation for payment, according to its terms, furnishes a cause of action to the drawer. (p. 249.)

(Syllabi by the court except when stated to be by the editor.)

Buie & Knight, Hendricks & Christian and E. P. S. Denmark, for the plaintiff in error.

W. A. Dodson and W. H. Griffin, for the defendants in error.

487 LUMPKIN, J. Johnson, King & Company, a corporation doing business in Macon, brought suit for damages against the Farmers' Bank of Nashville, Georgia. The petition as amended alleged as follows: On December 30, 1905, the plaintiff issued a check of which the following is a copy:

"JOHNSON, KING & COMPANY.

"\$62.00 Macon, Ga., Dec. 30th, 1905. No. 1044.

"Pay to the order of Hawley & Hoops, sixty-two and 47/100 \$62.47 Dollars.

"JOHNSON, KING & CO.,

"By JNO. C. HOLMES,

"V. P. & Gen. Mgr.

"To Bank of Nashville, Nashville, Ga.

"Payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate."

On the same date the plaintiff issued three other checks drawn on the Bank of Nashville, similar in form to the one above, and differing only as to amount and the name of the payee. The words, "Payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate," were stamped on each check. The checks were presented to the Bank of Nashville, at Nashville, Georgia, by the Farmers' Bank of Nashville, Georgia, three of them being presented on January 8, 1906, and one on January 6, 1906. Upon presentation the Bank of Nashville entered on the back of the checks, "Will pay when presented through the Citizens' Bank of Valdosta, Georgia." Thereupon the Farmers' Bank of Nashville caused the checks to be protested, each protest bearing the same date as the presentation for payment; and notice of dishonor was sent to certain ⁴⁸⁸ indorsers and to the drawer. The Bank of Nashville never refused to pay the checks, but, through its officers, stated to the Farmers' Bank of Nashville that it objected to the manner in which the checks were presented, it being different from the terms expressed on their face, and that they would be honored when presented through the Citizens' Bank of Valdosta. At the time when the checks were drawn, and when presented to the Bank of Nashville by the Farmers' Bank of Nashville, the plaintiffs had a sufficient amount of money on deposit in the Citizens' Bank of Valdosta, subject to check, for their payment. The plaintiff had an arrangement with the Bank of Nashville by which all checks drawn on that bank would be paid if presented through the Citizens' Bank of Valdosta. The Farmers' Bank of Nashville willfully disregarded the terms of the checks, which were that they were "payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate," and, for the purpose of casting suspicion upon the credit of the plaintiff before the commercial world, protested the checks and thereby damaged the plaintiff. The protest was made for the purpose of causing the plaintiff to become offended with the Bank of Nashville, and of forcing it to become a depositor with the Farmers' Bank of Nashville and its associates.

A story is told of a distinguished writer on the subject of negotiable instruments, to the effect that when he was asked what first suggested to him the idea of preparing such a work, he answered that he became interested in the question as to whether a demand was necessary in order to enforce by suit a promissory note or acceptance payable by its terms at a specified place, and that the extensive inquiry on this subject into which he was led suggested to him the utility of a new work on negotiable instruments. The story further proceeds, that, when the inquirer asked him whether such a demand was necessary, he humorously replied that he had forgotten. Whether this is without foundation or not, it serves to indicate the wealth of inharmonious learning which has been lavished upon a question which, at first sight, would appear to be quite ⁴⁸⁹ narrow. Much of the conflict in authorities has arisen over the question whether, in an action against the maker of a promissory note or the acceptor of a bill of exchange payable at a particular place, it was necessary to aver and prove a demand at such place. In England the authorities were divided on the subject of such acceptances. The court of king's bench held that where there was an acceptance payable at a specified place, it was not necessary to allege or prove demand at that place, in a suit against the acceptor. The court of common pleas, on the other hand, held that this made a qualified acceptance, and that presentment at the place stipulated must be averred and proved. In 1820 the case of *Rowe v. Young*, 2 Brod. & B. 165, 6 Eng. Com. L. 83, came before the house of lords. It was there decided that where the acceptance named a place of payment, demand at such place must be averred and proved. In the following year an act of parliament was passed on the subject declaring that an acceptance payable at a banker's or other specified place, without more, should be deemed a general acceptance; but if it were expressed to be payable at a banker's or other place "only, and not otherwise or elsewhere," it would be a qualified acceptance. This statute did not deal with promissory notes, and some of the decisions made a distinction as to them where the place of payment was named in the body of them. In this country a contrary doctrine to that declared by the house of lords was laid down by the supreme court of the United States in the case of *Wallace v. McConnell*, 13 Pet. 136, 10 L. ed. 95. It was held in that case that in actions on promissory notes against the maker, or on bills of exchange against the acceptor, where the note or bill is made payable at a specified time and place, it is not necessary to aver in the declaration or prove on the trial that a demand for payment was made, in order to sustain the action; but if the maker or acceptor was at the place at the time designated and was ready and offered to pay the money, it is matter of

defense, to be pleaded and proved on his part. This decision has been generally followed in America, and the ruling has been adopted in this state: *Dougherty v. Western Bank of Georgia*, 13 Ga. 287. It was said by this court that the defendant may plead readiness to pay at the place stipulated, or damages sustained by him in consequence of the neglect or omission to make the demand; and, upon proof of his plea, the defendant shall be exonerated to the extent ⁴⁹⁰ of the damages which he has sustained. It will be observed that the decisions above mentioned have reference to a case in which the acceptor of a bill of exchange or a maker of a promissory note is sued, not to questions involving the liability or release of indorsers or drawers of accepted bills.

In many respects a check is like an inland bill of exchange, but there are some differences. A check has been defined to be a "draft or order upon a bank or banking-house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand": 2 Daniel on Negotiable Instruments, 5th ed., sec. 1566. A check does not have to be accepted upon presentment, but paid, if good and if properly presented. One of the differences between a common check and an ordinary inland bill after its acceptance is in relation to the drawer. In the former the drawer is the principal debtor, and the check purports to be made upon a fund deposited; in the latter, the acceptor is the principal debtor. The negligence of the holder of a check in not making due presentment, or as to giving to the drawer notice of dishonor, does not absolutely discharge him from liability except to the extent to which he may have suffered loss or injury by reason of such negligence.

These principles have been stated because citations were made of cases which arose under them. They do not, however, fully cover the present case. Here the drawee of a check was a bank in a different place from that where the check was drawn and the drawer resided. The direction to the drawee bank was at the left-hand lower corner of the check, and immediately under it were the words, "Payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate." The check was not forwarded through the Valdosta bank, but came into the possession of a bank in Nashville, Georgia, the place where the drawee bank was located, and was thus presented to it. Whether the check was deposited with such demanding bank, or sent to it for collection, or how it became the holder, is not stated. On presentment, the drawee bank indorsed on the back of the check these words, "Will pay when presented through the Citizens' Bank of Valdosta." Thereupon the check was

protested for nonpayment, and a suit to recover damages was brought by the drawer against the collecting bank which caused ⁴⁹¹ the protest to be made, on the ground that such protest was wrongful, and was maliciously made.

Two questions are involved: 1. Whether the words, "Payable through the Citizens' Bank of Valdosta," etc., formed a part of the check, which the drawee bank was bound to regard, or which it had the right to disregard. 2. Whether this direction required payment through the Valdosta bank, or whether it was merely permissive, so that payment could be demanded through that channel or directly from the drawee bank at Nashville. If the presentment to the drawee was required to be made through the Valdosta bank, then the drawee had the right to decline payment except upon presentment in that manner; and if the bank holding the paper refused to recognize such reason for nonpayment on presentment by it, and caused the check to be protested, and notice to be given, this was unwarranted.

It was contended that the words, "Payable through the Citizens' Bank of Valdosta," etc., followed the signature, and formed no part of the check, but amounted merely to a memorandum, which the holder of the check did not have to regard. In England there is a well-known usage, which has now been made the subject of an act of parliament, for the drawer or holder of a check to "cross" it with the name of a banker. In 2 Daniel on Negotiable Instruments, fifth edition, section 1585a, it is stated that the effect of this was, "before the statute which now exists, a direction of the drawee bank to pay the check to no one but a banker; or rather, according to the cases, with only a caution or warning to the drawees that care must be used in paying it to anyone else." In 1 Morse on Banks and Banking, fourth edition, section 245, it is said: "In this country the system of 'crossed checks,' strictly so called, is unknown. But of late the germ of a similar custom has begun to manifest itself. Occasionally checks have stamped or written upon them some form of words which is intended to secure their payment exclusively through the clearing-house. No especial form has as yet been generally accepted, and the legal effect of none of those in use has ever been passed upon. It is safe to say, however, that there is no question but that the drawer could embody in his order a direction to his bank to pay only upon presentation of the instrument in the usual course through the clearing-house, and that such a direction would be as valid and as binding upon the bank as a direction to ⁴⁹² pay only to the order of a particular person. If the check be payable to the order of A B, it is probable that the privilege of including such instructions in his order, when indorsing over, might be accorded to

him; certainly indorsements in this form are very frequent, and no bank would be safe in disregarding them. Supposing the direction to be properly given, the collecting and the paying bank must both respect it, and the English cases above mentioned would be precedent directly in force. It would amount to an express designation by the drawer or the payee of the manner alone in which payment is authorized to be demanded or made." A check being in the nature of an order on a bank or banker to pay a certain sum purporting to be on deposit, there would seem to be no reason why the drawer could not direct the bank to pay only when presented through a specified channel or by a particular person or bank. The drawer is not compelled to make the check payable to bearer or order. Likewise no sound reason is perceived why, in giving direction to the bank of deposit, he cannot make an addition to the mere order for payment. If the person to whom the check is delivered is not willing to accept it with the direction, he can reject it; but if he accepts it payable only through a particular bank, or through a particular banker, he cannot insist that the bank on which it is drawn must disregard this direction given to it by its depositor on the face of the paper. No ground has been suggested why such a direction by one to his banker, in ordering the latter to pay money, is illegal or unreasonable, the banks being in the same state and not far distant from each other. The case in hand does not present the question of whether the drawer of the check has been wholly or partially discharged by negligence or delay in presentation, but whether, in giving direction to his banker to pay the check, he can lawfully direct payment to be made through a certain medium, and whether the bank, when so instructed, is bound to disregard such direction at the demand of another collecting bank.

In *Nazro & Green v. Fuller*, 24 Wend. 374, it was held that an alteration of a promissory note by the payee thereof, so as to make it purport to be payable at a particular place, vitiates it in the hands of an indorsee, so that he cannot recover upon it in an action against the maker; and that if it be doubtful whether it be an alteration of the note or a mere memorandum by the payee ⁴⁹⁸ indicating where demand for payment should be made to charge him as indorser, the question, it seems, should be submitted to a jury. In *Warrington v. Early*, 2 El. & Bl. (75 Eng. Com. L.) 763, a promissory note was made payable six months after date, "with lawful interest." After it had been signed, without the assent of the maker, but with the assent of the holder, there was added, in the corner of the note, "interest at six per cent per annum." It was held that this addition materially altered the contract, and that the holder

could not recover on the note against the maker. As to alterations in written contracts in this state, see Civil Code, secs. 3702, 3703; *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43; *Hotel Lanier v. Johnson*, 103 Ga. 604, 30 S. E. 558; *Pritchard v. Smith, Stewart & Co.*, 77 Ga. 463. See, also, *Woodworth v. Bank of America*, 19 Johns. 391, 10 Am. Dec. 239; *Polo Mfg. Co. v. Parr*, 8 Neb. 379, 30 Am. Rep. 830, 1 N. W. 312; *Farmers' Bank of Kentucky v. Ewing*, 78 Ky. 264, 39 Am. Rep. 231; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; 1 Daniel on Negotiable Instruments, 5th ed., pp. 173, 174, secs. 149, 150, and citations; 4 Am. & Eng. Ency. of Laws, 2d ed., 137 (11), 140; *McCalla v. McCalla*, 48 Ga. 502; *Mayor and Council of Griffin v. City Bank of Macon*, 58 Ga. 584.

It is commonly stated that the contract must be collected "from the four corners" of the document, and no part of what appears there is to be excluded; and Mr. Daniel, in his work on Negotiable Instruments, has somewhat broadly declared that, as indorsements are made on the back of a negotiable instrument, it might be said that the purport of the instrument is to be collected from "the eight corners": 1 Daniel on Negotiable Instruments, 5th ed., sec. 151, p. 175. A distinction is sometimes made between an entry upon a note or check at the time when it is made, and which is intended as a part of it, and a mere memorandum made by some person for convenience, and forming no part of the instrument. In the case before us the direction immediately follows the name of the drawee bank. From the allegations of the petition it appears to have been placed there when the check was drawn, as a part of the direction to the bank. It was a material part of such direction, and the drawee bank had the right to decline to disregard it.

It was argued that the statement that the check was "payable" through the Valdosta Bank did not indicate the exclusive method of collection, but gave to the holder an option to present it through ⁴⁹⁴ that medium or through any other medium to the Nashville Bank. If a negotiable instrument is payable at one of two banks, it may be presented for payment to either. The word "payable" has been defined as follows: "That may, can, or should be paid; suitable to be paid; that may be discharged or settled by delivery of value; matured; now due": Webster's Dictionary. As commonly employed in commercial paper or contracts, in stating the time or manner of payment, the word "payable" does not give to the debtor an option or privilege of paying at such time or in such manner, but signifies that payment is to be thus made. If it should be stated in a note or bill of exchange that the amount mentioned was payable in thirty days, clearly the expression would mean that such

amount was to be paid at that time, not merely that the debtor might then pay it. So if an obligation should be declared to be payable in gold coin of a certain fineness, it would mean that it was to be thus paid. And numerous illustrations might be given. A direction in a check to the drawee bank that it is "payable" through another named bank means that it is to be paid in that way: *City of Alma v. Guaranty Savings Bank*, 60 Fed. 203, 80 C. C. A. 564; *Cate v. Patterson*, 25 Mich. 191; *Johnson v. Dooley*, 65 Ark. 71, 44 S. W. 1032, 40 L. R. A. 74; *Easton v. Hyde*, 13 Minn. 90; *Webster v. Cook*, 38 Cal. 423. Taken in connection with the direction from the drawer of the check to the drawee bank to pay a certain sum, the addition meant that the sum was to be paid through the Valdosta Bank.

It follows from what has been said that, under the allegations of the petition, the drawee bank had a right to decline to pay the check until presented through the Valdosta Bank, and that, upon its entering on the back of the check that it would pay when so presented, the collecting bank was not authorized to cause the check to be protested and notice to be given. It was therefore not erroneous for the trial judge to overrule the demurrer to the petition. We have not discussed the motive which it was alleged actuated the collecting bank in causing the protest to be made, as without it we hold that the petition set out a cause of action: *Atlanta National Bank v. Davis*, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190; *Hilton v. Jesup Banking Co.*, 128 Ga. 30, 57 S. E. 78, 11 L. R. A., 495 N. S., 224, 10 Ann. Cas. 987; *State Mutual Life Assn. v. Baldwin*, 116 Ga. 855, 43 S. E. 262.

Judgment affirmed.

All the justices concur.

A Check is an Order to Pay the Holder a Sum of Money at a Bank on the presentation of the check or demand of the money; no further notice is necessary; no acceptance is required or expected, and it has no days of grace: *Minot v. Russ*, 156 Mass. 458, 32 Am. St. Rep. 472. It is a draft or order upon a bank or banking-house purporting to be drawn upon a deposit of funds for the payment, at all events, of a certain sum of money to a person or his order, or to bearer, and payable instantly on demand: *Industrial Bank v. Bowes*, 165 Ill. 70, 56 Am. St. Rep. 228.

The Unauthorized Alteration of Written Instruments is the subject of a note to *Burgess v. Blake*, 86 Am. St. Rep. 80.

DUKE v. NEISLER & NEWSOM.

[134 Ga. 594, 68 S. E. 327.]

MORTGAGE OF CROPS—Sufficiency of Description.—A mortgage containing a description of the property mortgaged in the following language: "Our crop planted this year, and on which said fertilizer is used," is not void for uncertainty in the description of the property upon which a lien is created. (p. 251.)

MORTGAGE OF CHATTELS—Enforcement Against Property of Husband.—Where a mortgage fi. fa., issued upon the foreclosure of a chattel mortgage, is being enforced by a levy upon property of a husband, as appears from statements in the affidavits of illegality filed by the husband and by the wife, the question as to whether the wife signed the mortgage note as principal or as surety is not material, inasmuch as the mortgage, if valid in other respects, is being enforced solely against the property of the husband. (p. 252.)

APPEAL—Assignments of Error Without Merit.—The other assignments of error presented in the record are without merit, and require no discussion. (p. 252.)

(Syllabi by the court.)

R. H. Culverhouse and L. D. Moore, for the plaintiffs in error.

H. A. Mathews, for the defendants in error.

⁵⁹⁴ BECK, J. Neisler & Newsom foreclosed a chattel mortgage against Mittie A. Duke and E. C. Duke. The property specified in the mortgage as that upon which a lien was created is described as follows: "Our crop planted this year, and on which said fertilizer is used." The mortgage fi. fa. was duly issued and levied on the following property: "Two hundred bushels of cotton-seed, more or less, in the house, also 1400 lbs. seed-cotton in house; also fifteen bushels of corn in house, more or less, two bales of seed-cotton in field, more or less." E. C. Duke and his wife, Mittie A. Duke, filed separate affidavits of illegality. The affidavit of illegality filed by E. C. Duke was, in substance, that he had never given to the plaintiffs a mortgage which they would have the legal right to foreclose; that the description of the property upon which it is claimed that a lien was created was so vague and uncertain that the instrument was ineffectual to operate as a mortgage. The other grounds contained in his affidavit of illegality it is unnecessary to set out, as none of the grounds of the motion for a new trial which we have under review refer to them. The affidavit of illegality filed by Mrs. Duke alleged that the mortgage fi. fa. was proceeding illegally, on the following grounds: "1. Deponent is the wife of E. C. Duke, and has no interest in the property levied on. 2. Deponent's husband, E. C. Duke, is a renter ⁵⁹⁵ from said deponent.

3. Deponent never signed any mortgage with deponent's said husband, but did sign a note with him to plaintiff, and she signed said note as security for her husband, E. C. Duke.

4. Deponent says that her signature to said note is void in law, for the reason that a married woman cannot be security for her husband." The jury returned a verdict finding "against the affidavit of illegality." A motion for a new trial was overruled, and the defendants excepted.

1. The mortgage sought to be foreclosed and enforced was not void because of insufficiency in the description of the property upon which a lien was created. "It is only when a description of premises is manifestly too meager, imperfect or uncertain to serve as adequate means of identification that the court can adjudge the description insufficient as matter of law": *Broach v. O'Neal*, 94 Ga. 474, 20 S. E. 113. See, in this connection, the case of *Patterson v. Evans & Turner*, 91 Ga. 799, 18 S. E. 31. In the case of *Boulware's Admr. v. Pendleton*, 6 Ky. Law Rep. 727, it was held that description of property in the following words occurring in a mortgage, "My present crop of tobacco and other crops with other property to me belonging," was too indefinite a description as to any of the property except the tobacco crop. In the case of *Crine v. Tifts & Co.*, 65 Ga. 644, it appears that the question was raised as to whether a mortgage was invalid as such because of the insufficiency of the description of the property mortgaged, and it was urged that the description was "too vague, uncertain and contradictory," the description being in these words: "As an advance on my crops of cotton, corn, oats, etc., growing and to be grown in the year 1879, the same being now planted, to enable me to make my said crops; and I do hereby give them a mortgage on all my said crops, to take effect as soon as my said crops are planted." But this court held: "The purpose was to create a lien by mortgage on all crops already growing or to be grown, and on that to be grown to fix the lien when planted. It is a little confused, but such is the meaning, and the description is sufficient, as it covers all the crops of that year. The crops levied on must have been all planted, as the earliest mortgage is dated the nineteenth day of April and the other two in May. From the evidence, it is barely possible that a little cotton was planted afterward. Certainly the execution should not have been quashed and the levy dismissed ⁵⁹⁶ on this ground." In the instant case it is evident that the mortgagor intended that the lien sought to be created should cover his entire crop, and the property mortgaged is further identified as being the crop planted in the year in which the mortgage was given and "on which said fertilizer is used." We are of the opinion that the court correctly held that the mortgage could not be

declared as a matter of law void for uncertainty in the description of the property mortgaged.

2. Inasmuch as Mrs. Mittie A. Duke disclaimed any title to the property levied upon by the mortgage *fi. fa.*, it is unnecessary to decide whether the charges of the court relative to the contention upon her part that she signed the mortgage note, not as principal, but as surety, correctly submitted that issue or not. The mortgage *fi. fa.* is not being enforced against her or any of her property; and even if she is not liable under the instrument foreclosed as a mortgage, that fact affords no reason why the mortgage execution, which the plaintiffs are seeking to enforce at present solely against property which she says belongs to her husband, should not proceed, unless he can show some valid reason for not enforcing the *fi. fa.* against his property.

3. The other assignments of error presented in the record are without merit, and require no discussion.

Judgment affirmed.

All the justices concur.

MORTGAGES—DESCRIPTION OF PROPERTY (NOT INCLUDING THE QUESTION OF BOUNDARIES).

- I. Errors Peculiar to Mortgages, 252.**
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- VI. Erroneous Descriptions.**
 - a. Duty of the Court, 267.**
 - b. Illustrations of Innocuous Error, 268.**

I. Errors Peculiar to Mortgages.

A legal document ought to be the last place in which to look for the perpetration of those errors, mistakes and blunders of carelessness which characterize the handiwork of laymen according to the exigency of undue haste, ignorance, or ordinary nervousness, including the writing of documents under various forms of excitement.

Yet it may be, and is in fact, the depot for a collection of errors of judgment and of fact, and a veritable olla podrida of uncertainties and inaccuracies. Distinguishing again between the kinds of legal documents, those conveying away property entirely and those reserving the return of the title to the grantor on the happening of certain contingencies, we can the more readily understand the error in the deed of conveyance, because the vendor is parting with his whole interest in that property, which may be the only landed property he owns, and he may be royally indifferent as to the document he signs or the regularity of the description of the property, so that he receives the purchase price. He possibly arrives at the conclusion that, as the property is to be acquired by the vendee, that party can look after his own interests and see that he not only gets what he bargained for, but that he gets it with the hall-mark of a proper description which will identify it for all time, and therefore the vendor troubles not over the words the scrivener has employed or omitted to employ. With a mortgage, however, both parties are interested in seeing that the land to be charged is so described that neither the security of the mortgagee may be impaired by a misdescription which may grant land not intended to be charged or no land at all, and that the mortgagor has created a charge only on that land on which the amount due to the mortgagee is to be secured, both having in view that the land may subsequently form the basis of a decree in foreclosure. Yet all sorts of errors are disclosed in the litigation which inevitably follows the discovery of the error, and the reports teem with cases of descriptions so meager that the mortgagee can get no title unless the deed is reformed; descriptions by township and range without county or state; descriptions as parts of sections without township or range; descriptions as parts of a farm and so on, which apparently have taxed the ingenuity of the writers of the documents to express so maladroitly as to render the document a menace to the security of its possessor. We purpose invading the collection of curios and holding some of them out as illustrations of what the careless scrivener is to try to avoid—the careful one needs no admonition to escape their perpetration—prefacing our note only with the legal axiom that a mortgage upon land must contain such certain and definite reference to the land as to make it the subject of the charge, which the mortgagor in the solemnity of the execution of the deed created, and of such further action of further charge, release or foreclosure as the fate of the given transaction shall make call for.

The fact is often lost sight of that the description in a mortgage of the land is not simply for the benefit of the parties and their privies. It is not so. The recording system plays just as important a part in the legal cosmogony as the alienation or hypothecation of property. Conceding this position, and it is impregnable, the watchword of the recording system is notice, and wherein the document recorded falls short of notice, the system must fail. This part of the subject is dealt with very acuminously by Mr. Justice Pardee in *Herman v. Deming*, 44 Conn. 124, and briefly referred to post, in this division.

No necessity exists for the employment of technical terms nor the language of the legal jargonist, but the land intended to be mortgaged must be so described that it may be found and identified.

"As land cannot be bodily delivered, it can pass only by such descriptions as will identify it; and if a deed contains any language, whatever the style, that will enable one to do so, it is so far good. It is not necessary that this description be contained in the body of the deed; but if it refers, for identification, to some other instrument or document, as to another deed or map, it is sufficient. Or if no reference be made, surveys, monuments, etc., must be ascertained, in order to locate the land. But while there is no technical rule in regard to the description, and the intention of the party governs, it must be contained in the instrument or its references, expressed or implied, with such certainty that the locality of the land can be ascertained from it": *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328. As the title of the note indicates, the question will be discussed excluding descriptions by boundaries, the rules which govern where the description of the land is inconsistent or uncertain having been dealt with in the monographic note to *Heaton v. Hodges*, 14 Me. 66, 30 Am. Dec. 731; but will include cases showing the consequences of error or vagueness in the description.

II. General Descriptions Without Reference to Political Subdivisions, Plats, or Accompanying Documents.

a. **The Rule.**—It is well settled that any description in a deed by which the premises intended to be dealt with may be found and identified is sufficient: *Johnson v. McKay*, 119 Ga. 196, 100 Am. St. Rep. 166, 45 S. E. 992; *Duke v. Neisler & Newsom*, 134 Ga. 594, ante, p. 250, 68 S. E. 327; *Richey v. Sinclair*, 167 Ill. 184, 47 N. E. 364; *Godfrey v. White*, 32 Ind. App. 265, 69 N. E. 688; *Doom v. Holmes*, 9 Kan. App. 520, 60 Pac. 1096; *Fields v. Fish (Ky.)*, 82 S. W. 376; *Huber v. Jennings-Heywood Oil Syndicate*, 111 La. 747, 35 South. 889; *Mahoney v. Mackubin*, 52 Md. 357; *Trustees of Smith Charities v. Connolly*, 157 Mass. 272, 31 N. E. 1058; *Slater v. Breese*, 36 Mich. 77; *Rochat v. Emmett*, 35 Minn. 420, 29 N. W. 147; *Scott v. Gordon*, 109 Mo. App. 695, 83 S. W. 950; *Vaughn v. Schmalse*, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411; *Carpenter Paper Co. v. Wilcox*, 50 Neb. 659; *Boon v. Pierpoint*, 28 N. J. Eq. 7; *People v. Storms*, 97 N. Y. 364; *Edwards v. Bowden*, 99 N. C. 80, 6 Am. St. Rep. 487, 5 S. E. 283; *Crow v. Kellman (Tex. Civ. App.)*, 70 S. W. 564; *Teetshorn v. Hull*, 30 Wis. 162.

That description, however, must be certain, and will be more closely scrutinized in the case of a mortgage than an absolute conveyance of the land. The policy of the law with regard to the definite information to be given to creditors and purchasers by mortgages does not apply to ordinary conveyances: *Herman v. Deeming*, 44 Conn. 124; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282. It has been the policy of the law that the title to real estate should appear upon record, that it might be easily and accurately traced, thus adding greatly to the security of titles and the lessening of litigation: *North v. Belden*, 13 Conn. 376, 35 Am. Dec. 83. If the description in the deed is neither certain nor that which could be made certain and identifiable by reference to other documents, the description is insufficient to carry the security: *Morris v. Giddens*, 101 Ala. 571, 14 South. 406; *Freed v. Brown*, 41 Ark. 495; *Osborne v. Rice*, 107 Ga. 281, 33 S. E. 54; *Merchants' & Laborers' Bldg. Assn. v. Scanlan*, 144 Ind. 11, 42 N. E. 1008; *Boyd v. Ellis*, 11 Iowa, 97; *Wilson v. Calder*,

8 Kan. App. 856, 55 Pac. 552; Keiffer v. Starn, 27 La. Ann. 282; Stead v. Grosfield, 67 Mich. 289, 34 N. W. 871; Simmons v. Hutchinson, 81 Miss. 351, 33 South. 21; Harris v. Woodard, 130 N. C. 580, 41 S. E. 790. The rule applies equally well to cases of reservations and exceptions: Morris v. Giddens, 101 Ala. 571, 14 South. 406; Wallace v. Furber, 62 Ind. 103.

b. Illustrations of What has Been Held as a Sufficient Description.

1. "Three hundred and twenty acres of land known as the 'Middlebrooks Place' where the said Hurston lived last year, and where Henry Talley now lives." The court said there was no error in admitting parol testimony to show what particular lands were known by that name, where Hurston lived last year and where Tally now resided, and cited Bausum v. George, 65 Ala. 259, Driggers v. Cascady, 71 Ala. 529, in support: Tranum v. Wilkinson, 81 Ala. 408, 1 South. 201.

2. "A lot of land near Florence, north of the fair-grounds, containing thirty-five acres, more or less." It appearing that this was the only such lot situated in that locality of which the mortgagor was the owner at the time he gave the mortgage, parol evidence of identification was admitted: O'Neil v. Seixas, 85 Ala. 80, 4 South. 745.

3. "One and a third ($1\frac{1}{3}$) acres of land lying south of W. T. McCord's lot in Albertville, Ala., in Sec. 15, T. 9, R. 4 east." In the opinion, from which, however, McClellan, C. J., and Dowdell, J., dissented, the court said that in Alabama it had been settled by decisions so numerous as to establish a rule of property that "mere indefiniteness in description, though it be such as to render a deed *prima facie* inoperative, does not necessarily have that effect; that evidence of extrinsic facts, relative to the situation of the parties and the circumstances attending the conveyance, may be looked to for the purpose of identifying its subject matter, and that it is only upon the failure of evidence to give certainty to the description that the instrument will be declared void: Caston v. McCord, 130 Ala. 318, 30 South. 431.

4. "The one equal, undivided half of a satinet factory, situate in the north part of Salisbury, and near Sterling Landon & Co.'s furnace, it being the same factory that the other half is now owned by Landon, Branch & Co. together with the one-half of all the machinery, and other appurtenances thereunto belonging": Frink v. Branch, 16 Conn. 260.

5. "As an advance on my crops of cotton, corn, oats, etc., growing and to be grown in the year 1879, the same being now planted, to enable me to make my said crops, and I do hereby give them a mortgage on all my said crops, to take effect as soon as my crops are planted." It was held that this description in a mortgage was neither too "vague, uncertain nor contradictory" to sustain the security: Crine v. Tifts, 65 Ga. 644.

6. "Two hundred and ninety acres, more or less, of land situate in the fifth district of Wilkinson County, upon which an encumbrance of \$125 exists, due October 15, 1888, taking priority of this mortgage." The court said that while the description was meager and vague, yet the question of whether the terms would serve to identify the premises was one of fact, and hence the mortgage was not void because the description was not more complete: Patterson v. Evans, 91 Ga. 799, 18 S. E. 31.

7. Where a mortgagor, owning at the time of executing the mortgage a tract of land lying all in one body, describes the same in the mortgage as containing one thousand acres, more or less, and all the contiguous owners are named save one, and the mortgagor himself is not named as a contiguous owner, nor any division of the tract indicated or hinted at, and nothing appears to show or suggest that the mortgagee understood or suspected that it was the purpose of the mortgagor to except or reserve any portion of the tract, the mortgage is rightly construed as embracing the whole tract, although, upon an actual survey afterward made, the contents are found to be seventy-one and seven-tenths acres more than one thousand. The omission of the name of one of the contiguous owners should be treated as casual or accidental. It is only when a description of premises is manifestly too meager, imperfect or uncertain to serve as adequate means of identification that the court can adjudge the description insufficient as a matter of law: *Broach v. O'Neal*, 94 Ga. 474, 20 S. E. 113.

8. "Our crop planted this year, and on which said fertilizer is used": *Duke v. Neisler & Newsom*, 134 Ga. 594, ante, p. 250, 68 S. E. 327. In refusing to hold the mortgage void for uncertainty, the court said it was evident that the mortgagor intended that the lien sought to be created should cover his entire crop, and the property mortgaged was further identified as being the crop planted in the year in which the mortgage was given and on which the fertilizer was used.

9. An instrument in the nature of a mortgage was executed, but contained no description whatever of the lands intended to be charged. It did contain a reference, however, to a conveyance executed at the same time in escrow of the lands intended to be charged, in which the lands were accurately described, the condition being that on default in the mortgage the deed was to be delivered. In a suit to enforce the lien the description contained in the deed was allowed to supply the want in the so-called mortgage: *Burkam v. Burk*, 96 Ind. 270.

10. "All the lands owned by" the mortgagor: *Leslie v. Merrick*, 99 Ind. 180.

11. Where the description of the land is such that the sheriff could readily ascertain the parcel ordered to be sold by him and the surveyor could easily locate it, it is sufficient: *Stevens v. Flannagan*, 131 Ind. 126, 30 N. E. 898; *Collins v. Dresslar*, 133 Ind. 290, 32 N. E. 883; *Edens v. Miller*, 147 Ind. 208, 46 N. E. 526; *Godfrey v. White*, 32 Ind. App. 265, 69 N. E. 688.

12. All the lands of the mortgagor "on the Dry Fork of Otter Creek": *Albertson v. Prewitt*, 20 Ky. Law Rep. 1309, 49 S. W. 196.

13. "A certain tract or parcel of land known as the D. farm on left-hand fork of Troublesome Creek": *Watts v. Parks*, 25 Ky. Law Rep. 1908, 78 S. W. 1125.

14. "My entire undivided one-tenth interest in about 265 acres of land also my entire undivided one-tenth interest in the personalty of R. deceased, of H. County, Kentucky": *Fields v. Fish & Co.*, 26 Ky. Law Rep. 659, 82 S. W. 376.

15. Where property has a particular name by reputation, it may be so described without giving the boundaries: *Sargent v. Adams*,

3 Gray, 72, 63 Am. Dec. 718; Woods v. Sawin, 4 Gray, 322; Goodenow v. Curtis, 18 Mich. 298.

16. If the means are given in the grant by a name of notoriety to identify the thing meant to be granted, with the aid of outside examination and proof to connect the name with the thing, the description is prima facie sufficient: Slater v. Breese, 36 Mich. 77.

17. Omitting to name the state, county and township will not prejudice where other adequate elements of identification exist: Ives v. Kimball, 1 Mich. 308; Russell v. Swezey, 22 Mich. 235; Slater v. Breese, 36 Mich. 77, citing Pursley v. Hayes, 22 Iowa, 11, 92 Am. Dec. 350; Atwater v. Schenck, 9 Wis. 160; Mecklem v. Blake, 19 Wis. 397.

18. "The mortgagor's undivided third interest in a plantation situate in Holmes County known as 'Wanalaw.'" As this description refers to extrinsic facts, it is sufficient: Bowers v. Andrews, 52 Miss. 596; Eggleston v. Watson, 53 Miss. 339.

19. Where the mortgage described the land as certain property held in trust for the mortgagor, and in a proceeding on the note the property was described from the trust deed, the mortgage was upheld against an objection for being uncertain: Edmonston v. Carter, 180 Mo. 515, 79 S. W. 459.

20. "All that certain tract or lot of land, situate in the township of North Brunswick (describing the boundaries thereof) containing fifty acres; or the next and nearest adjoining thereto fifty acres of land, of and belonging to the said farm or plantation now in the joint or separate possession of the aforesaid James, Alfred and Edward Crommelin that is unincumbered, provided the fifty acres first herein described is in any way incumbered so as to defeat the title hereby made or intended to be made to the said Robert Lee." This was held a sufficient description, in that the effect of the mortgage was that it covered the whole farm in this order, viz., that a strip of fifty acres on one side was to be resorted to first; and if that was not sufficient or so encumbered as to render the security useless for its purpose, then the next fifty acres was to be resorted to, and so on, until one might be found to satisfy the mortgage: Lee v. Woodworth, 3 N. J. Eq. 36.

21. The very old authority, Jackson v. De Lancey, 11 Johns. 365, affirmed in 13 Johns. 537, 7 Am. Dec. 403, asseverates the rule that words of general description in a mortgage are sufficient to pass the mortgagor's estate. A mortgage containing after the description of certain of the lands intended to be charged the words, "And all other the lands, tenements and hereditaments belonging to the said William, Earl of Stirling, within the Province of New York," was held to pass the residue of his lands in New York. But the same case is an authority that such description would not be sufficient in a sheriff's deed.

22. "My real and personal property all of which is situated in the city of Newbern": Strouse v. Cohen, 113 N. C. 349, 18 S. E. 323.

23. "Being 200 acres of a tract (boundaries given) containing 1600 acres, more or less. Said 200 acres lie west of the Hillsborough Turnpike." This was held sufficient, although the chief justice and an associate justice dissented. The facts were peculiar. A, having given a mortgage to B, obtained from C a mortgage with the description blank except that it was over two hundred acres of land. He then

filled in the description above given and exchanged mortgages with B. Evidence was given that C had nine hundred acres west of the turnpike, and the mortgage was held to apply to an undivided two-ninths interest in the nine hundred acres. The rule adopted by the court was that from 1 Washburn on Real Property, fourth edition, 654: "Where A granted one acre of woodland lying in common with his other woodland, it was held to be such an aliquot part of his woodland in common as one acre would be to the whole woodland owned by the grantor; and, upon a similar principle, where a deed of a given quantity of land, parcel of a large tract, does not locate it by its description, the purchaser becomes a tenant in common pro rata in the whole parcel": *Brown v. Maury*, 85 Tenn. 358, 3 S. W. 176.

24. "On about 908 acres of land of the F. K. Henderson headright, in Montgomery County, Texas, in the following proportions: Carson, Sewell & Co. to be secured by deed of trust on 500 acres of said land, beginning at the west boundary, and extending east sufficiently far to embrace 500 acres; and Halff & Newbouer to be secured by deed of trust on balance of tract now remaining unsold, which we estimate to be about 408 acres": *Westmoreland v. Carson*, 76 Tex. 619, 13 S. W. 559.

25. "Being two hundred and thirty-two and one-half acres of land situate in Harris county, state of Texas, originally patented to A. G. Holland by the state of Texas under date January 1, A. D. 1863, number 447, and the 232½ acres herein conveyed being a part of said Holland survey": *Hinzle v. Robinson*, 21 Tex. Civ. App. 9, 50 S. W. 635.

26. "All land of the grantor in the county of Hardy": *Van Meters' Exrs. v. Van Meters*, 3 Gratt. 148; *Carrington v. Goddin*, 13 Gratt. 587.

27. "Seventy-two acres of land situate near Hamlin, the same bought of the land company. Also twelve and one-half acres of land also situate near Hamlin and the same conveyed to said B. F. Curry by James T. Carroll, Jur. Also three acres situate near Hamlin, and known as the old church lot. Also my storehouse and lot and livery-stable and lot in Hamlin." The court, in holding that, under the authorities, the writing containing these descriptions was not void for uncertainty, drew attention to the fact that, though county and state were omitted, it had been recorded in Lincoln county in that state, and that Hamlin was the county seat of Lincoln, of which the court, under the authority of *People v. Faust*, 113 Cal. 172, 45 Pac. 261, would take judicial notice. Under those circumstances sufficient means of identification were afforded: *Holley's Exr. v. Curry*, 58 W. Va. 70, 112 Am. St. Rep. 944, 51 S. E. 135.

28. It is not essential to the validity of a grant that the property should be so described as to avoid the necessity of an appeal to extrinsic proofs to apply the grant to the property. The subject matter must undoubtedly be so earmarked in the grant as to be capable of being distinguished from other things of the same kind. But it is always competent to fix and identify by extrinsic proof the natural monuments and other badges of identity, and connect the description in the deed with the material subject matter dealt with by it: *Blake v. Doherty*, 5 Wheat. 359, 5 L. ed. 109.

29. A mortgage of "all my property" is sufficient; and a mortgage by a railway company to secure bonds covering "the road and prop-

erty of the several companies so receiving them" is also sufficient: *Wilson v. Boyce*, 92 U. S. 320, 23 L. ed. 608.

c. **Illustrations of What has been Held as an Insufficient Description.**—It is well settled that a description, in the mortgage, of the property mortgaged, may be sufficient to convey the property, as against the mortgagors, and yet not be sufficiently certain, if copied literally into a complaint to foreclose the mortgage, to render the complaint good without additional averments. "When the description of the mortgaged property, contained in the mortgage, is so indefinite as to render the mortgage inoperative and void, no allegations in a complaint upon the mortgage can make such complaint good. But where there is such a description in the mortgage as will render it operative to convey the property to the mortgagee, but not so definite as to enable a third person, in making sale of the property (an officer, for example), to specify the exact boundaries, in such case, if the complaint upon the mortgage alleges the true boundaries, the complaint will be good; proof of the allegations may be made, and, upon such proof, the court, in its decree, may specify the true boundaries, and the officer may sell and convey accordingly": *Halstead v. Board of Commrs. of Lake County*, 56 Ind. 363.

The following cases contain descriptions which have been held defective:

1. A and his wife, B and his wife, C and D joined in a mortgage. The lands were variously the property of the four male mortgagors. After the description of the lands specifically charged occurred the words, "Also all such other lands and real estate as we, the said grantors, or either of us, own, or have any interest in, situate in said town of Canaan; reference being at all times had to the land records of said Canaan and to the probate records for the district of Sharon, for more particular description of the same." The wife of A owned in her own right a tract of woodland containing about fifty-three acres, situated in the town of Canaan, neither connected with, nor adjacent to, nor necessary to the use and enjoyment of any of the tracts of land described in the deed, and not mentioned nor referred to otherwise than in the general clause we have quoted. The court in holding it insufficient to include the land of the wife of A said: "Whatever might be held with regard to the sufficiency of such a description in an ordinary deed intended merely to convey title, yet we think such a general description clearly insufficient in the case of a mortgage. It is a fixed principle of our law that mortgage deeds should give subsequent creditors of the mortgagor definite information as to the debt due to the mortgagee and as to the particular property pledged for its payment. . . . To be told that the mortgage covers all the real estate which the grantor owns in the town of Hartford is to impose upon them the examination of many thousand pages of records; for it is to be borne in mind that the grantor himself may have received his titles by the same general description and from many different grantors. The recognition by the courts of such a mortgage as valid would be equivalent to the abrogation of the recording system, so far as mortgages are concerned. It is not unreasonable to require of the mortgagee that his deed should mention a name, or a locality, or point to a monument, or to a particular deed, or refer to some book or page. It would be only his proper

contribution to the upholding of a system which confers great benefits upon the public": *Herman v. Deeming*, 44 Conn. 124.

2. "Two hundred and sixty-one acres of land off of lots number 5, 27 and 28 in the ninth district of Randolph county." The court said this mortgage was fatally defective in not clearly specifying the property upon which it was to take effect, and that a sale under it was void: *Atkins v. Paul*, 67 Ga. 97.

3. "Ninety-nine acres and seventy-six one-hundredths of land this day deeded to him": *Nolte v. Libbert*, 34 Ind. 163, citing in support of such a description being wholly defective, *Whittelsey v. Beall*, 5 Blackf. 143; *Davis v. Cox*, 6 Ind. 481; *Hunter v. McCoy*, 14 Ind. 528; *Torr v. Torr*, 20 Ind. 118, and *Guy v. Barnes*, 24 Ind. 345. In the first case cited in this paragraph the court suggests as a fair test of a sufficiently accurate description that the land should be described with such accuracy and particularity that the sheriff could put the purchaser in possession of the premises from the description.

4. "The south part of the northeast quarter of section thirty, etc., containing seventeen acres," and "The north part of the east half of the northwestern quarter of section thirty-one, etc., containing forty-five acres." Both of these descriptions were held entirely defective and insufficient: *Armstrong v. Short*, 95 Ind. 326.

5. "All that certain tract or parcel of land adjoining the lands of John Lummerville on the east, Peter Speece on the south, and Hiram Allen on the north, being a portion of the north end of the upper half of the lower half of the upper section of Conner's Reservation, said to contain one hundred and fourteen acres, more or less": *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057.

6. The "west part of lot eight (8), in block G, in Sullivan's addition to the city of Seymour, Indiana": *Merchants' & Laborers' Building Assn. v. Scanlan*, 144 Ind. 11, 42 N. E. 1008.

7. "All the property held in common appertaining to the succession of Joseph Schlatre deceased": *Edwards v. Caulk*, 5 La. Ann. 123.

8. In *Chapman v. Pittsburg etc. R. R. Co.*, 26 W. Va. 299, a mortgage by a Pennsylvania railroad corporation which had power to build a road from Pittsburg to the Pennsylvania state line granting "the whole of their railroad together with the lands, depots, depot grounds, and buildings situate at and between the termini of their railway at the city of Pittsburg and the boundary line of the state of Virginia, in the counties of Allegheny and Washington in the state of Pennsylvania," was held not to cover lands in Virginia. The court ruled that the "railroad" was limited to the termini, both of which were in the state of Pennsylvania. If the corporation had lands in Virginia, they could not be covered by a mortgage in whatever general description couched, where the whole of the lands charged were plainly in another state.

III. Description by Political Subdivision.

a. **The Rule.**—The rule appears to be that an instrument in the form of a mortgage, which accurately describes the land intended to be charged in accordance with the survey of the government of the United States, and from such survey it appears the land is located in a certain county of a certain state, though not so declared in the mortgage, such mortgage is valid and can be foreclosed by advertisement. A court takes judicial notice of the government surveys

and legal subdivisions, and when land is so conveyed, though the county and state are not named, yet, if the parties reside in the state, the court will presume the land is situated there: *Burton v. Ferguson*, 69 Ind. 486; *Russell v. Sweezy*, 22 Mich. 235; *Quinn v. Champagne*, 38 Minn. 322, 37 N. W. 451; *Prieger v. Exchange M. Ins. Co.*, 6 Wis. 89; *Smith v. Green*, 41 Fed. 455.

b. Illustrations of What has Been Held as a Sufficient Description.

1. Land was described in a mortgage as "The east half of the south-east fourth of section thirteen, township thirteen, range four east," without giving the state and county. The court said that while such description per se was imperfect and insufficient, and without aid of identification would render the mortgage inadmissible in evidence (*Goodwin v. Forman*, 114 Ala. 489, 21 South. 946), it was competent by parol evidence to identify the land (*De Jarnette v. McDaniel*, 93 Ala. 215, 9 South. 570; *Webb v. Elyton Land Co.*, 105 Ala. 471, 18 South. 178), and thus supply the deficiency in description in the mortgage: *Barron v. Barron*, 122 Ala. 194, 25 South. 55.

2. If land is described in a mortgage by specified number of lots situated in a certain state, county, and district, and as being "the land purchased by J. C. Henson of J. E. Derrick," the description as a whole is not so totally defective and uncertain as to render the mortgage inadmissible in evidence on a suit to foreclose it. Such description may be aided, and the land covered by the mortgage identified, by parol evidence: *Derrick v. Sams*, 98 Ga. 397, 58 Am. St. Rep. 309, 25 S. E. 509.

3. Lands described as "all that tract of land in Jones county containing 153 acres and known as the Zachariah Emerson place, part of lots No. 125 in the 11th district, one part number not known," are not so uncertainly and indefinitely described as to render the mortgage void: *Johnson v. McKay*, 119 Ga. 196, 100 Am. St. Rep. 166, 45 S. E. 992.

4. "One tract or parcel of land lying in Jefferson county, Georgia, in the 79th district, G. M., containing one hundred acres, and bounded as follows: On north by my own land; east by land of K. P. Walden; on south by W. L. Phillips; on west by Sarah and Emily Walden." The uncertainty contended for was on the north side, but in the face of three correct boundaries being given, the court concluded the fourth could be located with certainty: *Walden v. Walden*, 128 Ga. 126, 57 S. E. 323.

5. "One hundred acres in the southeast corner" of a square four hundred and ninety acres is a sufficient description: *Payton v. McPhaul*, 128 Ga. 510, 58 S. E. 50, 11 Ann. Cas. 163.

6. A mortgage on realty which describes the land as "one hundred acres of land No. 173, known as the Jones place, in the fifth district of Wilcox county," is not on its face void on account of defective description: *Jones v. McKinney* (Ga.), 68 S. E. 788.

7. "Lot No. 4, in block 13, in Ogden's addition to Chicago, having a frontage of 24½ feet and a depth of 80 feet, also one two-story and basement frame dwelling thereon." Although it was shown that lot 4 had no buildings upon it, the court found that subplot 4 had, and as critical accuracy was not essential, the deed was valid: *Bowen v. Galloway*, 98 Ill. 41.

8. Where a mortgage on land describes the same as so many acres in the northwest corner of a section, it is not void for uncertainty,

but will be taken to embrace the given number of acres in the form of a square in the northwest corner thereof: *Bybee v. Hageman*, 66 Ill. 519; *Richey v. Sinclair*, 167 Ill. 184, 47 N. E. 364.

9. "The following real estate in C. county in the state of Indiana, to wit, lots 8, 13 and 14, in block 17, and lot 5 in block 18," and "the stock in and about the paper-mill on said premises." It being shown the mortgagor only owned one lot in that county on which there was such a mill, the description was held sufficient: *Bowen v. Wood*, 35 Ind. 268.

10. Land "in the village of Raysville," the mortgagors describing themselves as of Raysville, Henry county, Indiana: *Parker v. Teas*, 79 Ind. 235.

11. When a mortgage, according to the statutory form of a state, is properly executed in that state between residents of that state, the law will presume, in the absence of anything in the instrument to the contrary, that the description was intended for lands in the same state: *Dutch v. Boyd*, 81 Ind. 146; *Stockwell v. State*, 100 Ind. 1; *Mann v. State*, 116 Ind. 383, 19 N. E. 181.

12. Land "situate in the county of J. and state of I. to wit, a part of the west half of the northwest quarter of section fifteen (15), township thirteen (13) north, range three (3) east, described as follows, to wit: Twenty-nine (29) acres off the south end of sixty (60) acres off the north end of the west half of the northwest quarter of said section fifteen": *Collins v. Dresslar*, 133 Ind. 290, 32 N. E. 883.

13. A was the patentee of a quarter section of land containing one hundred and fourteen and twenty-four hundredths acres, and sold to B thirty-five acres off the north end "of said quarter," and sold to C the whole quarter "except said thirty-five acres." C sold to D "the north half of the residue of said quarter," and sold to E thirty-nine and sixty-two hundredths acres off the south side of the quarter, describing the piece sold as "the south half of the residue of said quarter." E sold to F, excepting twenty acres off the west end, and F mortgaged to G, giving the mortgage on "the south half of the residue of said quarter, except twenty acres off the west end thereof." As this description could be made certain, it was sufficient: *Mettart v. Allen*, 139 Ind. 644, 39 N. E. 239.

14. When the names of the parish and the adjacent occupiers and the river on which the land abuts are given, and reasonably accurate and full in itself, without any reference to political divisions, the description is sufficient: *Ells v. Sims*, 2 La. Ann. 251; *Consolidated Assn. of Planters of Louisiana v. Mason*, 24 La. Ann. 518; *Slater v. Breese*, 36 Mich. 77.

15. "Lot 36 in the town of Webb," some of the parties being designated as of Webb in Mississippi, and executed there, was held a sufficient description: *Wilkinson v. Webb*, 75 Miss. 403, 23 South. 180.

16. Where the description of the land omitted the fourth side closing the area, but indicated that it was "twenty-six acres and eighty-six one-hundredths of an acre in the southwest corner of the southwest quarter of section 31, in township 52, of range 31, particularly described in deed from A. W., recorded in book 5, at page 574 of the deed records of Clay county, Missouri," it was held sufficient to put purchasers on notice. Another piece of land in the same deed was described as "Fourteen acres, being a part of the northwest quarter of section 6, in township 51, of range 31," particularly described in

the same way as the other, was also held in like manner sufficient: *Scott v. Gordon*, 109 Mo. App. 695, 83 S. W. 550.

17. "Sixteen feet of the north end of lots (1) one and (2) two in block forty-four (44)," the town, county and state being named, was a sufficient description: *Vaughn v. Schmalse*, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411.

18. The description in a mortgage of "a tract of land lying in Greene county, North Carolina, adjoining the lands of Patrick Lynch and R. N. Bowden, situate on the east side of the road leading from Jerusalem Church to Patrick Lynch's, it being a portion of their part of the original Gray R. Pridger tract and containing fifty acres," sufficiently points to a particular tract of land so described that it could be identified by proper parol evidence: *Edwards v. Bowden*, 99 N. C. 80, 6 Am. St. Rep. 487, 5 S. E. 283.

19. "The Noel Mill property situated in the Seventeenth Civil District of Franklin county": *Grace v. Noel Mill Co.* (Tenn. Ch. App.), 63 S. W. 246.

20. The land intended to be mortgaged was variously described in three separate instruments as "1,476 acres of land (lying and being situated in the state of Texas) granted to Samuel J. Rickhow, running and lying between the two branches of the San Jacinto River, in Montgomery county"; "1,476 acres of land granted to S. J. Rickhow, between the San Jacinto Rivers," and "1,476 acres, S. J. Rickhow." The court said: "We are of opinion the descriptions in the three instruments, taken together, clearly refer to the same land, and sufficiently identify it, especially in view of other proof adduced showing its location": *Turner v. Cochran*, 30 Tex. Civ. App. 549, 70 S. W. 1024.

21. "Thirty (30) acres in the southwest part of the northwest quarter of section (33) thirty-three." It was contended that the law required that the land described must be in square form. "He was asked by one of the members of this court, 'What law? The statute law of Alabama, or the common law, or any generally recognized law?' He did not refer us to any authority, either in the statutes of Alabama or other statutes, or course of judicial decision, demanding recognition of his proposition as settled law. . . . We can find no provision therein that supports the proposition . . . that the description of the mortgage cannot embrace any land . . . that does not fall within a square of that area": *Van Valkenberg v. American Freehold Land Mortgage Co.*, 87 Fed. 617, 31 C. C. A. 145.

c. Illustrations of What has Been Held as an Insufficient Description.

1. "A portion of the northeast quarter of section twenty-two in township 6, range 20, containing twenty acres." The court in holding the instrument void said that upon its face it was hopelessly uncertain, affording no clue for the application of parol evidence to indicate what the parties had in view, and that the maxim, "Id certum est, quod certum reddi potest," did not authorize parol evidence to show mere understandings of the parties, neither expressed nor indicated by anything in writing: *Freed v. Brown*, 41 Ark. 495.

2. "All that tract or parcel of land situate, lying and being in the county aforesaid, on the waters of S. creek, adjoining the lands of P. R. and S. R., to be run off the lower end of my tract of land formerly owned by R. S., containing ten acres; all of the remainder to be upland; in all, twenty acres more or less." In holding this insufficient, the court laid down the rule as to such descriptions: "We

are sure it would be impossible for the levying officer to locate the property either by the description contained in the mortgage or by that set forth in the execution. That he was in fact unable to identify the mortgaged premises is evidenced by the uncertainty and vagueness of his entry of levy. While this court has gone to a considerable length in holding descriptions of land in deeds, mortgages and entries of levy sufficient when it appeared practicable to identify and locate the premises, we do not think it has ever gone to the extent of sanctioning as sufficient descriptions as loose and vague as those with which we are now dealing. It is indispensable in every case that the words employed in describing realty should be clear and distinct enough to enable a reasonably intelligent person to apply the description to the subject matter. In the present instance we do not think even a most astute individual would be able to locate the property intended to be mortgaged": *Osborne v. Rice*, 107 Ga. 281, 33 S. E. 54.

3. "All the west half of the northwest quarter of section 8, township 6, range 7," and "all the east half of the southwest quarter of section 2 of township No. twenty-five north, of range No. 7": *Cochran v. Utt*, 42 Ind. 267; *Murphy v. Hendricks*, 57 Ind. 593. In the last-named case the court pointed out that without naming the state or county, or without something by which the state or county could be ascertained, the above description would be just as applicable to the same township and range, in reference to any other base and meridian line in the several states northwest of the Ohio river, as it was to the base and meridian lines by which the survey of the lands in the state of Indiana were made; and, as it was impossible to ascertain from the face of the mortgage or from anything to which it referred in what state or county the land lay, the mortgage was too uncertain to uphold the claim.

4. Where a mortgage described the property as being parts of certain sections, without designating what township or range the sections are in, and there are different townships in the county embracing the same numbered sections and parts thereof as those mentioned in the mortgage, such mortgage is void for uncertainty: *Boyd v. Ellis*, 11 Iowa, 97.

5. "All the property herein described, consisting of one house and lot, with other improvements thereon; also the half interest in the store adjoining, with all right and title and interest of the said P. Q. party of the first part," without any mention of state, parish, or town, was held void for total want of description: *Keiffer v. Starn*, 27 La. Ann. 282.

6. The "NW. $\frac{1}{4}$ of section 7 north of Castor river in Stoddart county." The court said the description would suit any land north of Castor river in any section 7 in that county. "In this case there are shown to be several sections 7 in Stoddart county north of Castor river. And, bringing the matter closer home, there was at least one other section 7 in a different township and range in that county through which Castor river actually flowed and which had a northwest quarter north of and adjacent to the said river": *Martin v. Kitchen*, 195 Mo. 477, 93 S. W. 780. The condition presented in the last-mentioned case was described as a plain and typical case, not of a latent ambiguity which might be capable of dissipation by parol identification, but of a patent ambiguity making the deed absolutely

void. The case is on all-fours with *Mudd v. Dillon*, 166 Mo. 110, 65 S. W. 973, which discusses the question at useful length, and with *Carter v. Holman*, 60 Mo. 498.

7. "A certain piece or tract of land, grist-mill and all fixtures thereunto, and one storehouse 28x100 feet long, lying and being in B. township, G. county, N. C. and adjoining the lands of A, B and C; said lot to contain three acres." Held fatally defective, in that as the tract contained forty acres, there was nothing to aid the segregation of the three acres referred to, nothing to indicate a commencing point, no subject matter either definite in itself or capable of being reduced to a certainty by reference to anything to which the deed might refer: *Harris v. Woodward*, 130 N. C. 580, 41 S. E. 790.

8. "The north part of the southwest quarter section twelve, T. 19 N., R. 2 E." The court ruled that a description at the north part of a quarter section is not definite enough to permit of the location of any part, and the description was therefore void, and no part of the mortgage could be enforced: *Hill v. Hite*, 79 Fed. 826.

IV. Description by Reference to Plats or Other Documents.

a. **The Rule.**—Where the mortgage refers to another deed for the description of the land mortgaged, such reference is always permitted: *Harding v. Strong*, 42 Ill. 148, 89 Am. Dec. 415; *Robinson v. Brennan*, 115 Mass. 582; *Slater v. Breese*, 36 Mich. 77; *Boon v. Pierpont*, 32 N. J. Eq. 217; *Rodriquez v. Haynes*, 76 Tex. 225, 13 S. W. 296; and references otherwise to extrinsic evidence are sanctioned: *Ells v. Sims*, 2 La. Ann. 251; *Slater v. Breese*, 36 Mich. 77.

b. **Illustrations of What has Been Held a Sufficient Description.**—

1. "Lying and situate in the county of P. and state of A. and known and designated on the plats of the survey of the public lands as a part of a tract originally patented to S. P. under S. B., being a Spanish concession for 640 acres (10 acres of said tract belongs to J. S. McK., leaving 630 acres) lying and being in township numbered 1 north, and range numbered 4 east, containing in the whole, according to survey, 630 acres of land": *McGehee v. State*, 39 Ark. 57.

2. Where the owner of land mortgaged it and directly referred to his own deed for a description of the land, such reference was not only permitted, but was limited to the express purpose for which it was made, namely, the delimitation of the land: *Willard v. Moulton*, 4 Greenl. 14.

3. "Lots 9 and 10, in block 51, in Rice & Irvine's addition to St. Paul, according to the recorded plat thereof, the same being the homestead of the parties of the first part." By an error on the plat, part of the lands mortgaged were in fact in Dayton & Irvine's addition, although the original and incorrect plat was retained and used in the office of the register of deeds. The court held the description sufficient to embrace the whole of the lots even without recourse to the further designation of the property as being the homestead of the mortgagor: *Rochat v. Emmett*, 35 Minn. 420, 29 N. W. 147.

4. The land was described as "Sixty-six acres of land, more or less, lying on 'Mill Point Road,' and being the same set over to him J. L. W. in the division of his father's land." The partition proceedings of the father's land showed that lot No. 3 was awarded to the said J. L. W., and contained a plat of this lot of land giving proper metes

and bounds. The court said the description was complete: *Hinton v. Moore*, 139 N. C. 44, 51 S. E. 787.

5. "Under the following chain of title," followed by a description of the title and references to the records was held sufficient: *Rankin v. McCarthy* (Tex. Civ. App.), 37 S. W. 979.

6. "All that certain land situated in Hill county, state of Texas, and described as follows: Lots seven (7) and eight (8) in block twenty (20), in the town of Mt. Calm, as shown by the map or plat of said town now of record in Hillsboro, to which reference is here made for a more particular description": *Glenn v. Seeley*, 25 Tex. Civ. App. 523, 61 S. W. 959.

V. Treatment of Surplusage.

a. **The Rule.**—There is little or no difference between the treatment of surplusage in a mortgage and that in other deeds as to the description of the land intended to be affected. As to the quantity of the land if a tract is conveyed by metes and bounds, or any other certain description, the grantee takes all of the land included within the designated limits, although the quantity may exceed what is stated in the deed; and he is likewise restricted to those limits if the quantity turns out to be less than is represented. The statement of quantity is considered the most uncertain part of the description, and when inconsistent with boundaries, courses or distances, must be rejected: *Powell v. Clark*, 5 Mass. 355, 4 Am. Dec. 67; *Jackson v. Barringer*, 15 Johns. 471; *Jackson v. Moore*, 6 Cow. 706; *Hathaway v. Power*, 6 Hill, 453; *Melick v. Dayton*, 34 N. J. Eq. 245. In *Myers v. Ladd*, 26 Ill. 415, Caton, C. J., delivering the opinion of the court, commenting upon the effect of false particulars in the written description of property, says: "The description of the property itself was perfect, but there was a mistake as to the geographical position of the mill in which it was situated. Parol evidence was not only admissible, but was absolutely indispensable, to identify the property described in the mortgage, and when that parol evidence did identify the property consistently with the description in the mortgage, that was sufficient. . . . If I sell an estate, and describe it as my dwelling-house in which I now reside, situate in the city of Ottawa, I shall not avoid the deed by showing that my residence was outside the city limits. So if a deed describe land by its correct numbers, and further describe it as being situated in a wrong county, the latter is rejected. The rule is, that where there are two descriptions in a deed, the one, as it were, superadded to the other, and one description being complete and sufficient of itself, and the other, which is subordinate and superadded, is incorrect, the incorrect description, or feature or circumstance of the description, is rejected as surplusage, and the complete and correct description is allowed to stand alone."

A mortgage of real estate will not be invalidated by reason of an error in the description of the property, in case the remainder of the description, after rejecting the erroneous portion, is sufficiently definite to enable the land to be located: *Huberman v. Evans*, 46 Neb. 784, 65 N. W. 1045; *Woods v. Hart*, 50 Neb. 497, 70 N. W. 53; *Carpenter Paper Co. v. Wilcox*, 50 Neb. 659, 70 N. W. 228.

b. **Illustrations of the Rejection of Surplusage.**—1. Where the mortgage was over "sixty-one acres of land, to wit, the southeast

quarter of section number twenty-eight, township two," and the computation of the area was incorrectly stated, it was treated as surplusage and rejected: *Kruse v. Scripps*, 11 Ill. 98.

2. "The undivided one-half of the donation land claim of Andrew Wiley and Lucy Wiley, his wife (now deceased), notification 7.630, lying and being in township 13 south, range 1 east, Willamette meridian." In this case the land lay partly in township 13 and partly in township 14 adjoining, and in the same range. In dismissing an objection to the description, the court said that if the reference to the township were rejected entirely, the description remaining was such that no court, either of law or equity, would hesitate to pronounce it sufficient for identification: *Board of S. L. Commrs. v. Wiley*, 10 Or. 86.

3. Land described in the mortgage giving the town, county and state, referring to the plan of the town and therein marked with a number to which description was added, "whereon is situated the two-story brick building formerly used and occupied by W. C. Gerald as a storehouse." The latter part of the description caused the question to be raised whether the lot or part of it only should be deemed covered by the mortgage. "There is nothing more common than to find in the description of real estate conveyed similar superadded words—as, for instance, the tract of land whereon the dwelling-house of the grantor or the defendant in execution is situated—which, so far as we know, were never held sufficient to confine the estate conveyed to that portion of the land actually covered by such dwelling-house itself or its appurtenances. Indeed, the case of *Bratton v. Clawson*, 3 Strob. 127, shows that the rule is exactly the other way, and that, where land is described in a conveyance by certain definite boundaries, the further description of it as 'the land on which the defendant resided' is merely incidental and may be rejected. . . . On this subject the rule laid down in *Shepherd's Touchstone* is 'that, when there is in the first place a sufficient certainty and demonstration, and an additional term of description, which fails in point of accuracy, it shall be rejected as surplusage': *Gerald v. Gerald*, 31 S. C. 171, 9 S. E. 792.

VI. Erroneous Descriptions.

a. **Duty of the Court.**—Mistakes in the description of the lands intended to be mortgaged do not vitiate the security any more than they would a conveyance of the land, provided always they are capable of correction. If the description is so inaccurate, vague and indefinite as to render the identity wholly uncertain, the deed is void, and parol evidence will not be admitted to cure it. Before pronouncing it void on that ground the court hears evidence of the circumstances which have relation to the subject matter when the deed was executed, and then if, after the comparison of the circumstances with the description, it is still found unintelligible, the deed will be pronounced void for uncertainty: *Pollard v. Maddox*, 28 Ala. 321.

The duty of the court is to ascertain and give effect to the intention of the grantor, where that is possible: *McIver v. Walker*, 9 Cranch, 173, 3 L. ed. 694. In *Clements v. Pearce*, 63 Ala. 284, the lands were inaccurately described, but on the authorities and especially on *Saltonstall v. Riley*, 28 Ala. 164, 65 Am. Dec. 334, parol

evidence of the exact situation and location of the lands and their identity was held admissible to relieve and cure whatever indefiniteness and discrepancy there was in the other descriptions.

b. **Illustrations of Innocuous Error.**—1. In *Whitehead v. Lane & Bodley Co.*, 72 Ala. 39, the description of the property as situated in square No. 4 in lieu of No. 7 did not harm the security.

2. In *Parker v. Teas*, 79 Ind. 235, the land was misdescribed as "in" a village, whereas it was "without."

3. In *Wilson v. Brown*, 82 Ind. 471, the land was erroneously described as "a part of Broad Ripple float." The court, in upholding the mortgage, said: "It will hardly do, as we think, to call a mortgage void because by mutual mistake of the parties it contains a mistaken and meaningless description, if that mistake is such as the mortgagee might have corrected. Equity treats as done what ought to be done, and consequently such mortgage, as between the parties and as to all who have notice, is a valid lien upon the land intended to be described."

4. In *Pence v. Armstrong*, 95 Ind. 191, "west" was written for "north" and "ground" for "right of way."

5. In *Hannon v. Hilliard*, 101 Ind. 310, in which the errors in the mortgage were held nonvital, the court emphasized the rule that "to enable the court to enforce the mortgage upon particular land under the averment of extrinsic facts, the extrinsic matter must not contradict the mortgage or produce a description of other property than that described therein, but it must merely explain the description in the mortgage, and point out the property by the means of identification indicated in the mortgage; that the mortgage may not be void, it must furnish such means of identification. It should be apparent that the mortgage and the complaint alleging extrinsic facts designate the same property."

6. "Lot 2 in Square 9" in place of "Lot 2 in Square 5": *City Bank of New Orleans v. Denham*, 7 Rob. (La.) 39, followed in *Thornhill v. Burthe*, 29 La. Ann. 639, in which the range was wrongly numbered.

7. In *Laforest v. Barrow*, 12 La. Ann. 148, it was laid down that notwithstanding article 3273 of the Civil Code required that a mortgage should describe the nature and situation of the property, yet where a sale of the mortgaged property had been effected, and possession given, an error in some of the boundaries ought not to be permitted to defeat the title.

8. The case of *Kernan v. Baham*, 45 La. Ann. 799, 13 South. 155, is rendered interesting for rather unique circumstances created in consequence of an erroneous survey of a right which called for a location of six hundred and fifty acres on a certain river. The land was located altogether wrongly as to sections, township, range and numbers. The owner mortgaged it, using these wrong descriptions. Subsequently the government resurveyed and properly located the land, and it was held such resurvey and relocation bound the owner and inured to the benefit of the mortgagee, on the ground that there was in this no change in the thing mortgaged, no substitution of one tract for another, but a mere yielding of some incorrect calls, by replacement, to bring them to conform to others, which, having been correct all the time, were not altered, but adhered to, by the government.

9. "Section 28" in lieu of "Section 18": *Cooper v. Bigly*, 13 Mich. 463.

10. Incorrect metes and bounds not vital to the description rejected: *Boon v. Pierpoint*, 28 N. J. Eq. 7.

11. In *People v. Storms*, 97 N. Y. 364, there occurred what justified the court in saying that it is not easy to find two cases alike. At the end of the description of a piece of land mortgaged was written: "The intention of this last-mentioned piece of land is to mortgage 46 acres of land on the south side of it next to Mr. Norton's to secure a part of the above consideration." The court, in curing the error, said the words should be read as if they said, "The intention is to mortgage 46 acres of land on the south side of it [the land described previously to the maldescription] next to Mr. Norton's." The description was inartificial and imperfect, but the intention was more apparent than in many of the cases in which the courts afford relief.

12. "Lot No. 1 in Block 209" in lieu of "Lot No. 6 in Block 209." The court applied the maxim of Lord Bacon, "*Falsa demonstratio non nocet*," that the farm A, otherwise accurately described, though referred to as being in possession of B, in the deed, if actually in possession of C, is not so misdescribed as to render the deed void. The court followed the doctrine announced in *Berry v. Wright*, 14 Tex. 270.

13. In the comparatively recent case of *Anderson v. Casey-Swasey Co.* (Tex. Civ. App.), 120 S. W. 918, a deed conveyed "an undivided interest of 160 acres of land in the W. P. Kincannon's headright in Navarro county, Texas," and described the metes and bounds. In an action of trespass to try title it was discovered that the description in certain of the muniments of title did not close, a call evidently having been omitted, and that the lot referred to contained three hundred and twenty acres, and not as might be read from the deed one hundred and sixty acres. The sheriff having sold all the right, title and interest of the then owner "in 160 acres of land on the W. P. Kincannon Survey," the court held that the interest levied upon and sold was whatever interest appellant had in the tract of land actually described, whether it were one hundred and sixty or three hundred and twenty acres. The court also repeated the rule which we now reiterate, that if the description is such that with the aid of extrinsic evidence the land can be identified and located, the description is sufficient, and cited in support: *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282, *Mansel v. Castles*, 93 Tex. 414, 55 S. W. 559, and *Pierson v. Sanger Bros.*, 93 Tex. 160, 53 S. W. 1012.

HAGINS v. SOUTHERN BELL TELEPHONE COMPANY.

[134 Ga. 641, 68 S. E. 428.]

MASTER AND SERVANT—Danger in Felling Trees—Warning. When a servant is engaged with others in pulling down, by means of a rope attached thereto, a tree being felled in an open space, the danger of his being injured by the fall thereof is an obvious one, and known, or should be known, to the servant; and in the absence of an express contract on the part of the master to give warning when the tree begins to fall and in what direction it will fall, there is no duty on him to do so. (p. 271.)

MASTER AND SERVANT—Felling Trees—Warning—Fellow-servant.—The failure of foremen in charge of the details of such work (who at the time of the injury, because of the absence of other employes, are engaged with the servant who is injured in pulling on a rope to guide the direction of the fall of the tree) to warn the servant when it begins to fall and in what direction it will fall, or to station themselves or others elsewhere to give such warning, cannot be charged against the master as negligence entitling the servant to recover damages for injuries received by reason of the tree falling on him. There being no nondelegable duty resting on the master to thus warn the servant, the negligence of the foreman, if any, is that of a fellow-servant. (pp. 271, 272.)

APPEAL—Error in Dismissing Petition.—The court committed no error in dismissing the petition upon the general demurrer filed thereto. (p. 272.)

(Syllabi by the court.)

Gignilliat & Heidt and Travis & Travis, for the plaintiff.

Osborne & Lawrence, for the defendant.

642 HOLDEN, J. The gist of the plaintiff's allegations may be stated as follows: With other servants of the master, he was engaged in pulling down, by means of a rope, a tree which was being felled. The tree was to be so pulled as to fall within a space of about eighty feet between the wires of the defendant company on the one side and a railroad track on the other. The work was under the charge and direction of one who was a general foreman over several gangs, and another employé who was immediate foreman over the gang in which the plaintiff worked. Usually six men pulled the rope; but at the time of the injury for which suit is brought, only four had hold thereof, two of them being the foremen above referred to. The tree in falling struck and injured the plaintiff. He claims the company is liable to him in damages, because it was negligent in not warning him when it began to fall and in which direction it was falling, which he alleges it was the duty of the foremen in charge of the work to do, and their failure to do so was the sole cause of his injury, he being free from fault. He alleges that the immediate foreman was the alter ego of the company, and that he had a right to rely, and did rely,

on receiving warning from him, or the other foreman, or the master, or some one by them provided for that purpose, when the tree began to fall and in what direction it was falling in time for him to escape injury, for which reason and the fact that he was engaged in pulling on the rope he did not discover that the tree was falling until it was half-way down. The allegations above stated are amplified, but it is unnecessary to state them more in detail, as the plaintiff's right to recover depends upon whether the facts above set forth give him a cause of action.

A servant assumes the ordinary risks of his employment, whether or not such employment be of a dangerous character. One who is pulling on a rope fastened to a tree being felled in an open space, ⁶⁴³ for the purpose of pulling the tree down and so guiding it that it may fall in some general direction, incurs an obvious danger of the tree falling on him, and he either knows of such danger or is chargeable with knowledge thereof. Under such circumstances there is no hidden danger, but one which is as obvious to the servant as to the master. Such danger is an accident to the very work in which the servant is engaged, and does not come from an independent agency. A case of this character differs from that class of cases in which the danger arises from sources disconnected with the details of the work upon which the servant at the time is employed; as, for instance, where an employé is working in a mine, and the danger is occasioned by the firing of a blast by other fellow-servants at irregular intervals in other parts of the mine. Among the nonassignable duties of the master are those of furnishing the servant a reasonably safe place in which to work, and to give the servant warning of dangers incident to the employment, unknown to the servant, of which the master knows or ought to know. When a tree being felled in an open space is guided in the direction in which it falls by a rope which the servant is pulling, there is no duty imposed upon the master to warn the servant when the tree begins to fall and in what direction it is falling, in order that the servant may escape being injured by its fall. In this connection, see *Anderson v. Columbia Improvement Co.*, 41 Wash. 83, 82 Pac. 1037, 2 L. R. A., N. S., 840, and authorities cited in note; *Melton v. Jackson Lumber Co.*, 133 Ala. 580, 31 South. 848; *Allen v. Augusta Factory*, 82 Ga. 76, 8 S. E. 68; *Holland v. Durham Coal & Coke Co.*, 131 Ga. 715, 63 S. E. 290. The petition alleges that it was the duty of the foreman in immediate charge of those engaged in the work of felling the tree to warn the latter when the tree began to fall and in what direction it was falling. As there was no duty on the master to give such warning, the failure of the foremen to thus warn the servants, if any such duty

rested on them, is not chargeable to the master, being an act of negligence by a fellow-servant for which the master, is not responsible: *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S. E. 839, 10 L. R. A., N. S., 772; *Dennis v. Schofield's Sons Co.*, 1 Ga. App. 489, 57 S. E. 925. The court committed no error in dismissing the petition upon general demurrer thereto.

Judgment affirmed.

All the justices concur.

The Doctrine of Assumption of Risk in the Law of Master and Servant is discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 886; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289.

A Master is not Under an Obligation, according to *Anderson v. Columbia Improvement Co.*, 41 Wash. 83, 82 Pac. 1037, 2 L. R. A., N. S., 840, to instruct employes as to the danger incident of felling trees in a forest, for the danger is open and obvious to ordinary inspection. And in *Melton v. Jackson Lumber Co.*, 133 Ala. 580, 31 South. 848, it is decided that the foreman of a gang of men clearing trees from a railroad right of way is not required to warn one of the men who is a deaf-mute, but whose sight is unimpaired, of the danger incident to the work.

As to Who is a Vice-principal, see the note to *Mast v. Kern*, 75 Am. St. Rep. 584.

ELLIOTT v. HIPP.

[134 Ga. 844, 68 S. E. 736.]

MANDAMUS—*Issuance by One Judge Against Another.*—When duties are imposed on a judge of a superior court as an officer, another judge of the superior court has no power to issue a mandamus to compel the performance of such duties. (pp. 273, 274.)

JUDGES—*Appointment of Registrar as Official Act.*—The duty devolving upon the judge of a superior court under the Political Code, sections 50, 51, providing for the appointment of a board of county registrars, is an official act. (p. 274.)

MANDAMUS—*Issuance by One Judge Against Another.*—Where the judge of another circuit to whom such application was presented refused a mandamus nisi against the judge named in the petition, and granted a restraining order and mandamus nisi against the registrars, it was proper for the judge granting the order and mandamus nisi to subsequently revoke the same and refuse to take further action on such application, for the reason that the same should be presented to the judge referred to in the application, who had jurisdiction to act thereon and who was not disqualified from so doing. (pp. 275, 276.)

JUDGES—*Disqualification Through Political Interest and Activity.*—The allegation that a judge is active in aiding one faction of a political party in a county to gain control of the party and the politics of the county, in order to further his political purposes and interests and those of a faction with which he is in sympathy, does

not disqualify him from passing on an application to enjoin the registrars from filing a registration list alleged to have been prepared by them with the names of certain persons opposing such faction illegally left off for the purpose of gaining such control, and to compel them by mandamus to place such names on the registration list. (p. 275.)

JUDGES—Disqualification Through Political Interest and Activity.—While the petition and the amendment thereto aver political interest and activity on the part of the judge in whose jurisdiction the case falls, and an attempt and conspiracy on his part with others to dominate and control the politics of the county in his own interest and that of others, the allegations made do not show that he has any pecuniary interest in the result of the litigation, nor do they state any other facts sufficient to render him disqualified from presiding in the case. (p. 275.)

(Syllabi by the court.)

Gober & Griffin and A. H. Burtz, for the plaintiffs.

D. W. Blair and L. Z. Rosser, for the defendants.

⁸⁴⁵ HOLDEN, J. The plaintiffs in error addressed a petition to the superior court of Gilmer county, alleging that they were citizens and taxpayers of that county; that the judge of the circuit in which the county is situated had appointed a board of county registrars, all of whom belonged to one faction of a named political party. The petition prayed that a writ of mandamus issue against the judge of the circuit, requiring him to appoint a bipartisan board of registrars composed of citizens belonging to both factions; and an injunction against the registrars, restraining them from filing with the clerk of the superior court a list of registration with the names left off which they had illegally omitted therefrom; and a writ of mandamus, requiring them to complete the lists of registration as they were required to do by law, and to place thereon the names of petitioners and others whom they had illegally left off. The judge of the Atlanta circuit, to whom the petition was presented, refused to issue a mandamus nisi against the judge, but issued a restraining order against the registrars and an order that the registrars show cause before him at a named time why the mandamus absolute and injunction as prayed should not be granted. Upon the hearing the judge of the Atlanta circuit rejected ⁸⁴⁶ an amendment offered by the plaintiffs, and revoked the restraining order and mandamus nisi therefore granted against the registrars, and refused to take further action in the matter, on a motion made by the registrars on the ground that Judge Morris of the Blue Ridge circuit was not disqualified to act upon the application and the judge of the Atlanta circuit had no jurisdiction to pass upon the same. The plaintiffs filed exceptions pendente lite to the refusal to issue a mandamus nisi against

Judge Morris. They excepted to the order revoking the restraining order and mandamus nisi against the registrars, and to the refusal of the judge of the Atlanta circuit to entertain jurisdiction in the matter.

1. The provisions in reference to the appointment of county registrars are contained in the Political Code, sections 50. 51. Section 50 requires that the judge of the superior court of each county shall biennially appoint three upright and intelligent citizens of the county as county registrars, and that he shall have the power, with or without cause, to remove any registrar and appoint a successor. Section 51 makes it the duty of the judge not to appoint all the registrars from any one political interest or party, but to so regulate his appointments and removals as to maintain a bipartisan board. Clearly, the duties defined in these sections relate to acts to be performed by the judge of the superior court in his capacity as such judge, and therefore are official functions pertaining to that office. The writ of mandamus implies that the authority issuing it is possessed of power to enforce obedience to its mandate. One superior court judge in this state has no more power than another, and no one of them has power to compel another to perform an official act: *Shreve v. Pendleton*, 129 Ga. 374, 58 S. E. 880, 12 Ann. Cas. 563.

2. The only relief sought against Judge Morris was that the court issue a writ of mandamus requiring him to appoint a bipartisan board of registrars. The prayer for process was that the defendants be required to appear "at a time fixed by the court." The petition was addressed to the superior court of Gilmer county, of which Morris is the judge, but was presented to a judge of the Atlanta circuit, who indorsed thereon that he took jurisdiction "by reason of the fact that Judge N. A. Morris is named as a party." The judge to whom the petition was presented refused to ⁸⁴⁷ issue a mandamus nisi, or other process, against Morris, and therefore the latter never became a party defendant in the case; and it cannot be said that as judge of the superior court to which the petition was addressed he was disqualified from hearing the case because of being a party thereto. The action of the judge of the Atlanta circuit, refusing process against Judge Morris, left the case as one standing against the registrars named in the petition, in which the relief sought against them was an injunction to prevent them from filing with the clerk of the superior court the list of registration from which it was alleged they had illegally left off certain names, and a writ of mandamus requiring them to complete the list of registration as required by law and to place thereon the names of petitioners and others illegally omitted therefrom. Was the judge of the Blue Ridge circuit disqualified to pass on the application be-

cause of any of the matters alleged in the petition? Briefly stated, the gravamen of the case alleged against the registrars in the petition was a failure to discharge their duties as registrars, and the performance by them of illegal acts in connection with their duties as such in passing upon the qualification of citizens whose right to vote had been challenged and in preparing the registration lists; and on information and belief it was alleged that their illegal conduct was done at the instance and under the direction of Morris, the judge of the circuit. An amendment was offered, alleging that since 1904 Morris had been in a conspiracy with one Cox to dominate and control the politics of the county, and stating various acts done by them in furtherance of this design. The allegations that one who holds the office of judge of the superior court is an active partisan of one political faction in a county, that it is his desire and to his interest that such faction should dominate and control the politics of the county, that he is engaged in a conspiracy to that end, that he attempts to influence and control the acts of other officials with this purpose in view, and that such officials, at his instance and direction, are acting illegally in order to accomplish such purpose, are not such as to disqualify such judge from hearing and acting on a petition making such allegations and seeking to restrain such officials from committing the illegal acts charged, and to compel them to perform the duties enjoined upon them by law. The above is especially true where, as in this case, the allegations regarding the conduct ⁸⁴⁸ of the judge were made on information and belief and were not positively verified. It is to be presumed that, in hearing and acting upon an application of the character outlined above, the judge will not disregard his solemn oath as an official charged with the just administration of the law, but will accord a fair and impartial hearing to the petitioners, and grant them whatever legal relief they may show themselves entitled to receive. In 17 American and English Encyclopedia of Law, 738, and in 23 Cyc. 582, it is stated that in the absence of statutory provisions, bias or prejudice on the part of a judge does not disqualify him. The only provisions of our law on the subject of the disqualification of a judge are set forth in the Civil Code, section 4045, which provides "that no judge can sit in any cause or proceeding in which he is pecuniarily interested, or related to either party within the fourth degree of consanguinity or affinity, nor of which he has been of counsel, nor in which he has presided in any inferior judicature when his ruling or decision is the subject of review, without the consent of all the parties in interest." In 17 American and English Encyclopedia of Law, pages 738 and 740, it is stated that it is the general rule that statutory grounds of disqualification are exclusive. Under the pro-

visions of the code section above referred to, Morris was not disqualified to act upon the petition, as the allegations thereof do not show that he was pecuniarily interested in the cause, or that he came within any of the other provisions relating to disqualification.

After the judge of the Atlanta circuit to whom the petition was presented refused a mandamus nisi against Morris, judge of the Blue Ridge circuit, as the allegations in the petition did not show that Judge Morris was disqualified from acting thereon, it would have been proper for the judge of the Atlanta circuit to have refused to grant a restraining order and a mandamus nisi against the registrars; but after having granted such order and mandamus nisi against them, it was proper to sustain the motion made by the defendant registrars and revoke the restraining order and mandamus nisi against them, and to refuse to entertain jurisdiction in the matter. No error was committed in refusing to allow the amendment offered by the plaintiffs, and in sustaining the motion of the registrars.

Judgment affirmed.

All the justices concur.

When Mandamus is the Proper Remedy against public officers is the subject of a note to *State v. Gardner*, 98 Am. St. Rep. 863. What duties the performance of which may be compelled by mandamus is the subject of a note to *Ward v. Commrs. of Beaufort Co.*, 125 Am. St. Rep. 492. That mandamus lies to compel a court to assume jurisdiction, see *State v. District Court*, 38 Mont. 166, 129 Am. St. Rep. 636.

JONES v. McELROY.

[134 Ga. 857, 68 S. E. 729.]

CANCELLATION—Deed Obtained by Fraud from Co-owner.—

Where land is jointly owned by two persons, and one obtains a deed from the other of his interest by means of an intentionally false and fraudulent promise to sell the land at its true value and pay off an encumbrance and account for the balance, or, failing to find a purchaser, he will procure a new loan to discharge the present encumbrance, and, having thus obtained the title, he retains, uses and claims the property as absolutely his own, the whole transaction by which ownership is obtained is such a fraud as will entitle the grantor to have the deed canceled. (pp. 278, 279.)

CANCELLATION—Deed Obtained by Fraud from Co-owner.—

In such a case equity affords relief, not because of the mere breach of the verbal promise, but because of the fraud of the grantee in procuring an absolute deed to be made to him upon his false and fraudulent representation and promise that he will use the title for the grantor's benefit. (p. 278.)

TRIAL—Duty of Judge in Giving Instructions.—While it is the duty of a judge to state the contentions of the litigants, an instruction that the jury will find the contentions of the parties in the petition and answer, which are so clearly set out and so frequently referred to by counsel that the court does not deem it necessary to again state them, sufficiently meets the requirement, unless the special facts of the case demand a more formal summary to prevent possible misapprehension. (p. 279.)

TRIAL—Inaccurate but not Misleading Instruction.—In view of its context and the general charge, an instruction that the evidence "should be stronger to show the plaintiff is correct in her contentions than it is going to show that the defendant's contentions are correct; but if it be but slightly so, that would be sufficient," though inaccurate, is not so misleading as to require a new trial. (p. 279.)

TRIAL—Instruction in Regard to Documentary Evidence.—In a case where documentary evidence is submitted, an instruction that "you take the law from the court and the facts from the witnesses, and apply the one to the other and make your verdict," is technically inaccurate. But from the general structure of the charge and the scope of the evidence it is apparent in this case that the jury could not have been misled by the inaccurate expression, as excluding the documentary evidence from their consideration. (p. 280.)

TRIAL—Sufficiency of Evidence to Support Verdict.—There was sufficient evidence to support the verdict, which is approved by the trial judge. No substantial error of law was committed requiring a new trial. (p. 280.)

(Syllabi by the court.)

John T. Norris and Neel & Peeples, for the plaintiff in error.

Thomas W. & Watt H. Milner, D. K. Johnston and G. H. Aubrey, for defendant in error.

888 EVANS, P. J. The action was by Mrs. S. F. McElroy against her brother, J. M. Jones, and his mother in law, Mrs. K. P. Larey, for cancellation and other relief. The case made in the amended petition may be thus briefly stated: C. M. Jones, the father of the plaintiff and J. M. Jones, was the owner of a tract of land encumbered by a deed to secure a debt of one thousand dollars. On January 7, 1895, he transferred the bond to reconvey, executed by the lender, to the plaintiff and her brother, J. M. Jones, upon an expressed consideration of three thousand dollars. After maturity of the loan the brother represented to the sister that he could sell the land for its real worth, and orally promised, if she would make a deed to him of her half interest, that he would sell the land and account to her for one-half of the net purchase price, and, in the event he could not sell the land for its full value, he would procure a new loan on the land and from its proceeds pay off the present encumbrance. On the faith of this promise the plaintiff, on March 18, 1899, made to her brother a quitclaim deed to her half interest in the property, stating in the deed that the

consideration was one dollar and love and affection. It is alleged that the brother obtained this conveyance with the intentional design to defraud the plaintiff, his sister. Thereafter, on May 22, 1900, J. M. Jones conveyed the land by quitclaim deed to his mother in law, Mrs. Larey, upon a consideration of one hundred dollars, and Mrs. Larey, on the same day, paid the encumbrance and took a conveyance from the holder of the security deed, in which the amount paid by her was stated to be twelve hundred and eighteen dollars and fifteen cents. At the time Mrs. Larey received the deed from J. M. Jones and paid the encumbrance she knew the purposes for which the plaintiff executed the deed to J. M. Jones, and that the conveyance from J. M. Jones to Mrs. Larey was in pursuance of a conspiracy to defraud the plaintiff of her land. The value of the land was alleged to be eight thousand dollars, and the net income therefrom, while in the defendant's possession, during the interval between the making of the deed and the bringing of suit, was one hundred and fifteen dollars, which amount, with five hundred and fifty dollars, was sufficient to pay the plaintiff's half of the loan debt, which latter amount was tendered to the defendants and refused by them. The plaintiff prayed for the cancellation of the deeds, ⁸⁵⁹ and for general relief. The defendants severally demurred and answered. The demurrers were overruled, and the trial of the case resulted in a verdict for the plaintiff. The defendants each moved for a new trial, which motions were overruled. J. M. Jones sued out a bill of exceptions, assigning error on the refusal of his motion for a new trial and on the pendente lite exceptions to the overruling of his demurrer. No error is assigned on the rulings against Mrs. Larey.

1, 2. Cancellation of the deed was prayed on the ground that the grantee obtained it by means of an intentionally false and fraudulent verbal promise to hold and use the land for certain specific purposes, and having thus obtained the title, he conveyed the land to another who had notice of his fraudulent purpose, and in pursuance of his scheme to defraud. Equity affords relief in such a case, not because of any express trust declared in the verbal promise, but because of the fraud of the grantee. The relief may be granted either by declaring the holder of the legal title a trustee ex maleficio (*Brown v. Doane*, 86 Ga. 32, 12 S. E. 179, 11 L. R. A. 381), or by a cancellation of the deed fraudulently procured. The plaintiff's relief is not based on a mere breach of an oral promise, but upon the fraud of the grantee in procuring an absolute deed to be made to himself upon his fraudulent representation and promise that he would use the title for the grantor's benefit. There is no

law which requires a fraudulent undertaking to be manifested in writing; and parol evidence is admissible, not for the purpose of contradicting the deed, but for the purpose of establishing the fraud by means of which the grantee became vested with the absolute title.

3. The court instructed the jury that they would find the contentions of the parties set out in the pleadings. Error is assigned in that the court should have restated the contentions. While it is the right and duty of the court to state the contentions of the parties, his reference to the pleadings as containing such contentions will suffice, unless the special facts of the case may require a formal statement of the actual issues in order to prevent possible misapprehension: *Central Ry. Co. v. McKinney*, 118 Ga. 535, 45 S. E. 430.

4. The court charged: "The burden of proof is upon the plaintiff in the case to show that her contentions are correct. What ⁸⁶⁰ is meant by the burden of proof is the weight of evidence; it should be stronger going to show the plaintiff is correct in her contentions than it is going to show the defendant's contentions are correct; but if it be but slightly so, that would be sufficient, but it must preponderate in her favor in order for her to recover in the case. Then I charge you, if you find from the evidence that the contentions of the plaintiff are correct, you will find in her favor; otherwise you would find in favor of the defendant." The error assigned is, that, before the plaintiff is entitled to relief by cancellation on the ground of fraud, the evidence must be clear and unequivocal as to the fraud, and that the court should have so instructed the jury; that the expression that if the evidence of the plaintiff be but slightly stronger than that of the defendant, that would be sufficient, in effect abrogates the rule as to the strength of evidence sufficient to justify cancellation. Our code declares that in all civil cases the preponderance of evidence is sufficient to produce mental conviction; and that by a preponderance of evidence is meant that superior weight of evidence which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other: Civ. Code, secs. 5144, 5145. Further on in his charge the court said: "When you come to make your verdict in this case, don't view the evidence in detached portions, but take the whole of it, all the facts and circumstances proven in the case, to determine for yourselves what the truth is as best as you can, and let your verdict speak the truth, trying to do justice between the parties." While the particular expression to which exception is taken may be inapt, yet, when taken in connection with its context and the general charge, we do

not think that it misled the jury as to the degree of proof required in order to authorize a recovery by the plaintiff.

5. In his instruction the court said to the jury, "You take the law from the court, and the facts from the witnesses, and apply the one to the other and make your verdict." Certain documentary evidence was used, and it is contended that this charge excluded such evidence from the consideration of the jury. We do not think so. The court was charging upon the issues made in the case by the parol evidence which was offered relating to such documentary evidence. While it would have been better for the court to have ⁸⁶¹ instructed the jury that they should consider all the evidence, oral and written, in applying the law to the case, we do not think that the jury was in any way misled by the particular expression of the court of which complaint is made. Especially so, where it appears that the court, in discussing the weight of evidence, instructed the jury: "Now, there is some record evidence introduced here, and the same rules will apply to that, except that it is not delivered from the stand, and not delivered in the same way as witnesses on the stand."

6. There was sufficient evidence to authorize the verdict, which has the approval of the trial judge. We do not think any substantial error was committed in the trial; and the judgment is affirmed.

All the justices concur.

That Equity has Jurisdiction to Cancel an Instrument Fraudulently Procured, see *Smith v. Werkheiser*, 152 Mich. 177, 125 Am. St. Rep. 406; *Crawford v. Mobile etc. R. R. Co.*, 83 Miss. 708, 102 Am. St. Rep. 476. That a deed may be canceled because of misrepresentations or fraud in procuring it, see *Byrd v. Byrd*, 95 Tenn. 364, 49 Am. St. Rep. 932; *Bell v. Campbell*, 123 Mo. 1, 45 Am. St. Rep. 505; *Matlock v. Shaffer*, 51 Kan. 208, 37 Am. St. Rep. 270; *Morgan v. Dinges*, 23 Neb. 271, 8 Am. St. Rep. 121. Misrepresentations, to constitute sufficient grounds for ordering the cancellation of a deed, must be as to an existing and material fact, or the affirmation of a matter in the future as a fact, and not a mere opinion, statement of intention, or promise to do some act in the future: *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29.

Before Cancellation can be Decreed for Fraud Practiced in the procurement of a deed, the bill must aver facts from which fraud is the legal result. Mere averments of conclusions are insufficient to raise the issue of fraud. It is also essential to allege and prove that the defendant participated in the fraud or had notice of it, actual or constructive, before paying for the land: *Pratt Land etc. Co. v. McClain*, 135 Ala. 452, 93 Am. St. Rep. 35.

There is No Occasion for Equitable Relief from a Deed Void on its face, because it convicts itself and casts no cloud upon the title. It is on the theory that a deed is voidable only that a bill in equity will lie: *Shelton v. Franklin*, 224 Mo. 342, 135 Am. St. Rep. 537.

ROSS v. LETTICE.

[134 Ga. 866, 68 S. E. 734.]

CONSTITUTIONAL LAW.—A Statute is Retrospective in its legal sense which creates a new obligation on transactions or considerations already past, or destroys or impairs vested rights. A statute does not operate retrospectively because it relates to antecedent facts, but if it is intended to affect transactions which occurred or rights which accrued before it became operative as such, and ascribe to them essentially different effects, in view of the law at the time of their occurrence, it is retroactive in character. (By the editor.) (p. 282.)

CONSTITUTIONAL LAW—Retrospective Statute.—A statute which creates a liability against a county for services rendered by an attorney, when no such liability existed at the time they were rendered, is retrospective and opposed to the constitution. (By the editor.) (p. 282.)

CONSTITUTIONAL LAW—Retrospective Statute.—An act of the General Assembly which creates a new obligation and imposes a new duty in respect to transactions or considerations already past is retroactive in character, and in violation of article 1, section 3, paragraph 2, of the constitution (Civil Code, section 5730), which forbids the General Assembly to pass a retroactive law. (p. 283.)

(Syllabi by the court except when stated to be by the editor.)

J. E. Hall and John P. Ross, for the plaintiff.

Guerry, Hall & Roberts, for the defendant.

⁸⁶⁶ **EVANS, P. J.** In 1871 the General Assembly created the road board of Bibb county, conferring upon that body ministerial authority over clearing and working the legally established public roads. The fiscal affairs of Bibb county are looked after by the ⁸⁶⁷ county board of commissioners, and that board has also jurisdiction to lay out and establish a public road. The county board of commissioners established a public road, directing it to be entered upon the register of public roads, to be worked by the county road forces. The road board refused to obey this order, and certain citizens of Bibb county filed an application for mandamus against them to compel obedience to such order. The road board employed Mr. Ross, an attorney at law, to resist the application for mandamus. His defense was successful: *Green v. Road Board of Bibb County*, 126 Ga. 693, 56 S. E. 59. Mr. Ross presented a bill for his fees to the proper authorities of Bibb county, who refused to audit and pay the demand; and suit was instituted, which resulted in favor of the county. Thereupon the General Assembly passed an act authorizing and directing Bibb county to pay Mr. Ross' fee, and certain expenses incurred by him in the litigation. The county commissioners, after the passage of this act, approved the demand and issued a warrant to the

treasurer for its payment. The treasurer refused to pay the warrant, and Mr. Ross applied for a mandamus to compel him. The court refused to grant a mandamus absolute, and exception is taken.

At the time of the enactment of the act of 1909 it had been adjudicated that Mr. Ross was not entitled to receive from the county's revenues compensation for defending the road board in certain litigation. This adjudication was based on the lack of power in the road board to employ counsel at the county's expense to defend the board in a mandamus proceeding instituted by citizens of the county to compel it to open and work a road purporting to have been established by order of the county board of commissioners: *Ross v. Bibb County*, 130 Ga. 585, 61 S. E. 465. Whatever right Mr. Ross may now have against the county to collect his fee and certain expenses must spring from the act of 1909. By the terms of the act Bibb county "is authorized and directed to pay to John P. Ross, of said county, the sum of seven hundred and fifty (\$750) dollars for attorney's fee incurred by the road board of Bibb county in the case of John C. Green and T. B. West vs. The Road Board of Bibb County, petition for mandamus, in the superior court of Bibb county, and fourteen dollars and seventy-five cents (\$14.75) for costs incurred by said road board and advanced by him on a cross-bill of exceptions in said case": Acts of 1909, p. 377. This ~~868~~ act is assailed as being void, because violative of article 1, section 2, paragraph 2, of the constitution (Civil Code, section 5730), which declares that "No bill of attainder, ex post facto, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities shall be passed." Manifestly, the act is retrospective, and intended to confer not only power upon the county to pay the fee, but to create a liability against the county which theretofore did not exist. In construing a similar provision in the Texas constitution, the supreme court of that state said that "retrospection within the meaning of the constitution would be to give a right where none before existed, and by relation back to the party the benefit of it": *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 100. A statute is retroactive in its legal sense which creates a new obligation on transactions or considerations already past, or destroys or impairs vested rights. A statute does not operate retrospectively because it relates to antecedent facts, but if it is intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribe to them essentially different effects, in view of the law at the time of their occurrence, it is retroactive in character: *Hasbrouck v. Milwaukee*, 13 Wis. 37, 80 Am.

Dec. 718; *Evans v. Denver*, 26 Colo. 193, 57 Pac. 696; *Chicago B. & Q. R. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624, 41 L. R. A. 481; *State v. Whittlesey*, 17 Wash. 447, 50 Pac. 119; *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242. Mr. Justice Story, in the case of the *Society for Propagating the Gospel v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13,156, thus defines a retroactive law: "Upon principle every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already past, must be deemed retrospective." This definition has been adopted in *Rairden v. Holden*, 15 Ohio St. 207, and *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. Rep. 1014, 29 L. ed. 240. The design of the act is to create a new obligation and to impose a new duty in respect to a transaction or consideration already past, and under the overwhelming weight of authority such a statute is retroactive. The constitution forbids the General Assembly to pass retroactive laws, and the act of 1909 comes within the prohibition.

⁸⁶⁹ The statute was attacked as offending other provisions of the constitution, and special facts were pleaded in bar of the plaintiff's remedy; but in view of our holding that the act of 1909 is unconstitutional because it is retroactive, it becomes unnecessary to discuss the other features of the case.

Judgment affirmed.

Beck, J., absent.

The other justices concur.

Retrospective Statutes are considered in the note to *Goshen v. Stonington*, 10 Am. Dec. 131-140. A statute attempting to create a personal liability to pay assessments previously made on land, where no liability existed when the assessments were made, is unconstitutional and void: *City of Grand Rapids v. Lake Shore etc. Ry. Co.*, 130 Mich. 238, 97 Am. St. Rep. 473. And the legislature has no power to give new life to a cause of action which has been finally adjudicated by a court of competent jurisdiction: *McManus v. Hornaday*, 124 Iowa, 267, 104 Am. St. Rep. 316. See, also, *Philip v. Heraty*, 147 Mich. 473, 118 Am. St. Rep. 554.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

BABCOCK v. FARWELL.

[245 Ill. 14, 91 N. E. 683.]

FOREIGN CORPORATION—Jurisdiction Over Internal Affairs.

The reasons which influence courts of chancery to refuse to interfere in the management of the internal affairs of a foreign corporation are, that the rights arising between a corporation and its members out of such management depend upon the laws of the state under which the corporation is organized; that the courts of that state afford the most appropriate forum for adjudication upon the relation between the stockholders and the corporation; and that frequently such courts alone possess power adequate to the enforcement of all decrees that justice may require. (p. 297.)

FOREIGN CORPORATION—Jurisdiction Over Internal Affairs.

It is the inability of the court to do complete justice by its decree, not its incompetency to decide the question involved, that determines the exercise of its power to entertain suits affecting the internal affairs of a foreign corporation. (p. 297.)

FOREIGN CORPORATION—Jurisdiction Over Internal Affairs.

The general statement that courts will not interfere with the management of the internal affairs of foreign corporations must be construed in connection with the particular facts. The rule rests more on grounds of policy and expediency than on jurisdictional grounds; more on want of power to enforce a decree than on jurisdiction to make it. Where the wrongs complained of are merely against the sovereignty by which the corporation was created or the law of its existence, or are such as require for their redress the exercise of the visitorial powers of the sovereign, or where full jurisdiction of the corporation and of its stockholders is necessary to such redress, the courts will decline jurisdiction. (pp. 297, 298.)

FOREIGN CORPORATION—Jurisdiction Over Internal Affairs.

Acts which affect the relation of stockholders to one another or to the corporation as individual stockholders or as classes of stockholders must be regarded as acts of internal management of the corporation, relief against which must be sought in the courts of the country where the corporation was organized. Where, however, the relief sought is within the general jurisdiction of a court of chancery, where all the parties necessary to the full and proper adjustment of the rights involved are before the court, and where the relief sought does not require the exercise of the visitorial power of the government, the court should exercise the power of determining controversies

brought before it instead of remitting suitors to a foreign jurisdiction. (p. 299.)

FOREIGN CORPORATION—Jurisdiction Over Internal Affairs. Where minority stockholders in a foreign corporation seek by suit in equity to have restored to the corporation property fraudulently appropriated to their own use by directors who, together with the corporation itself, are personally subject to the jurisdiction of the court, the court should exercise its jurisdiction for the determination of the controversy. (p. 300.)

CONTRACT.—The Right to Rescind must be Exercised in Toto. The contract must stand in all its provisions, or fall altogether. (p. 301.)

CONTRACT—Rescission—Return of Consideration.—A party to a contract cannot retain the consideration or a part of it, and refuse to be bound by the contract or a part of it. And his inability to restore the consideration will not relieve him from the necessity of so doing, nor is it sufficient to offer to set off the amount against what is claimed from the other party. (p. 301.)

CONTRACT—Rescission—Return of Consideration.—Whatever may be the relation of the parties, or on whatever party may rest the burden of proof, the right of rescission of a contract can be exercised only upon a return of the consideration, which must be alleged in the bill. (p. 302.)

RELEASE—Rescission for Fraud—Return of Consideration.—The rule that a release procured by actual fraud may be avoided without a return of the consideration does not apply when there was fraud only in the consideration, as where the party knew he was executing a release but was induced to do so by false representations of the other party as to matters other than the character of the instrument. In such a case the release is voidable only, and is binding until set aside in equity. (p. 302.)

CORPORATION—Suit by Stockholder After Ratifying Acts.—A stockholder who, for a valuable consideration, settles matters in dispute between himself and the directors, and expressly waives his objections to the transactions between them and the corporation, cannot seek relief against the transactions by bringing suit in his own right or in the right of the corporation or other stockholders. (p. 302.)

CORPORATION—Suit by Stockholder After Ratifying Acts.—A stockholder who has waived his objections to transactions of the directors cannot maintain a suit in his personal capacity to obtain relief therefrom; neither can his executor nor his legatee sue. (p. 302.)

CORPORATION.—The Theory of a Stockholder's Suit is, that he has sustained a wrong through the injurious effect upon his stock of the wrong done to the corporation. If he has himself consented to or participated in the acts constituting such wrong, or has waived his right to object to them, he cannot afterward maintain a bill, on account of such transactions, for the benefit of the corporation or of other stockholders. (p. 302.)

CORPORATION—Suit by Assignee of Stock.—An assignee of stock cannot maintain a suit in regard to transactions with the corporation done or assented to by his assignor. (pp. 302, 303.)

CORPORATION.—The Purchaser of Shares of Stock Acquires no greater rights than his vendor. He holds by the same title and subject to the same liability. (p. 303.)

POWER—Revocation by Death of One Party.—A naked power committed to several persons is determined by the death of one, but if coupled with an interest the power, even though discretionary, passes to the survivor. (p. 304.)

POWER—When not Terminated by Death of One Party.—A contract by which a syndicate is entitled to the exclusive use and possession of the real and personal property of a corporation for a term of years as security and in compromise of a claim of members of the syndicate creates a power coupled with an interest which is not terminated by the death of one or two of the members. (p. 305.)

CONTRACT.—Upon the Death of One of Several Joint Contractors before complete performance, ordinarily the survivors are bound by the obligations of the contract and entitled to its benefit. (p. 305.)

CORPORATION.—Stockholders cannot Ordinarily Maintain a Suit to enforce any right of the corporation. That privilege belongs to the corporation itself, acting through its directors. And the mere failure of the directors to bring suit does not entitle any stockholder to do so. (p. 306.)

CORPORATION—Stockholder's Suit.—A Demand upon the Directors to bring suit is, in general, essential before a stockholder may himself maintain a bill to enforce a right of the corporation. His remedy must first be sought within the corporation, and it is only where the majority of the directors are themselves involved in the matters complained of, so that it is evident that the demand would be unavailing, that it can be dispensed with. (p. 306.)

Kraus, Alschuler & Holden, for the appellant.

Horace Kent Tenney, M. Lester Coffeen and Roger Sherman, for the appellees.

¹⁸ DUNN, J. This was a stockholder's suit begun in the superior court of Cook county by the appellant, as the owner of 15,196 shares of the stock of the Capitol Freehold Land and Investment Company, Limited, a corporation organized under the laws of Great Britain and Ireland, for and on behalf of all other stockholders in that corporation, as well as on her own behalf, against the corporation, John V. Farwell and the executors of the will of Charles B. Farwell, deceased, whereby it is sought to have various contracts between the corporation and John V. Farwell and Charles B. Farwell declared unconscionable and void, to charge John V. Farwell and Charles B. Farwell as trustees for the corporation, and compel them to account for, pay over and deliver to the corporation all property received, held or claimed by them under any of the contracts sought to be set aside and all profits made thereon, and to compel an accounting of various other transactions arising out of the relations and contracts between the corporation and the Farwells whereby it is alleged that the assets of the corporation have been fraudulently reduced. The appellate court affirmed the decree of the superior court ¹⁹ sustaining a demurrer to the amended bill and dismissing it for want of equity.

The transactions set out in the bill extend over a period of many years and are numerous and complicated. In 1882

Matthias Schnell entered into a contract with the state of Texas for the erection of a state capitol building in consideration of a land grant of 3,000,000 acres. This contract was assigned to John V. Farwell, Charles B. Farwell, Abner Taylor and Amos C. Babcock, the husband of appellant, who later assigned it to Taylor alone but without any change of interest, their equal interest in and obligation upon the contract being evidenced by a written agreement signed by all of them, dated December 4, 1882. Babcock was unable to advance any money toward the carrying out of the contract, and on November 12, 1884, being indebted to Charles B. Farwell, he assigned his one-fourth interest in the contract to Farwell as security for his indebtedness. On September 19, 1885, Babcock, in consideration of the release of his indebtedness to the Farwells and of the additional sum of \$25,000 paid him, the total consideration not exceeding \$40,000, transferred one-half of his interest in the contract to them absolutely, and they executed an acknowledgment that they held an eighth interest in the contract in trust for him and agreed to account to him for one-eighth of the net profits, including the cattle business proposed to be carried on upon the lands received from the state, it being understood that Babcock should not be required to furnish any money.

Previous to this sale of one-half of Babcock's interest the Capitol Freehold Land and Investment Company had been incorporated in the summer of 1885, and in anticipation of such incorporation a contract had been entered into on June 1, 1885, between Taylor, the Farwells and William Chase Prescott as manager for and trustee on behalf of the company, wherein it was represented by Taylor and the Farwells that they were the only persons having any ²⁰ interest in the contract for the erection of the state capitol and the profits thereof or the lands to be acquired thereunder, and in particular that Babcock had no longer any interest therein. It was then agreed that Taylor should sell to the company the entire tract of land, containing not less than 3,000,000 acres, appropriated for the purpose of erecting the new capitol, in exchange for 199,993 shares, of the par value of £10 each, of the company's stock, and £600,000 in cash or first mortgage debentures of the company, being part of a proposed issue of £1,000,000, all having an equal lien and bearing five per cent interest; that when the remaining £400,000 had been subscribed or issued for the purpose of stocking the property or as soon as the property was sufficiently stocked and the requisite improvements completed, even though the full £400,000 might not have been issued, the directors should take steps for the issue of the £600,000 and pay the proceeds to Taylor and the Farwells; that Taylor and the Farwells might at any time demand and receive any portion of the £600,000

of debentures then unissued, and that they would apply for and have allotted to them 149,993 shares of the stock, leaving 50,000 shares, which were to be used as a bonus in selling debentures of the company, subject to conditions mentioned in the contract. The Farwells agreed to transfer to the company all livestock on hand, and the company agreed to apply the proceeds of debentures not intended for payment to vendors of land to the improvement and stocking of the property. The net profits of the company were to be applied to the payment of the interest on debentures issued, and until such net profits were sufficient for that purpose Taylor and the Farwells agreed to make good the deficiency. John V. Farwell was to be the first managing director in the United States, with the general management of the lands and property of the company and the conduct of its business in America, subject to the approval and control of the directors. The board of directors,²¹ and such agents in the United States as they might appoint, should alone act for the company, and not the American directors or managing director. Any differences or disputes arising between the parties touching the agreement or its construction, or any clause or thing therein or matter relating thereto, should be left to, and be absolutely decided in, England by arbitration, and for the purpose of such arbitration the agreement might be made a rule of her majesty's high court of justice in England. Babcock, though he then owned a fourth interest in the capitol contract, had no knowledge of the contents of this agreement until after the sale of half of his interest to the Farwells, on September 19, 1885. The incorporation of the Capitol Freehold Land and Investment Company was in accordance with this agreement. Its purposes were very broad, and included the acquisition, development and improvement of the Texas land, the stocking of it and raising and dealing in all kinds of livestock. Both the Farwells were directors, and John V. Farwell was made first managing director in the United States.

The bill alleges that the Farwells received for the contract of June 1, 1885, and the sale thereby of said 3,000,000 acres of land £1,999,930 of the capital stock of the company and £600,000 of debentures, altogether amounting to \$12,884,000; that the total cost of the erection of the capitol building did not exceed \$3,200,000, of which not over \$500,000 had then been paid; that one-eighth interest in the capitol building contract belonged to Babcock and was worth \$1,456,500; that after deducting certain proper charges against this interest there remained a net profit thereon of \$742,333, yet the Farwells bought it for themselves, of Babcock, for \$40,000; that they occupied a fiduciary relation to the company and had no right to purchase said interest without giving the com-

pany the benefit thereof; that they did not for many years afterward disclose to the company, or its officers, directors or stockholders, ²² the fact of making said contract with Babcock, and should be held to have purchased and to hold said interest for the company.

By the agreement of June 1, 1885, Taylor and the Farwells agreed to advance to the company such amount of money as might be necessary to pay any deficiency of interest on the debentures not covered by the net cash profits of the company, to be repaid to them only out of net cash profits. It is alleged that there were no net profits before January 1, 1889, but an actual loss, and that the Farwells made false statements to the company as to the net profits, and the debenture interest was actually paid out of the capital of the company. Various modifications of the agreement of June 1, 1885, were made at different times, and on February 1, 1888, a supplementary agreement was made in regard to the payment of debenture interest, whereby Taylor and the Farwells were to pay such interest only in case of a deficiency for that purpose in the gross receipts of the company from the sale of cattle instead of in the net cash profits. It is averred that Babcock never knew of this agreement, nor did the complainant, until 1906.

On February 15, 1888, an agreement was executed by Taylor, the Farwells, Babcock, John T. Chumasero and the firm of John V. Farwell & Co., wherein, after reciting, among other things, that the signers had formed a syndicate for the erection of a state house at Austin, Texas, and that the money expected from the sale of debentures had not been received, and John V. Farwell & Co. had advanced, and were still advancing, large sums, it was agreed that in consideration of the advances so made and to be made until the sum requisite for the completion of the state house was raised, the syndicate should give to John V. Farwell & Co. twenty-five per cent of the total issue of stock of the Capitol Freehold Land and Investment Company as a bonus for such advances, all expenses incident to placing the total amount of the debentures to be a charge ²³ upon the stock so given as a bonus and the debentures to be carried or bought by John V. Farwell & Co. without expense to the syndicate. On January 5, 1889, the state house having been completed, the members of the syndicate executed another agreement concerning the issue of the stock. It recited that they were entitled to the disposal of about 180,000 shares, and it was agreed that these shares should be allotted as follows: 30,000 to Taylor, 15,000 to Babcock, 7,500 to John T. Chumasero, 33,750 to each of the Farwells and the residue to John V. Farwell & Co. The disposition of several unsettled matters was agreed upon, and, except as specifically stated, John V. Farwell & Co. agreed to pay all debts of the syndicate incurred in the erection of

the state house and all expenses incurred or to be incurred in the sale of debentures. They were also to have all the remaining unsold debentures belonging to the syndicate and all lands belonging to the syndicate and not deeded to the Capitol Freehold Land and Investment Company. The only unsettled matters which were not assumed by John V. Farwell & Co. were a litigation with E. E. Myers and S. B. Burke, which the bill avers was settled at an expense not exceeding \$3,000, and the cost of 15,000 head of cattle, which, it is also averred, was paid by the sale of the cattle. Babcock, when this agreement was signed, knew nothing of the modification of the agreement of June 1, 1885, or the execution of any of the agreements to which he was not a party, and the Farwells represented to him that the obligation of the vendors remained the same as under the agreement of June 1, 1885.

In April, 1889, Babcock authorized John V. Farwell to receive the 15,000 shares of stock due to Babcock, and Farwell wrongfully procured the shares to be issued to himself or to Charles B. Farwell, and then refused to deliver the stock to Babcock, claiming to have advanced large sums of money which were a charge against said stock. After much fruitless negotiation Babcock filed a bill in the circuit ²⁴ court of Cook county on June 15, 1891, to obtain possession of said stock and an accounting from the Farwells. The latter filed a cross-bill seeking to charge the stock with liens, and on January 30, 1896, the matters in controversy were settled and the suit dismissed. Among other things, the parties mutually released each other from all claims or demands. The Farwells paid Babcock \$15,000, and delivered 10,000 shares of ordinary stock and 10,000 shares of deferred stock, at Babcock's request, to William H. Parlin. Certain of these shares were delivered to Babcock's creditors, at his request, in payment of his debts, and the rest remained in Parlin's possession until Babcock's death, on February 25, 1899. Babcock died testate, and the shares of stock, in accordance with his will, were transferred to the appellant and constitute the basis of this suit. In the meantime, on March 27, 1889, the company leased the Texas lands to the Farwells and Taylor for the term of five years from January 1, 1889, at an annual rental of fifteen cents per acre and five per cent of the value of the cattle on the land. The lessees were to manage the cattle on the land, develop and improve the land, provide water, pay taxes and keep up repairs. They might sell certain kinds of the cattle and use the proceeds for the payment of rent and other money required to be paid out by the lessees under the lease, except such sums as should be necessary to pay the interest on the debentures, London expenses and fixed charges of the company. They agreed to deliver to the company, at the expiration of the lease, not less than 150,000

head of cattle of the same ages and classes as the present herd.

The bill avers that the lands were operated under said lease at a loss, but that on July 29, 1892, the directors presented a report to the stockholders showing a profit, and a dividend of two and a half per cent on ordinary shares was declared and paid. On that day a new agreement was entered into terminating the lease on December 31, 1892,²⁵ reciting the fact that a large number of debentures were outstanding, some of which would become due in 1892 and others at different times thereafter; that the business upon the company's ranches conducted by the lessees showed an increasing profit, more than sufficient to pay interest on debentures; that the lessees had made advances of money and were willing to continue the business and guarantee sufficient profits to pay all expenses of the company and interest on its debentures, and waive all claims for advances, except the right to be reimbursed from surplus profits above said expenses and interest. The lessees sold to the company their cattle, horses and outfit on the ranches and agreed to guarantee the payment of interest on the reissue of any debentures, and the company agreed that the lessees, as its agents, should conduct the business of raising cattle on the company's lands and of buying and selling cattle, and out of the profits reimburse themselves for interest paid on debentures, pay the expenses of the company, pay any dividends declared by the company, reimburse themselves for advancements made in the purchase of cattle and deliver the surplus profits to the treasurer of the company. The company assumed no obligation with respect to said advances, which were to be repaid solely from the profits of the business over and above the prior disbursements to be made therefrom, and when all said advances should have been repaid, the lessees agreed to turn over to the company the ranches, with cattle thereon to the number of at least 150,000.

The bill charges that the recitals contained in the said agreement were fictitious and insufficient to warrant its execution, and that the agreement was made in pursuance of a plan to obtain the profits of the business for the lessees; that in pursuance of such plan, on the twenty-second day of February, 1893, another agreement was entered into, reciting the maturing of a number of debentures of the company and the inability of the company to pay them; that²⁶ at a meeting of the debenture holders on January 10, 1893, a resolution was passed, which is attached to the agreement, and which provided for the extension of maturity of the debentures to December 31, 1907, subject to prior redemption at the option of the company, and that the rate of interest from January 1, 1893, should either be five per cent per annum, or, at the

option of the holder, four per cent, the holder so electing to receive from the Farwells and Taylor twenty-five per cent of the face value of the debentures in fully paid-up shares of the company at par, the interest on all debentures to be guaranteed by the Farwells and Taylor. By said agreement the Farwells and Taylor agreed to transfer to the debenture holders fully paid-up shares of the capital stock of the company in accordance with the resolution, and further agreed to pay the interest on the debentures in case the company failed to pay it. The company covenanted not to declare or pay any dividends until all of the debentures had been redeemed or paid off. The bill alleges that there was no occasion for this agreement, as the income from the business on the ranches of the company was more than sufficient to pay all interest on said debentures; that the Farwells and Taylor were already bound as guarantors of the higher rate of interest on said debentures, and that the purpose of the agreement was to secure a reduction in the interest on said debentures, with the view that they might absorb all the income of the business of the company over the amount of the reduced interest, and also the application of the proceeds of cattle to the payment of debenture interest, whether such proceeds represented net profits or whether they impaired the capital of the company.

The bill alleges that the Farwells and Taylor became dissatisfied, and being aware that the consideration for the said agreement would not stand upon any just accounting, and without any valid reason therefor, caused the company, by its board of directors, of whom they formed a part and ²⁷ whom they controlled, to enter into another agreement on July 12, 1894. This agreement is set out in full, its most material parts being as follows: After reciting the guaranty by the Farwells and Taylor (called the syndicate) of the payment of interest on all debentures from January 1, 1893, it is agreed that until all of the said debentures have become due, or until default in the payment of any of them, the syndicate shall manage the business of raising cattle on the ranches of the company; that they shall keep a minimum number of 120,000 head of cattle thereon, properly graded and the same as now thereon; shall sell and buy such cattle as shall be necessary to maintain the grade, and shall maintain and keep in repair the buildings, fences and equipment; that they shall, in addition to paying interest on debentures as provided by the contract of February, 1893, pay all expenses of carrying on the business, including the purchase money of cattle and other things bought, and shall render an annual account of all cattle bought and sold and of all expenses. They shall receive for their own benefit the proceeds of all the cattle sold by them which shall be accepted

in full satisfaction of all claim against the company for interest and money paid out under any clause of this contract, and the company shall have no claim against the syndicate for money received from the sale of cattle. When all the debentures are due, the syndicate will surrender its agency and hand over to the company the ranches, and all equipment, in good condition, and cattle to the number of 120,000 head, of the same grade as then on the ranch. If the cattle shall be less than 120,000 head or of a lower grade, the difference in value shall be paid to the company; if there shall be over this number of cattle, the excess shall belong to the syndicate. All amounts expended by the syndicate since December 31, 1892, for permanent improvements shall be refunded to them. The syndicate waives all claims against the company and the company waives all claims against the syndicate. It is recited that the agreement shall operate from January 1, 1893, and all other agreements in conflict therewith are superseded and abrogated. The account of the syndicate on the books of the company shall be closed on December 31, 1893, and shall show no balance on either side. It is agreed there were 128,259 head of cattle then on the ranches of the company.

Prior to the execution of the July 12, 1894, agreement, a draft of an agreement between the same parties had been prepared, bearing date February 6, 1894. The material parts of this draft were similar to those of the agreement of July 12, 1894, but it was not signed by the parties. Said draft recited that the syndicate claimed the company was indebted to it for £420,000 while the company claimed the syndicate owed it £38,000, and both claims were proposed to be settled by the agreement as drafted. The bill sets out, with much detail, that all of these agreements were procured to be entered into by the Farwells and Taylor for the purpose of enabling them to reap the benefits of all profits made, which were alleged to be very large. The bill seeks to avoid the effect of the settlement made by Babcock in 1896 by reason of the frauds alleged to have been practiced by the Farwells to procure it. It avers that at the time of her husband's death the appellant was of the age of sixty-six years and not familiar with business affairs, and that Babcock, at the time of making the settlement agreement, and for some time prior to his death, was in ill-health and incompetent to transact business affairs.

On June 9, 1901, the appellant caused to be served upon the Capitol Freehold Land and Investment Company a request that steps should be taken to annul the contract of July 12, 1894, and secure an accounting from the syndicate. No attention being paid to such request, she later filed a bill in the state of Texas for such relief. Answers

were filed, and the case being called for trial, after evidence had been given, on the eighth day of April, 1902, it is alleged²⁹ that appellant, being of advanced age and without means to prosecute said cause, and being then wholly ignorant of any grounds for assailing the said settlement of 1896 save those stated in said bill filed in Texas, and being unable, because of the death of said A. C. Babcock, to prove such allegations, and being wholly ignorant of the false character of the representations and fraudulent transactions herein set forth and not mentioned in said bill in Texas, dismissed the Texas bill; that appellant was induced to dismiss her said Texas bill in large part by the assertions and statements set out in the answers of the Farwells made under oath; that in the Texas litigation she was opposed by the Capitol company, when, as she claims, she should have had its assistance; that in reply to requests and demands for assistance from said Capitol company, being wrongfully led and controlled by J. V. Farwell, it stated to appellant that there was no ground whatever for the various claims made in said statement and requests, and left your oratrix to take such course as your oratrix thinks fit. Appellant further alleges that she has not been able, owing to said misrepresentations of said defendants, even to the present time, to fully ascertain the character and details of all of the acts of said defendants, and that she has only been able to secure and frame the facts herein set forth within the last few months; that the appellant first applied to the counsel in the cause about June 1, 1905, and laid before them the record in the Texas suit and such papers as she had in relation thereto; that such counsel spent several months in examining such papers, and not until the fall of 1905 did they, from their investigation of such papers and from investigations made by her son, advise her, nor did she have reason to suspect, that the representations of the syndicate as to the company's earnings in the year 1899, and the representations of the Farwells to Babcock as to the indebtedness of the company, were untrue; that she did not ascertain the facts stated in the original bill earlier than six months³⁰ before its filing, and that since its filing she learned of the following matters: (1) The pretended contract of February 1, 1888, and the action of the directors thereon; (2) that no reference to the interest of Babcock appeared in the company's record for 1885; (3) that shortly after May 3, 1893, the directors sent an accountant to America to facilitate the preparation of the yearly accounts; (4) that the directors resolved to take the opinion of counsel relative to the liability of the syndicate under the agreements of 1892; (5) that by correspondence and cablegrams J. V. Farwell first suggested and dictated the execution of the July 12,

1894, contract; (6) that on October 16, 1893, the company's accountants made a report in writing, shown in the depositions, that the company was not indebted to the syndicate, and that there were only 128,259 head of cattle on hand December 21, 1892, and a balance then due by the lessees of £38,693, 19s. 5d., with a statement that the actual sum expended in excess of receipts by the lessees appears to be £424,024, 3s.

It is further alleged the Farwells have been residents of Illinois continuously since 1885, and that John V. Farwell and the representatives of Charles B. Farwell were such residents at the time the bill was filed; that the Capitol company had its main land office in Chicago, and that practically all its business was carried on in Chicago under the supervision and direction of John V. Farwell; that all the money of which the company has been deprived is represented by the liability of the defendants resident in Chicago; that the Farwells, appellant and other residents of Illinois own about nine-tenths of all the company's stock; that the incorporation of the company in England and the maintaining by it of offices there are merely nominal; that the business of the company and its property interests and management are, in fact, located in and chiefly owned by citizens of the United States; that defendants have continuously since January, 1889, and are now continuing to ³¹ carry on a fraudulent agreement and device for the sole benefit of defendants other than said company, and have never disclosed to your oratrix or offered any means to your oratrix or other minority stockholders of the said company of ascertaining the nature and character of the true state of said company, and that your oratrix has at great trouble and expense and many years of effort secured the knowledge of the facts now known to her and which are herein set forth; that the officers and directors of the company are: John V. Farwell; Walter Farwell, an executor of the will of Charles B. Farwell, deceased; Frank Crisp, Jr., solicitor in England of the company; George and William Findlay, employes of John V. Farwell; John Young, chairman of the company; that Crisp and Young are nominees and under the control of John V. Farwell, and that no action can be secured to be taken by such directors against the Farwells; that the Farwells own and control more than two-thirds of the capital stock of the company, and it is therefore necessary that appellant and the other stockholders similarly situate be authorized, for all the stockholders of said company and in its right and behalf, to bring and maintain this bill of complaint. The bill prays that the contracts of July 29, 1892, February 1, 1888, July 12, 1894, and all other contracts made by the defendants with the Capitol company, whereby they, or either of them,

claim the right to hold the profits and increase of ranches, improvements and cattle of the Capitol company, may be adjudged to be invalid and unconscionable and of no force or effect, and that defendants, other than the company, be held to the liability of trustees of the company, and be decreed to account for and pay to and turn over to the company all of the cattle, lands, improvements and property received at any time under any of said contracts, together with all profits made thereon, including compensation for the use and enjoyment thereof, as may be just and proper, and that John V. Farwell and the estate ³² of Charles B. Farwell, deceased, may also be required to account for and pay to the company the fair value of 30,000 head of cattle under the obligation of the lease of March 27, 1889, or such number of cattle which, with those actually on the ranch January 1, 1890, shall make 150,000 head, and that they be required to account for and pay to the company such amount as it may have paid upon interest on company debentures of the £1,000,000 issue mentioned in the agreement of June 1, 1885, where such interest was paid exclusive of the net cash profits of the company and resulted in an impairment of its capital; that the amount so required to be repaid be held to be payable out of or offset by net profits of the company and not out of capital, and such amount be held not to be a debt of the company or payable otherwise than from net profits; that net profits be ascertained by deducting from the fair value of all the company's property and its cash resources the par value of its capital stock and the principal of its unpaid debentures; that all the defendants be enjoined from paying any further interest on debentures except out of net cash profits or from money advanced by defendants, except the company, and that the defendants, except the company, be enjoined from asserting any claim for interest or principal on the debentures held by them, and from transferring the same until they have accounted with the company as prayed; that John V. Farwell and the estate of Charles B. Farwell be decreed to account to the company for and surrender to it for cancellation all stock and debentures held by them or at any time received by them, representing or being the profit secured by them out of stocks and debentures acquired by them from Babcock or from Taylor, together with the money or claims to money likewise so acquired; that the last-named defendants be further enjoined from using as their own the brands and goodwill of the company, and from advertising and holding themselves out as the owners of the lands, cattle and business, and that appellant ³³ and the other stockholders, in their own right and in the right of and on behalf of the company, may have general relief.

The appellees contend that a court of chancery of this state ought not to take jurisdiction of this suit, because, it is claimed, the controversy relates merely to the internal management of the affairs of a foreign corporation, and the remedy for any wrongs in that regard must be sought in the country in which the corporation was organized. The general rule has been declared by the decisions of many courts and has been stated by text-writers to be, that the courts of one state will not exercise the power of deciding controversies relating merely to the internal management of the affairs of a corporation organized under the laws of another state or of determining rights dependent upon such management: *New Haven Horseshoe Nail Co. v. Linden Springs Co.*, 142 Mass. 349, 7 N. E. 773; *Wason v. Buzzell*, 181 Mass. 338, 63 N. E. 909; *Kimball v. St. Louis etc. Ry. Co.*, 157 Mass. 7, 34 Am. St. Rep. 250, 31 N. E. 697; *Madden v. Penn Electric Light Co.*, 181 Pa. 617, 37 Atl. 817, 38 L. R. A. 638; *McCloskey v. Snowden*, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796; *Wilkins v. Thorne*, 60 Md. 253; *North State Copper etc. Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Condon v. Mutual Reserve Fund Life Assn.*, 89 Md. 99; *Taylor v. Mutual Reserve Fund Life Assn.*, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621; *Clark v. Mutual Reserve Fund Life Assn.*, 14 App. (D. C.) 154; *Howard v. Mutual Reserve Fund Life Assn.*, 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853; *Young v. Farwell*, 139 Ill. 326, 28 N. E. 845; 6 *Thompson on Corporations*, secs. 7904, 8011; 3 *Clark & Marshall on Corporations*, sec. 864; 19 *Cyc.* 1236.

As stated in *Thompson on Corporations*, *supra*, this doctrine obviously has its limitations. Except in cases involving the exercise of visitorial powers, the question is not strictly one of jurisdiction, but rather of discretion in the exercise of jurisdiction. The reasons which influence courts of chancery to refuse to interfere in the management of the internal affairs of a foreign corporation are, that the ³⁴ rights arising between a corporation and its members out of such management depend upon the laws of the state under which the corporation is organized; that the courts of that state afford the most appropriate forum for adjudication upon the relation between the stockholders and the corporation, and that frequently such courts alone possess power adequate to the enforcement of all decrees that justice may require. It is the inability of the court to do complete justice by its decree, and not its incompetency to decide the question involved, that determines the exercise of its power. The general statement that courts will not interfere with the management of the internal affairs of foreign corporations must be construed in connection with the particular facts. The rule rests more on grounds of policy and expediency than

on jurisdictional grounds; more on want of power to enforce a decree than on jurisdiction to make it. Where the wrongs complained of are merely against the sovereignty by which the corporation was created or the law of its existence, or are such as require for their redress the exercise of the visitorial powers of the sovereign, or where full jurisdiction of the corporation and of its stockholders is necessary to such redress, the courts will decline jurisdiction. Examples of such cases are suits to dissolve a corporation; to appoint a receiver; to determine the validity of its organization or which of two rival organizations is legal; to restrain it from declaring a dividend or compel it to make one; to restrain an issue of stock or of bonds; to compel a division of its assets; to restore a stockholder to his right to vote at stockholders' meetings from which he has been excluded, or to compel the recognition of one claiming to have been elected a director. But here the relief sought substantially amounts to requiring resident directors of the corporation to restore to it such sums of money as upon an accounting they shall be found to have unlawfully diverted and retained from it. The corporation and all persons necessary to a decree adjusting ³⁵ the rights involved in the controversy have appeared in the cause. Such decree as may be rendered will be personal and may be enforced in the ordinary manner.

In *North State Copper etc. Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039, it is said: "Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, that then such action is the management of the internal affairs of the corporation, and in the case of a foreign corporation our courts will not take jurisdiction. Where, however, the act of a foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction whenever the cause of action arises here." So courts have refused, in the cases above cited, to entertain jurisdiction of suits against foreign corporations brought by the stockholders to cancel a lease of the corporate property and reckless and fraudulent contracts made by the directors which depreciated and destroyed the value of the stock; for an accounting of the value of property fraudulently purchased at double its value of the promoters of the corporation; to restrain the defendant, who had taken possession of the corporate property, from refusing to recognize complainant's rights and fraudulently excluding him from participation in the corporate affairs; to restrain the issue of mortgage bonds unless made subordinate to complainant's preferred stock; to restrain the

wrongful levy of excessive assessments on a beneficiary certificate in a fraternal benevolent association for the purpose of forcing the complainant's policy to lapse.

Following some of these and similar decisions we would be justified in holding that the courts of this state have no jurisdiction to entertain this suit. But we are not satisfied with the distinction announced in the language just³⁶ quoted. If the word "capacity," as there used, is limited to the meaning of "status," it more nearly expresses the rule, in our judgment. Acts which affect the relation of stockholders to one another or to the corporation as individual stockholders or as classes of stockholders must be regarded as acts of internal management of the corporation, relief against which must be sought in the courts of the country where the corporation was organized. Where, however, the relief sought is within the general jurisdiction of a court of chancery, where all the parties necessary to the full and proper adjustment of the rights involved are before the court, and where the relief sought does not require the exercise of the visitorial power of the government, we think the court should exercise the power of determining controversies brought before it instead of remitting suitors to a foreign jurisdiction. Corporations have become, to a great extent, migratory in their character. A corporation may be organized in a state distant from the field of its actual business and its residence in the state of its organization may be merely nominal. It may be more difficult to bring it within the jurisdiction of the courts and subject it to their decrees in that state than elsewhere. In many cases, under various circumstances, the courts have entertained jurisdiction of a suit brought against a foreign corporation and its directors or agents to compel the restoration of property misappropriated by such officers. In such case, though the act complained of is, in part, that of the corporation itself, and though the complainant is affected only in his capacity as a stockholder, the suit is, in effect, for the benefit of the corporation itself. The corporation, under such circumstances, may maintain a suit against its defaulting directors wherever they may be found, and there is no good reason why a stockholder who seeks to enforce precisely the same rights in favor of the corporation may not maintain a similar suit. Accordingly, actions by minority stockholders in foreign³⁷ corporations to redress grievances in corporate management have been sustained where the court has obtained jurisdiction of the persons of the necessary parties and the relief sought could be accomplished by acting directly on the persons of the defendants: *Wineburgh v. United States Steam etc. Adv. Co.*, 173 Mass. 60, 73 Am. St. Rep. 261, 53 N. E. 145; *Richardson v. Clinton Wall Trunk Mfg. Co.*, 181 Mass.

on jurisdictional grounds; more on want of power to enforce a decree than on jurisdiction to make it. Where the wrongs complained of are merely against the sovereignty by which the corporation was created or the law of its existence, or are such as require for their redress the exercise of the visitorial powers of the sovereign, or where full jurisdiction of the corporation and of its stockholders is necessary to such redress, the courts will decline jurisdiction. Examples of such cases are suits to dissolve a corporation; to appoint a receiver; to determine the validity of its organization or which of two rival organizations is legal; to restrain it from declaring a dividend or compel it to make one; to restrain an issue of stock or of bonds; to compel a division of its assets; to restore a stockholder to his right to vote at stockholders' meetings from which he has been excluded, or to compel the recognition of one claiming to have been elected a director. But here the relief sought substantially amounts to requiring resident directors of the corporation to restore to it such sums of money as upon an accounting they shall be found to have unlawfully diverted and retained from it. The corporation and all persons necessary to a decree adjusting ³⁵ the rights involved in the controversy have appeared in the cause. Such decree as may be rendered will be personal and may be enforced in the ordinary manner.

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Following some of these and similar decisions we would be justified in holding that the courts of this state have no jurisdiction to entertain this suit. But we are not satisfied with the distinction announced in the language just³⁶ quoted. If the word "capacity," as there used, is limited to the meaning of "status," it more nearly expresses the rule, in our judgment. Acts which affect the relation of stockholders to one another or to the corporation as individual stockholders or as classes of stockholders must be regarded as acts of internal management of the corporation, relief against which must be sought in the courts of the country where the corporation was organized. Where, however, the relief sought is within the general jurisdiction of a court of chancery, where all the parties necessary to the full and proper adjustment of the rights involved are before the court, and where the relief sought does not require the exercise of the visitorial power of the government, we think the court should exercise the power of determining controversies brought before it instead of remitting suitors to a foreign jurisdiction. Corporations have become, to a great extent, migratory in their character. A corporation may be organized in a state distant from the field of its actual business and its residence in the state of its organization may be merely nominal. It may be more difficult to bring it within the jurisdiction of the courts and subject it to their decrees in that state than elsewhere. In many cases, under various circumstances, the courts have entertained jurisdiction of a suit brought against a foreign corporation and its directors or agents to compel the restoration of property misappropriated by such officers. In such case, though the act complained of is, in part, that of the corporation itself, and though the complainant is affected only in his capacity as a stockholder, the suit is, in effect, for the benefit of the corporation itself. The corporation, under such circumstances, may maintain a suit against its defaulting directors wherever they may be found, and there is no good reason why a stockholder who seeks to enforce precisely the same rights in favor of the corporation may not maintain a similar suit. Accordingly, actions by minority stockholders in foreign³⁷ corporations to redress grievances in corporate management have been sustained where the court has obtained jurisdiction of the persons of the necessary parties and the relief sought could be accomplished by acting directly on the persons of the defendants: *Wineburgh v. United States Steam etc. Adv. Co.*, 173 Mass. 60, 73 Am. St. Rep. 261, 53 N. E. 145; *Richardson v. Clinton Wall Trunk Mfg. Co.*, 181 Mass.

580, 64 N. E. 400; *Wilson v. American Palace Car Co.*, 64 N. J. Eq. 534, 54 Atl. 415; *Miller v. Quincy*, 179 N. Y. 294, 72 N. E. 116; *Sloan v. Clarkson*, 105 Md. 171, 66 Atl. 18; *Watkins v. North American Land etc. Co.*, 107 La. 107, 31 South. 683. Where minority stockholders seek to have restored to the corporation property fraudulently appropriated to their own use by directors who, together with the corporation itself, are personally subject to the jurisdiction of the court, we think it is the better doctrine that the court should exercise its jurisdiction for the determination of the controversy.

The alleged wrongful acts which constitute the basis of the appellant's claim divide themselves into two classes: those done in the lifetime of Amos C. Babcock, and those occurring since his death. The appellant claims that there should be an accounting for the alleged profit of more than \$700,000 made by the Farwells through the purchase of one-half of Babcock's one-fourth interest; for more than \$400,000 which it is claimed the Farwells should have advanced to pay interest on the debentures but which they did not advance; for an alleged unpaid balance of £38,693 rent under the lease of March 27, 1889; for 21,741 head of cattle not accounted for under said lease, and for all the profits made under the contract of July 12, 1894. All these matters arose during the life of Mr. Babcock and before the settlement on January 30, 1896, of his suit in the circuit court of Cook county, commenced in 1891. That suit was begun for the purpose of securing the delivery of the 15,000 shares of stock to which Babcock was entitled under the agreement of January 5, 1889, and which the ³⁸ Farwells had wrongfully obtained, and for an accounting in respect thereto. The Farwells claimed that the stock was subject to a lien for Babcock's share of certain advances claimed to have been made by them. It did not involve directly any of the matters now under consideration, but after it had been pending for four years, during which some of the acts and contracts now complained of were done and entered into, a settlement was made between the parties, whereby, in consideration of \$15,000 paid by the Farwells to Babcock, and of the transfer by the Farwells to William H. Parlin, at Babcock's request, of 10,000 ordinary shares and 10,000 deferred ordinary shares of the Capitol Freehold Land and Investment Company, and of a general release of Babcock from all claims and demands, of whatever kind, of the Farwells against him, Babcock agreed to dismiss all suits against the Farwells, released and discharged them from any and all claims and demands, of every nature, which he might have against them, and particularly waived any objection he might or could have to any and all contracts theretofore entered into between the Capitol

Freehold Land and Investment Company and the Farwells and Taylor, and assigned and released to the Farwells any interest he might have therein. Babcock never attacked this settlement in any way. It was a complete ratification of all the transactions between the Farwells and Taylor and the Capitol Freehold Land and Investment Company. By it Babcock waived any right he might have had to object to those transactions, and the contract of settlement stood as a perfect defense to any suit he might have brought for that purpose and stands as an equally good defense to the appellant's suit.

To meet the obvious barrier of the settlement thus made, it is insisted that it was procured by the fraud and concealment of the Farwells in regard to their relations to the company, the true condition of the accounts between them, the contracts actually made and the business conducted ³⁹ under such contracts. No offer has been made to return the \$15,000 paid to Babcock, but, on the contrary, the bill avers that the appellant is unable, either personally or as executrix of his will, to do so, or to return the value of the stock received by Babcock in the settlement, and to seek for her own benefit, or the benefit of the estate of said A. C. Babcock, the rescission of the settlement of 1896, but only as a holder of the stock of the company and in its right and behalf, for the benefit of all of the stockholders of said company. The appellant insists that the Farwells should be held to account to the company as trustees. This statement seems to concede that the appellant has no right to maintain the suit on her own account without a rescission of the contract of settlement and a restoration of the consideration, and whether conceded or not, this position is in accordance with the law. If a party accepts the provisions of a contract which are of advantage to him, he will be bound by the provisions which purport to be obligatory on him. If a right to rescind exists, it must be exercised in toto. The contract must stand in all its provisions or fall altogether. A party to a contract cannot retain the consideration or a part of it, and refuse to be bound by the contract or a part of it: *Kellogg v. Turpie*, 93 Ill. 265, 34 Am. Rep. 163; *Bollnow v. Novacek*, 184 Ill. 463, 56 N. E. 801. The inability of the party to restore the consideration will not relieve him from the necessity of doing so, and it is not sufficient to offer to set off the amount against what is claimed from the other party: *Rigdon v. Walcott*, 141 Ill. 649, 31 N. E. 158; *Mortimer v. McMullen*, 202 Ill. 413, 67 N. E. 20; *Dunbar v. American Telephone etc. Co.*, 224 Ill. 9, 115 Am. St. Rep. 132, 79 N. E. 423, 8 Ann. Cas. 57. In this connection no question arises in regard to the relation of trustee and cestui que trust or the burden of proof. Whatever may be the relation or on whatever party

may rest the burden of proof, the right of rescission of a contract can be exercised only upon a return of the consideration, which must be alleged in the bill.

⁴⁰ It is insisted on behalf of appellant that it is not necessary, in order to avoid a release obtained by actual fraud, to return the consideration therefor. This is true where the fraud was in procuring the execution of the release—that is, where the party was induced to execute the instrument not knowing it to be a release but believing it to be an instrument of a different character. A release so obtained is void: *Indiana etc. Ry. Co. v. Fowler*, 201 Ill. 152, 94 Am. St. Rep. 158, 66 N. E. 394. The doctrine has no application to a case where there was fraud only in the consideration, as where the party knew that he was executing a release but was induced to do so by the false representations of the other party as to matters other than the character of the instrument. In this latter case the release so obtained is not void, but is voidable only, and until set aside in equity is binding on the party executing it: *Rigdon v. Walcott*, 141 Ill. 649, 31 N. E. 158; *Papke v. Hammond Co.*, 192 Ill. 631, 61 N. E. 910; *George v. Tate*, 102 U. S. 564, 26 L. ed. 232. In the former case no contract was entered into. The release was not the deed of the party signing it, because it was not knowingly executed by him. It was void and no necessity existed for setting it aside. It might be disregarded anywhere. In the latter case a contract was knowingly entered into. The party intended to execute the very contract he did execute. He can be relieved from it only on the equitable principles which apply to all contracts and require the restoration of the consideration before their rescission.

Since Babcock could not himself have maintained the suit in his personal capacity, neither could his executor nor appellant as his legatee. By expressly waiving his objections to the transactions now complained of, he debarred himself from seeking relief against them in his own right. He could not, therefore, indirectly obtain such relief by bringing suit in the right of the corporation or of other stockholders. A complainant cannot maintain a bill and obtain relief unless he has himself sustained a wrong. The ⁴¹ theory of a stockholder's suit is, that the stockholder has sustained a wrong through the injurious effect upon his stock of the wrong done to the corporation. If he has himself consented to or participated in the acts constituting such wrong, or has waived his right to object to them, he cannot afterward maintain a bill, on account of such transactions, for the benefit of the corporation or of other stockholders: *Burt v. British Assn.*, 4 De Gex & J. 158; *Brown v. De Young*, 167 Ill. 549, 47 N. E. 863; *Wells v. Northern Trust Co.*, 195 Ill. 288, 63 N. E. 136. Neither can an assignee of stock main-

tain a suit in regard to transactions with the corporation done or assented to by his assignor. The purchaser of shares of stock acquires no greater rights than his vendor. He holds by the same title and subject to the same liability. Shares of stock are merely choses in action, and the successive owners acquire only the rights held by their predecessors in title: *Home Ins. Co. v. Barber*, 67 Neb. 644, 108 Am. St. Rep. 716, 93 N. W. 1024, 60 L. R. A. 927; *Venner v. Atchison etc. R. R. Co.*, 28 Fed. 581; *Church v. Citizens' R. R. Co.*, 78 Fed. 526.

The appellant concedes that if Babcock, with full knowledge, expressly ratified the contract of July 12, 1894, by the settlement of January 30, 1896, and thereby estopped himself from attacking such contract, the appellant is also estopped. She insists, however, that the general terms of the waiver contained in the settlement do not apply to the contract of July 12, 1894, because Babcock never knew of that contract and it was fraudulently concealed from him. Estoppel is not the proper term to apply to the effect of the contract of settlement. That contract was an express agreement of ratification—an express waiver of objection. It did not take effect by way of estoppel but by direct and express agreement. Its operation was directly binding upon Babcock unless rescinded.

In regard to Babcock's knowledge of the contract of July 12, 1894, it is averred that he never knew of it. It appears, however, from the bill that on March 25, 1895, ⁴² he filed in the suit in Cook county a supplemental bill, in which he set out a copy of the draft of an agreement of February 6, 1894, which has been before referred to. This draft in all substantial particulars was equivalent to the contract of July 12, 1894. So far as the two differ, the changes in the contract actually executed were not to the disadvantage of the corporation. Babcock had knowledge of the unsigned draft of February 6, 1894. Whatever objections he may have had to the terms contained therein he was willing to waive. Though the form of the contract differed from the draft, it did so in no essential particular. Though Babcock had no actual knowledge of that particular contract, he knew that a contract in substantially the same terms existed, and the settlement must be regarded as having been made with it in view and as applying to it.

After Babcock's death Taylor and Charles B. Farwell died in 1903, and appellant insists that by their death the contract of July 12, 1894, was terminated, and that the defendants have taken the profits of the business of the company since that date without right and should be required to account therefor. We have already seen that the appellant is in no position to complain of the making of that contract,

and the complaint now under consideration, conceding the contract to be valid and binding, goes upon the theory that it was merely a contract of agency, which was terminated by the death of two of the then joint agents.

It is further contended that whatever view may be taken of the nature of the contract, the services contracted for were of so personal a nature that the contract would necessarily terminate by the death of two of those persons by whom the services were to be performed. On the other hand, it is contended that the contract was in substance a lease of the ranches, with the cattle on them. Whether the contract amounted to a lease or not, it seems clear that it was more than the creation of an agency. At the time it ⁴³ was entered into, the syndicate was claiming a large indebtedness from the company and the company a smaller amount from the syndicate. The syndicate was liable for a large amount by reason of its guaranty of the interest on the company's debentures, and was in possession of the company's ranches and property under a contract to conduct the cattle business for the reimbursement of its advances. By this contract the respective claims of the parties against one another were released and the syndicate continued in possession of the ranches and other property, with the right to receive the proceeds of the business carried on in satisfaction of the expenses of such business, the expenses of the company and the interest on the debentures, all of which the syndicate was bound to pay.

It is contended by the appellant that the indebtedness claimed by the syndicate was fictitious and the claim fraudulent; that the amount claimed by the company was justly due to it from the syndicate; that the business on the ranches was conducted at a large profit above all expenses and the debenture interest, and that the making of the contract was not only unwise and unjust to the company, but was fraudulent on the part of the directors, and knowingly done for the purpose of enabling the syndicate to absorb the profits of the company. We have, however, already held that Babcock could make no complaint about the contract and that the appellant is in no better position. Since appellant is precluded from raising the objection of fraud, we cannot inquire into the character of the contract, but must assume that it was fairly entered into for a valuable consideration, and is binding on the company.

It is a well-known rule of law that a naked power committed to several persons is determined by the death of one, but if coupled with an interest, the power, even though discretionary, passes to the survivor: 1 Perry on Trusts, 3d ed., sec. 414. Here the syndicate was entitled to the possession of the real estate and the personal property for ⁴⁴ a

term of years ending on December 31, 1907, to enable it to realize from the use thereof, in the manner mentioned in the contract, satisfaction of the compromise claims of the parties and indemnity against the sums agreed to be paid by the syndicate from interest and expenses. Being entitled to the exclusive use and possession of the property as security and in compromise of their claim of indebtedness, the members of the syndicate had an interest in the property with which the power was coupled, and upon the successive deaths of Taylor and Charles B. Farwell the power passed to the survivor, John V. Farwell.

Whether or not the contract was of such a character as to require the personal service of all the three joint contractors in its performance and to be terminated by the death of one or of two of them is to be determined by a construction of the contract itself and depends upon the intention of the parties. The question is not whether the rights and obligations of the contract devolve upon an administrator, but whether they survive to and against the surviving joint contractors. The general rule is, that upon the death of one of several joint contractors before complete performance of the contract, the survivors are bound by the obligations of the contract and entitled to its benefit: *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138. There is nothing in the nature of this contract or the relation of the parties to lead to the supposition that it was intended by the parties to take it out of the general rule. The members of the syndicate could not be relieved of their obligation to third parties, the holders of the debentures. The estates of those who died, as well as the survivors, were bound for the debenture interest for the full term and could not be relieved from it. The claims of the syndicate against the company had been released, security had been given on account of the syndicate's guaranty of the interest, and it is not to be believed that it was the intention of the parties that the death of one or two of the syndicate immediately after the ⁴⁵ execution of the contract should end it, and leave the survivors, as well as the estate of the deceased member, liable for the interest guaranteed to the end of the term but without the indemnity of the contract.

It is alleged in the bill that, beginning about the year 1900, the syndicate proceeded recklessly to sell large quantities of the land of the company at prices largely below the cost thereof and to apply the proceeds of such sale to the redemption of the debentures, the interest upon which was guaranteed by the syndicate; that the Farwells have so conducted the ranch and cattle business as to cause the ranch to be known as Farwell's ranch, the cattle as Far-

well's cattle and the brand as Farwell's "X.I.T." brand, and they have thus diverted to themselves the name and goodwill of the business of the company; that the syndicate has paid out of the treasury of the company, and wrongfully charged to it, the expenses of a ranch in Montana used for the sole benefit of keeping cattle for the profits of the syndicate; and that the syndicate has allowed third persons to range cattle, other than those of the company, on its ranches, and has received large sums therefor without accounting to the company. To say nothing of other objections which may be urged to the sufficiency of the averments of the bill to entitle the appellant to relief in respect to those matters, it may be said that, except with reference to cattle brands and goodwill of the company, no mention is made of any of those supposed causes for complaint in the demand made by the appellant upon the directors of the company that they proceed to take the proper action to secure the rights of the company against the syndicate. The matters there mentioned as requiring the attention of the directors were the contract of July 12, 1894, and precedent contracts, and the appropriation of the brands and goodwill of the company. If the averments of the bill were sufficient to show a right of action in the company in regard to the sales of the land, the Montana ⁴⁶ ranch and the ranging of cattle, it does not follow that they are sufficient to enable the appellant to maintain this bill. The stockholders cannot ordinarily maintain a suit to enforce any right of the corporation. That privilege belongs to the corporation itself, acting through its directors. The mere failure of the directors to bring suit does not entitle any stockholder to do so. A demand upon the directors to bring the suit is, in general, essential before a stockholder may himself maintain a bill. His remedy must first be sought within the corporation, and it is only where the majority of the directors are themselves involved in the matters complained of, so that it is evident that the demand would be unavailing, that it can be dispensed with. Though the directors refused to accede to the demand that they seek to obtain a cancellation of the contract mentioned, there are no facts alleged from which it may be inferred that they would not seek redress from the breach of the contract, for a failure to account under it or for a fraudulent diversion of the funds of the corporation. So far as the appropriation of the cattle brand and goodwill of the company is concerned, no injury, present or prospective, to its rights is shown. The attachment of the name of Farwell to the ranch brand or cattle is not shown to be injurious and is certainly not necessarily so. On the contrary, the retention of the name at the expiration of the contract may

be a benefit to the corporation. It cannot be said that the refusal of the directors to institute a suit to prevent the use of the name in the business conducted under the contract was fraudulent or opposed to the interest of the corporation.

We are of the opinion that the demurrer to the bill was properly sustained, and the judgment of the appellate court will therefore be affirmed.

Farmer, C. J., and Vickers and Cooke, JJ., dissenting.

Courts will not Ordinarily Interfere With the Internal Affairs of Foreign Corporations: State v. De Groat, 109 Minn. 168, 134 Am. St. Rep. 764; McCloskey v. Snowden, 212 Pa. 249, 108 Am. St. Rep. 867. This rule, however, is subject to modification, as appears in the principal case; and also in Edwards v. Schillinger, 245 Ill. 231, post, p. 308. In Voorhees v. Mason, 245 Ill. 256, 91 N. E. 1056, it is decided that where the directors of a foreign corporation have illegally appropriated stock and income certificates to their own use, and have unlawfully retained dividends and commissions, and declined to bring suit in the name of the corporation against themselves for an accounting, a stockholder may maintain a bill for an accounting to the corporation for the full amount due. Said the court: "We think complainant, or the corporation, can have no relief in this case—certainly no adequate relief—against the directors of this corporation who have wrongfully caused to be issued to themselves a large amount of stock and income certificates of said corporation, and wrongfully caused to be paid to themselves a large amount in dividends upon stock for which they paid no value, and retained a large sum in commissions which apparently they should account for, unless such relief can be had in the courts of this state. All of the unlawful acts of the directors took place at Joliet. The stock and income certificates were there wrongfully issued, the dividends were there wrongfully paid, and the commissions were there wrongfully collected and retained, and we are of the opinion the suit was properly brought in this state. If this suit had been brought by the corporation, clearly it would have had to be brought in Illinois, where the directors reside, and as the suit is brought on behalf of the corporation, the forum must, we think, be the same, although the bill is filed in the name of the complainant as a stockholder. In Beale on Foreign Corporations (section 309) it is said: 'Where proceedings are instituted against officers of a corporation for an accounting and a restoration of property wrongly abstracted by them from the corporation, a bill may be brought in any jurisdiction where the officers are found. . . . The right of the plaintiffs, as stockholders, to compel a restoration by the officers to the corporation is coextensive with the right of the corporation itself. Surely the corporation would not be confined to the courts of the state which created it, but could pursue its officers in whatever jurisdiction it might find them, otherwise it would be remediless if those officers remained without the state.' We think, therefore, the fact that the corporation was organized in the state of Delaware and that it may be necessary to interpret and apply the laws of that state is no ground for refusing to entertain jurisdiction where the offending parties reside in this state and the suit is brought in the name of a stockholder, for and on behalf of the corporation: Mandel v. Swan Land & C. Co., 154 Ill. 177, 45 Am. St. Rep. 124, 40 N. E. 462, 27 L. R. A. 313; Bell v. Farwell, 176 Ill. 489, 68 Am. St. Rep. 194, 52 N. E. 346, 42 L. R. A. 804; Beale on Foreign Corporations, sec. 309."

Jurisdiction of Foreign Corporations is the subject of a note to *Abbeville F. & P. Co. v. Western Elec. Supply Co.*, 85 Am. St. Rep. 905.

Actions by Stockholders on Behalf of Their Corporation are discussed in the note to *Johns v. McLester*, 97 Am. St. Rep. 29.

EDWARDS v. SCHILLINGER.

[245 Ill. 231, 91 N. E. 1048.]

FOREIGN CORPORATIONS.—Corporations may Institute Suits in the courts of other states and countries than those under whose laws they may have been established. (pp. 311, 312.)

FOREIGN CORPORATIONS.—Business Corporations may be Sued Wherever they can be served with process in accordance with the local law. (p. 312.)

FOREIGN CORPORATIONS.—A Business Corporation is Constructively present, outside of the state of its origin, wherever it has property and carries on its operations by means of agents. (p. 312.)

FOREIGN CORPORATIONS—Right to Maintain Suit.—A foreign mercantile corporation may bring suits in our courts to collect debts arising from the sale and delivery of goods, though it has no general office in the state nor any agent upon whom process may be served, so that it cannot be sued here. (p. 313.)

FOREIGN CORPORATION—Service of Officer Temporarily in State.—If a foreign corporation confines its operations to the state within which it was created, does not transact any business in another state, and has no office or agent located there, jurisdiction cannot be obtained by serving process upon an officer or agent temporarily in the latter state. (p. 313.)

FOREIGN CORPORATION—Insolvency and Dissolution.—The courts of one state have no power to dissolve a foreign corporation and wind up its affairs, but it will retain its legal existence until dissolved by a proceeding in the state which created it. But even in that case, assets which are a trust fund for shareholders and creditors will be administered by the domestic courts where they are found. And it is the duty of a state to keep the legal assets for the satisfaction, in the first instance, of local claims. (p. 314.)

FOREIGN CORPORATION.—If a Court can Make No Effective Decree, it will not assume jurisdiction of a suit affecting a foreign corporation. (p. 314.)

FOREIGN CORPORATION.—Courts cannot Exercise Visitorial Powers over corporations of other states, such as requiring them to pay such dividends as on an accounting of the affairs of the corporation may appear to be proper, nor to determine whether a stockholder has been wrongfully excluded from his privileges, and matters of that kind. (p. 314.)

FOREIGN CORPORATION.—If a Court has Jurisdiction of the Necessary parties and of the subject matter, and has power to grant an effective remedy, it may assume jurisdiction of a suit involving a foreign corporation, but it will not afford remedies denied the parties in the foreign state which will operate with hardship on citizens of the domestic state. (p. 314.)

COMITY.—How Far Foreign Laws Should be Enforced under the doctrine of comity depends upon whether any wrong or injury will be done to citizens of the domestic state, whether the policies of its laws will be contravened or impaired, or whether the courts can do complete justice to those affected by the decree. (p. 314.)

FOREIGN CORPORATION—Laws of Foreign State.—A court will not decline to take jurisdiction of a suit affecting a foreign corporation, on the ground that the laws of the foreign state are unknown, when such laws can be pleaded and proved as facts. (p. 316.)

CORPORATION—Balance Due on Stock.—The Liability of an Assignee of stock for the unpaid balance thereon is the same, whether his promise is directly to the corporation or to the assignor of the stock for its benefit. (p. 316.)

CORPORATION—Creditor's Suit—Necessity of Call.—A creditor of an insolvent corporation may proceed in equity against stockholders without a call being made by the corporation or the bankruptcy court. (p. 316.)

CORPORATION.—A Creditor of a Corporation Seeking Satisfaction of his debt need look no further than to find a solvent stockholder who is liable for it, and he sustains no relation to the corporation which requires him to adjust equities between stockholders or between the corporation and others. (p. 316.)

FOREIGN CORPORATION—Jurisdiction.—The Term "Internal Affairs," in the rule that courts will not assume jurisdiction of the internal affairs of foreign corporations, must be confined to relations affecting only the stockholders and the corporation among themselves. (p. 317.)

CORPORATION—Stockholders' Liability, Contract Limiting.—A contract of a corporation limiting the liability of its stockholders to a portion of the par value of their stock is invalid both as to creditors and the assignee in bankruptcy. (p. 317.)

CORPORATION.—The Relation of a Stockholder Who has not Paid for his stock to the corporation is the ordinary one of debtor. (p. 317.)

BANKRUPTCY.—The Trustee in Bankruptcy for an Insolvent corporation represents both the creditors and the corporation. (p. 317.)

FOREIGN CORPORATION—Jurisdiction of Creditor's Suit.—An Illinois court will assume jurisdiction of a suit by the trustee in bankruptcy of a Missouri corporation against resident stockholders (the nonresident stockholders being insolvent) to set aside a dividend declared in fraud of creditors and applied by stockholders in payment of their subscriptions, and to compel payment of the amount of their subscriptions represented by the fraudulent dividend certificates. (pp. 311, 317.)

McCaskill & Son, for the plaintiffs in error.

Hoyne, O'Connor, Hoyne & Irwin, Harry D. Irwin and Carl J. Appell, for the defendant in error.

²³⁵ **CARTWRIGHT, J.** The defendant in error, John B. Edwards, trustee in bankruptcy of Schillinger Bros. Asphalt Company, a corporation, filed his bill in the superior court of Cook county against the plaintiffs in error, Gustav A. Schillinger and A. C. Gumbinger, stockholders of the corporation, to set aside a dividend declared by the directors

in fraud of creditors and applied by the stockholders in payment of unpaid balances of their subscriptions to the capital stock, and to compel plaintiffs in error to pay the amount of their subscriptions represented by the fraudulent dividend certificates. The defendants to the bill filed a general demurrer thereto, which was overruled by the court, and they were ruled to answer the bill within ten days. They failed to answer but elected to stand by their demurrer, and were defaulted, and a decree was entered in accordance with the prayer of the bill, requiring the defendant Gustav A. Schillinger to pay to the complainant \$3,000, and the defendant A. C. Gumbinger to pay \$2,000, being the portions of their unpaid subscriptions which they had attempted to cancel by means of the fraud. The appellate court affirmed the decree on appeal, and a writ of error was sued out of this court to review the judgment of the appellate court.

The following are the material facts alleged in the bill and admitted by the demurrer: Schillinger Bros. Asphalt Company is a corporation organized on October 3, 1900, under the laws of the state of Missouri, with a capital stock of \$20,000, divided into shares of \$100 each. The original subscribers, with the amounts of their subscriptions,²³⁶ were as follows: B. J. Calking one hundred shares, Charles Mueller, Jr., ninety-nine shares, and Henry Jacobson one share. Money or property turned over to the corporation was accepted as half payment and certificates were issued showing that the stock was only half paid for. The defendant Gustav A. Schillinger became the owner of sixty shares of the capital stock and received a certificate showing upon its face that it was but half paid, and he assumed and agreed to pay to the corporation the balance of the subscription price when demanded. The defendant A. C. Gumbinger became the owner of forty shares and received a certificate therefor showing on its face that said stock was but half paid, and he assumed and agreed to pay the corporation the balance of the subscription price when demanded. At a meeting of the board of directors held in the city of St. Louis, Missouri, on April 28, 1902, when the corporation was wholly insolvent and unable to pay any dividend whatever upon its stock, the directors, for the purpose of relieving the stockholders from liability for the unpaid portion of the stock held by them, pretended to declare a dividend of \$8,920.65, and authorized the secretary to issue dividend certificates to Schillinger upon sixty shares, to Charles Mueller, Jr., upon fifty shares, to A. C. Gumbinger upon forty shares, to Henry Jacobson upon one share and to A. Maritzan upon ten shares, and to receive said dividend certificates and the stock certificates held by

each of said parties, and to issue to them, in lieu thereof, certificates of fully paid stock in the corporation. Dividend certificates were given to the above-named stockholders, who were the only holders of stock in the corporation, and said certificates, with the half-paid certificates, were exchanged for certificates of fully paid stock. On November 8, 1902, the corporation was adjudged a bankrupt by the district court of the United States in Missouri, and the complainant was elected trustee of the estate and qualified as such. The trustee reduced to cash all of the assets except ²³⁷ the liability of the stockholders and a claim that was in litigation, and has \$725.95, proceeds of such assets. Claims to the amount of \$7,194.10 were proved and allowed, payable out of the assets. The bankrupt corporation ceased doing business, and all the stockholders but the defendants are residents of the state of Missouri and are insolvent, and a judgment against them, or either of them, would be uncollectible. By the laws of Missouri a transferee of stock is liable for any unpaid balance thereon.

The substantial ground upon which it is contended that the judgment of the appellate court was wrong is, that the superior court had no jurisdiction to set aside the fraudulent dividend or to order a call upon stockholders to pay unpaid subscriptions, because the dividend was declared by a corporation which was a resident of the state of Missouri, and the courts of that state alone had jurisdiction over it or its affairs. Counsel for plaintiffs in error regard the bankrupt corporation as a necessary party to the suit, and any interference with the action of its directors, by setting aside the fraud, as beyond the jurisdiction of the courts of this state. The arguments touching that subject have taken a very wide range, and cover nearly all questions relating to the powers of courts over foreign corporations or in any litigation where their affairs are in any manner involved.

The courts have never entertained any doubt of the right of a corporation to bring suits in other jurisdictions than that where it was created. When that question first arose in England, the argument that a foreign corporation was but an emanation of the foreign sovereignty, of which the laws of England would not take notice and the courts might not sufficiently understand the foreign laws, did not prevail, and it was held that such a corporation might sue in the English courts: *Henriques v. Dutch West India Co.*, 2 *Ld. Raym.* 1532; *Dutch West India Co. v. Henriques & Moses*, 1 *Strange*, 613. The law in this state ²³⁸ on that subject was declared in the early case of *Bank of Washtenaw v. Montgomery*, 2 *Scam.* 422, where the court said: "It is supposed that nothing is better settled than that corporations may institute suits in the courts of other states and

countries than those under whose laws they may have been established." The only rule consistent with that doctrine would be that a corporation permitted to enforce rights in this state should also be subject to have its liabilities enforced here, but as a matter of fact there was considerable conflict in the decisions in this country as to whether a foreign corporation could be sued outside of the state of its creation except upon a voluntary appearance, and perhaps more numerous decisions were that it could not. The view of many courts was that a corporation could not migrate beyond the boundaries of the state of its creation so as to be there served with process: *Peckham v. Haverhill North Parish*, 16 Pick. 274; *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5; *Middlebrooks v. Springfield Ins. Co.*, 14 Conn. 301.

The theory that a corporation can only have its existence in the state of its creation has long since been dispelled by the migratory corporations which have transacted the business of the country, and there have always been courts which held that they could be sued wherever they could be served with process in accordance with the local law. Quite convincing reasons that they could be so sued were given in *Libby v. Hogdon*, 9 N. H. 394, where the court said: "If we admit and vindicate their rights, evenhanded justice requires that we also enforce their liabilities and not send our citizens to a foreign jurisdiction in quest of redress for injuries committed here." The supreme court of the United States, in *Barrows Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. Rep. 526, 42 L. ed. 964, commented on the manifest injustice resulting from permitting a foreign corporation to do business in a state and to bring suits in its courts but not permitting the corporation to be sued there. It was said that ²³⁹ such injustice had induced the passage of statutes in many states providing that a foreign corporation doing business within the state shall keep a place of business and appoint an agent residing therein upon whom process may be served; but it was held that a foreign corporation doing business in the state might be sued there without any such statute, and that the liability to be sued might be implied from the grant to do business in the state. In *Western Union Tel. Co. v. Pleasants*, 46 Ala. 641, it was held that a foreign corporation doing business in a state through a managing agent or employé may be sued there by obtaining service on such agent or employé, and a statute providing for that method of service on corporations generally was applied to a foreign corporation.

It is a just and reasonable theory that a business corporation is constructively present, outside of the state of its origin, wherever it has property and carries on its operations by means of agents. This court has maintained

that doctrine from the beginning, and in *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124, which was an action of debt, with an attachment in aid, against a Wisconsin corporation, it was held that service upon an agent in this state was sufficient to give jurisdiction. The court said that it would be neither just nor wise to bestow upon foreign corporations having property within this state and exercising powers and privileges here immunity of exemption from observance of their contracts, or to deny to the people the usual facilities for collecting their debts against them. It was held that service of process could be had upon agents of foreign corporations within the state in the same manner as on agents of local corporations. The same principle was stated in *Midland Pacific Ry. Co. v. McDermid*, 91 Ill. 170, where it was said that a foreign corporation doing business and having agents in this state may be sued and service had through its agents or officers doing business here the same as domestic corporations. Again, in ²⁴⁰ *Italian-Swiss Agricultural Colony v. Pease*, 194 Ill. 98, 62 N. E. 317, it was held that where a foreign corporation voluntarily extends its business into this state, which it can only transact through an agent, it is presumed to do so with full knowledge that the statutes of the state authorize the courts to obtain jurisdiction of it by service of a copy of process on one of its agents. While a corporation is a resident of the state of its creation there is no ground of distinction between it and an individual, so far as a suit or jurisdiction of courts is concerned. Even under that rule entire equality cannot be secured, since a foreign mercantile corporation may bring suits in our courts to collect debts arising from the sale and delivery of goods though it has no general office in the state nor any agent upon whom process might be served, so that it cannot be sued here: *Spry Lumber Co. v. Chappell*, 184 Ill. 539, 56 N. E. 794.

It may be that a suit cannot be maintained against a foreign corporation because a court cannot obtain jurisdiction of the corporation. If a foreign corporation does no business in a state through agents or employes and has no office there, jurisdiction cannot be obtained by serving the president accidentally within the state or passing through it: *Moulin v. Trenton Mutual Life etc. Ins. Co.*, 24 N. J. L. 222. If a foreign corporation confines its operations to the state within which it was created and does not transact any business in another state and has no office or agent located there, jurisdiction cannot be obtained by serving process upon an officer or agent temporarily in the latter state: *Midland Pacific Ry. Co. v. McDermid*, 91 Ill. 170; *Italian-Swiss Agricultural Colony v. Pease*, 194 Ill. 98, 62 N. E. 317. There are also cases where the court would have

no jurisdiction of the subject matter, an illustration of which is the power to decree a forfeiture of the franchise of a foreign corporation: *Society for Propagation of Gospel v. New Haven*, 8 Wheat. 464, 5 L. ed. 662. The courts of one state have no power to dissolve a foreign corporation and wind up its affairs, ²⁴¹ but it will retain its legal existence until dissolved by a proceeding in the state which created it; but even in that case, assets which are a trust fund for shareholders and creditors will be administered by the domestic courts where they are found: *Life Assn. of America v. Fassett*, 102 Ill. 315. It is the duty of a state to keep the local assets for the satisfaction, in the first instance, of local claims: *Coombs v. Carne*, 236 Ill. 333, 86 N. E. 245, 18 Cyc. 1229. Another class of cases is where the court cannot make any effective decree, as in a case of enjoining or compelling an act in a foreign state where the decree could only be enforced by proceedings for contempt and the parties are beyond the jurisdiction. Courts of one state cannot exercise visitorial powers over corporations of other states, such as requiring them to pay such dividends as on an accounting of the affairs of the corporation may appear to be proper, nor to determine whether a stockholder has been wrongfully excluded from his privileges, and matters of that kind.

If, however, a court has jurisdiction of the necessary parties and of the subject matter, and has power to grant an effective remedy, there has never been any question about the existence of the jurisdiction, but the question has been as to the propriety of assuming jurisdiction in the exercise of a sound judicial discretion. In the exercise of such discretion the courts will not permit their tribunals to be used for the purpose of affording remedies denied to the parties in the foreign state and which would operate with hardship on the citizens of the domestic state: *Rice v. Merrimac Hosiery Co.*, 56 N. H. 114. How far foreign laws should be enforced under the doctrine of comity depends upon whether any wrong or injury will be done to citizens of the domestic state, whether the policies of its laws will be contravened or impaired, or whether the courts can do complete justice to those affected by the decree: *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 7 N. E. 773. In the case of ²⁴² *May v. Black*, 77 Wis. 101, 45 N. W. 945, it was considered that the foreign law was enforceable only in the foreign state and in a particular form of action, and for those reasons it was held that the Wisconsin court ought to decline to assume jurisdiction. It was there sought by a bill in equity to enforce the constitution and statute of the state of Michigan making stockholders liable for labor performed for a corporation by an

action in assumpsit, and it appeared to the Wisconsin court that the corporation must be a party to the suit. The necessity of the corporation being a party and an account being taken and its affairs being wound up in order to do complete justice was the basis of the decision in *Young v. Farwell*, 139 Ill. 326, 28 N. E. 845. In that case a bill was filed against two stockholders of a Michigan corporation residing in this state, to enforce payment of the amount of a judgment. The bill was dismissed as to one and relief granted as to the other, and it appeared that it was necessary to take an account of the indebtedness and wind up the affairs of the corporation and apportion the indebtedness among the solvent delinquent stockholders, and for that purpose to determine liabilities under the laws of Michigan, so that no decree entered in this state could do complete justice to those liable to be affected by it and might do injustice to some. What was said in that case about a want of sufficient comprehension of the laws of Michigan and the possibility of the supreme court of that state reaching a different conclusion from this court is not applicable to this case, where the bill avers both the laws of Missouri and an express promise to pay the balance to the corporation. In *Tuttle v. National Bank of Republic*, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750, it was held that the liability of stockholders under the constitution of Kansas and the special remedy given by the statute of that state must be applied within that jurisdiction, but afterward, in *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194, 42 L. R. A. 804, the holding that a special remedy provided by the statutes of another state, not opposed to the legislation or ²⁴³ public policy of this state nor calling for forms of action unknown to our law, could not be enforced here, was distinctly disapproved. It was also there held that where the laws of Kansas were pleaded, the stockholder's liability would be enforced in this state, and under that decision the possibility suggested in *Young v. Farwell*, 136 Ill. 326, 28 N. E. 845, that the supreme court of Michigan might reach a different conclusion from this court, ceases to have any weight. In *Young v. Farwell* the court cited and relied upon the decision of the Massachusetts court in *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 7 N. E. 773, but that court afterward, in *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349, held that a declaration alleging that according to the law of Kansas a stockholder in a corporation is liable to a judgment creditor as upon a contract is a good declaration, and that requirement is satisfied by the bill in this case. In *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. Rep. 477, 44 L. ed. 587, which was a suit to enforce the lia-

bility of a stockholder, it was held that the action not being to enforce a penal statute of Kansas, but only to secure a private remedy, could be maintained in any court of competent jurisdiction.

There is no reason in this case for declining to take jurisdiction on the ground that the laws of the state of Missouri are unknown. The laws of other states are pleaded in the courts of this state as facts, and our courts constantly take jurisdiction of cases where laws must be, and are, proved as facts. Our courts are perfectly competent to determine what the laws of other states are as matters of fact, and there is no reason for sending an applicant for the redress of wrong to another state to have a fact determined which is pleaded and may be proved in our courts. Counsel are in error in contending that the allegation concerning the laws of Missouri is a mere conclusion of law, not admitted by the demurrer. The averment is an averment of fact, which may be pleaded, admitted or denied like any other fact. It is suggested that the allegation as ²⁴⁴ to the laws of Missouri is not sufficient in form, but we see no objection to it. Furthermore, the liability for the unpaid balance need not rest upon any allegation as to the laws of Missouri, since the bill alleges a specific promise to pay to the corporation the unpaid balance on the stock. The objection that this promise might have been made to the persons from whom the stock was purchased has no force, for the reason that it makes no difference whether the promise was made directly to the corporation or to the assignor of the stock for its benefit.

It was not necessary that there should be any call made by the corporation or the bankruptcy court. The creditor of a corporation can proceed in equity without a call and without taking any account of other indebtedness or making all stockholders defendant. The liability of a stockholder for unpaid subscriptions is several and not joint, and the creditor is not bound to settle up the affairs of the corporation in order to obtain his dues: *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885. A creditor of a corporation seeking satisfaction of his debt need look no further than to find a solvent stockholder who is liable for it, and he sustains no relation to the corporation which requires him to adjust equities between stockholders or between the corporation and others: *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. ed. 349.

It was suggested in *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885, that a stockholder, when sued, could, if he desired, file a cross-bill and bring in other stockholders and enforce contribution, and upon that suggestion counsel found an

argument that this suit ought to have been brought in Missouri, so that the defendants could bring in other stockholders. Inasmuch as the Missouri court would have no jurisdiction of the defendants and they could not be brought into that court, there would be no occasion for their filing any cross-bill to bring in someone else, and, of course, it would be desirable for them to have the suit in a court that could render no decree against them. But wherever the suit might be ²⁴⁵ brought, it would be of no avail to the defendants to bring in the other three stockholders who are insolvent and from whom nothing could be recovered in the way of contribution.

Much is said about this suit relating to the internal affairs of a Missouri corporation, and that because it relates to internal affairs the courts of this state have no jurisdiction to set aside the fraudulent scheme by which the balance of the unpaid subscriptions was nominally satisfied. The term "internal affairs" has no very definite or fixed meaning, but we do not think that it extends to cheating creditors, and it must be confined to relations affecting only the stockholders and the corporation among themselves. A contract of a corporation limiting the liability of its stockholders to a portion of the par value of their stock is void both as to creditors and the assignee in bankruptcy (*Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203), and the scheme in this case is admitted by the demurrer to have been a fraud. The relation of a stockholder who has not paid for his stock to the corporation is the ordinary one of debtor: *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725. If it was necessary that the corporation should be represented in the litigation, it was present in this case by the trustee in bankruptcy, who by the law represents and stands in the place of the corporation. The bankrupt corporation was in legal contemplation a party, and all the stockholders except those who are insolvent were defendants. The stockholders except the defendants were not necessary parties by reason of their insolvency, and as the trustee represents both the creditors and the corporation (*Brandenburg on Bankruptcy*, 737; *Collier on Bankruptcy*, 389), all the parties whose presence could in any manner affect the litigation were subject to the jurisdiction of the court. There was no lack of jurisdiction in the court to hear and determine the case nor any reason for declining to assume jurisdiction. The courts of Missouri could not obtain jurisdiction of the defendants ²⁴⁶ and the courts of this state alone could grant relief. The controversy was between creditors through their representative, the trustee in bankruptcy, and the defend-

ants, and the court could apply an effective remedy, which it did.

The judgment of the appellate court is affirmed.

Farmer, C. J., and Vickers and Cooke, JJ., dissenting.

For Authorities upon the Questions Involved in the Principal Case, see Babcock v. Farwell, 245 Ill. 14, ante, p. 284, and cases cited in the cross-reference note thereto.

STACK v. EAST ST. LOUIS RAILWAY COMPANY.

[245 Ill. 308, 92 N. E. 241.]

DEATH—Burden of Proof on Plaintiff to Show Care.—The burden of proof is on the plaintiff in an action for negligent death to show that the deceased was in the exercise of ordinary care at the time he was injured. (p. 319.)

DEATH—Exercise of Care a Question of Fact.—Whether the deceased was in the exercise of ordinary care at the time of his injury is a question of fact, in an action to recover damages for his death, to be determined by the circumstances attending the event. Whether the evidence tends to prove such care is a question of law, which a court can determine adversely to the plaintiff, only when no other conclusion can reasonably be drawn from uncontradicted facts and from the evidence favorable to the plaintiff. (p. 319.)

NEGLIGENCE—Conduct of Person in Danger.—There is No Rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances. (pp. 319, 320.)

STREET RAILWAY—Person Stepping Around One Car in Front of Another.—Courts can lay down no precise rule of action to be observed by a man who, passing behind a street-car, finds himself suddenly confronted, without warning, by a rapidly moving car or other vehicle. If, momentarily paralyzed or confused by the imminent danger, he does nothing, or takes a step or two in the wrong direction, and a collision results, it cannot be said, as a matter of law, that he acted in a manner different from which might have been expected from a man of ordinary prudence. (p. 320.)

STREET RAILWAY—Persons Stepping Around One Car in Front of Another.—A person who alights from a street-car, passes behind it, and is struck by another car going in an opposite direction, has a right to rely upon his sense of hearing as well as of sight, and to expect the railway company, in running its car past another car stopped for the discharge of passengers, to give warning and observe ordinances in respect to speed. But while such negligence on the part of the company does not relieve such person from the necessity of exercising care for his own safety, it is to be considered in determining whether his conduct was such as an ordinarily prudent

man might have adopted under the circumstances, which question may properly be submitted to the jury. (p. 320.)

STREET RAILWAY—Person Stepping Around One Car in Front of Another.—Where a person alights from a street-car, passes behind it, and steps in front of another car going in an opposite direction, an instruction is objectionable which authorizes the jury to find that the decedent must not only use reasonable care, but must, at his peril, ascertain whether the track is clear or a car approaching. Ordinary care to ascertain the fact is all that is required. (p. 321.)

Schaefer, Farmer & Kruger, for the appellant.

M. V. Joyce and D. J. Sullivan, for the appellee.

³⁰⁰ **DUNN, J.** The appellee recovered a judgment against the appellant for causing the death of her intestate, John Stack, and the judgment has been affirmed by the appellate court. The errors assigned question the action of the trial court in refusing to instruct the jury to find the defendant not guilty and in refusing one other instruction.

The deceased alighted from the rear platform on an inter-urban car going west on State street, in the city of East St. Louis which had stopped at the west side of Sixteenth ³¹⁰ street. As he passed around the rear end of the car to go to the south side of State street he was struck and killed by an east-bound car. The negligence charged in the declaration was running the car past the standing car at a high rate of speed in excess of the rate limited by an ordinance of the city, without ringing a bell or sounding a gong, without having the car under proper control and without having it equipped with a fender in a reasonably safe condition. There was evidence tending to prove the negligence charged, and it is not contended that the judgment of the appellate court is not conclusive against appellant on this question. It is, however, insisted that there is no evidence in the record that the deceased was in the exercise of ordinary care for his own safety.

The burden of proof is always on the plaintiff, in actions of this character, to show that the deceased was in the exercise of ordinary care at the time he was injured, and this question is always one of fact, to be determined by the circumstances attending the event. Whether the evidence tends to prove such care is a question of law, which a court can determine adversely to the plaintiff only when no other conclusion can reasonably be drawn from uncontradicted facts and from the evidence favorable to the plaintiff. There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce

such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances. Courts can lay down no precise rule of action to be observed by a man who, passing behind a street-car, finds himself suddenly confronted, without warning, by a rapidly moving car or other vehicle. If, momentarily paralyzed or confused by the imminent danger, he does nothing, or takes a step or two in the wrong direction, and a ³¹¹ collision results, it cannot be said, as a matter of law, that he acted in a manner different from that which might have been expected from a man of ordinary prudence. It is not an extremely unusual situation, and each case, as it arises, must be determined upon its own facts. There was evidence in this case that the car which struck the deceased was running at a rate of speed greatly in excess of the ten miles an hour limited by the ordinance; that the gong was not sounded within fifty or sixty feet of the crossing where the deceased was struck, and that the east-bound car was within two or three feet of him as he came from behind the west-bound car. It was possible for him by the exercise of a sufficiently high degree of care, to have discovered the east-bound car and not have got in its way. He had, however, a right to rely upon his sense of hearing as well as of sight, and to expect the appellant, in running its car past another car stopped for the discharge of passengers, to give warning and to observe the ordinance of the city in respect to speed. While the negligence of the appellant did not relieve the deceased from the necessity of exercising care for his own safety, it is to be considered in determining whether his conduct was such as an ordinarily prudent man might have adopted under the circumstances, and that question was properly submitted to the jury.

Complaint is made of the refusal of the court to give to the jury the following instruction which was asked on behalf of appellant:

“The court instructs the jury that if you believe, from the evidence, under the instructions of the court, that the degree of care required of the said John Stack for his own safety, as defined in these instructions, required him, before crossing said track, to look and ascertain whether the track was clear or whether a car was approaching, and if the jury believe, from the evidence, under the instructions of the court, that the said John Stack, by the exercise of such care would have looked and ascertained whether the track ³¹² was clear and whether or not a car was approaching, and if the jury further believe, from the evidence, under the instructions of the court, that the said John Stack did

not so look and ascertain whether the track was clear and whether or not a car was approaching, and that he was killed in consequence of his failure to so look and ascertain, if he did so fail, then the court instructs the jury to find the defendant, East St. Louis and Suburban Railway Company, not guilty."

This instruction authorized the jury to find that the degree of care required of the deceased for his own safety required him, before crossing the track, not only to look, but to ascertain whether the track was clear or a car was approaching. In other instructions the court had told the jury, in accordance with the correct rule, that it was the duty of a person about to cross a street railway track to use reasonable care to ascertain whether there was an approaching car, and that neglect to do so would preclude a recovery. This instruction, however, went beyond that proposition, and authorized the jury to find that the deceased must not only use reasonable care, but must, at his peril, ascertain the fact. Ordinary care to ascertain the fact was all that was required of the deceased, and the instruction was objectionable because it permitted the jury to find that more was required. In *Chicago City Ry. Co. v. O'Donnell*, 208 Ill. 267, 70 N. E. 294, 477, the refusal of an instruction somewhat similar to that now under consideration was held erroneous. That instruction, however, submitted to the jury the question whether the deceased, if he had looked, could by the exercise of ordinary care have ascertained whether or not a car was approaching. The instruction now under consideration does not submit this question, which was necessary to be decided in determining whether the deceased had exercised due care.

The judgment of the appellate court is affirmed.

One Who Leaves a Street-car and Steps in Front of Another Car going in an opposite direction without looking or giving attention to warnings cannot be regarded as having exercised due care: *Creamer v. West End Street Ry. Co.*, 156 Mass. 320, 32 Am. St. Rep. 456; *Buzby v. Philadelphia Traction Co.*, 126 Pa. 559, 12 Am. St. Rep. 919. In *Shuler v. North Jersey St. Ry. Co.*, 75 N. J. L. 824, 127 Am. St. Rep. 834, the plaintiff alighted from a street-car, passed around the rear platform, and was struck by the corner of the fender of a car approaching at excessive speed on the other track just as he reached the nearest rail thereof. He looked for the approaching car just as he was struck. It was held that he was guilty of contributory negligence in failing to wait for the car from which he alighted to move on so as to enable him to look with effect along the other track, and that the fact that the approaching car was running at an excessive speed did not relieve him of the charge of negligence.

LEHIGH PORTLAND CEMENT COMPANY v. McLEAN.

[245 Ill. 326, 92 N. E. 248.]

FOREIGN CORPORATION — Power to Regulate — Interstate Commerce.—The legislature has power to impose such conditions as it may choose upon foreign corporations for the exercise of powers and privileges within the state, subject to the power of Congress to regulate commerce among the several states. (p. 323.)

INTERSTATE COMMERCE—Authority of States and of Congress.—The authority of Congress to regulate interstate commerce is exclusive, and no state, except in the exercise of the police power for the security of the lives, health and comfort of persons and the protection of property, can make any law or regulation which will affect the free and unrestrained intercourse and trade between the states as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states coming or brought within its jurisdiction. (p. 323.)

INTERSTATE COMMERCE—Corporations.—The Right of Free and unrestrained intercourse between the states is not confined to natural persons, but extends to corporations. (p. 324.)

FOREIGN CORPORATION—Failure to Comply With Law—Interstate Commerce.—A foreign manufacturing corporation selling its products to merchants through salesmen, without maintaining a place of business within the state, is engaged in interstate commerce, and is not within the Illinois statute regulating the admission of foreign corporations to do business in the state. Hence it may sue therein to enforce its contracts, although it has not complied with such statute. (pp. 323, 327.)

H. G. Morris, for the appellant.

John Lynch and T. A. Fritchey, for the appellee.

327 VICKERS, C. J. The appellee sued the appellants in assumpsit. To the declaration containing a common count for goods sold and delivered, a plea was filed alleging that the appellee is a Pennsylvania corporation engaged in manufacturing cement in Pennsylvania and in selling it in Illinois; that the merchandise for which the suit was brought was sold to ³²⁸ the appellants in 1907 at Olney, Illinois, by the appellee through its agent, to be there delivered by appellee and paid for by appellants, and was there delivered to appellants; that at the time of such sale and until the commencement of the suit the appellee was engaged in selling in Illinois its products to the merchants of Illinois through numerous salesmen, who were authorized by the appellee to sell its products, open accounts with merchants purchasing them and collect money from such merchants; that at the time of such sale and the delivery of the goods, and when suit was brought, the appellee had not designated any person as its agent or representative in this state upon whom service of legal process might be had, did not maintain a public office or place of busi-

ness in this state, had not filed in the office of the Secretary of State a copy of its charter, articles or certificate of incorporation, nor had the Secretary of State issued to appellee a certificate that it had complied with the laws of this state, by reason whereof the appellee could not bring and maintain its suit. A demurrer was sustained to this plea, and the appellants electing to stand by it, judgment was entered against them for five hundred and sixty-nine dollars and thirty-two cents. The appellate court affirmed the judgment and granted a certificate of importance and appeal to this court.

The plea is based upon the act of May 18, 1905, "to regulate the admission of foreign corporations for profit to do business in the state of Illinois." According to its averments the appellee was engaged in the transaction of business in this state without having complied with the provisions of this act. The contract upon which the suit was brought, being made in violation of an express statutory provision, was therefore void if the act applies to the business of appellee transacted in this state: *Cincinnati Mutual Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Penn v. Bornman*, 102 Ill. 523; *United Lead Co. v. Reedy Elevator Mfg. Co.*, 222 Ill. 199, 78 N. E. 567, 6 Ann. Cas. 637.

³²⁹ It is a familiar rule that the legislature has power to impose such conditions as it may choose upon foreign corporations for the exercise of powers and privileges in this state, and such conditions must be complied with. This power of the legislature is, however, subject to the restriction contained in section 8 of article 1 of the constitution of the United States, which grants to Congress the power to regulate commerce among the several states. The authority of Congress in this regard is exclusive, and no state, except in the exercise of the police power for the security of the lives, health and comfort of persons and the protection of property, can make any law or regulation which will affect the free and unrestrained intercourse and trade between the states as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states coming or brought within its jurisdiction. The cases are too numerous for exhaustive citation and the doctrine too well established to require it: *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. Rep. 1, 32 L. ed. 368; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725, 34 L. ed. 150; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. Rep. 829, 38 L. ed. 719; *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. Rep. 576, 46 L. ed. 785; *Norfolk etc. Ry. Co. v. Sims*, 191 U. S.

441, 24 Sup. Ct. Rep. 151, 48 L. ed. 254; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. Rep. 229, 47 L. ed. 336.

This right of free and unrestrained intercourse is not confined to natural persons, but extends also to corporations. In *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, in discussing this clause of the constitution it is said (page 182): "It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the constitution a large part of the commerce of the world was carried on by corporations. . . . This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations."

³³⁰ "It is clear the statute cannot be construed to impose upon a foreign corporation limitations of its right to make contracts in the state for carrying on commerce between the states, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several states": *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. Rep. 739, 28 L. ed. 1137.

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826, 29 L. ed. 158, the state of Pennsylvania attempted to collect a tax from the ferry company, which was a New Jersey corporation operating a steamboat ferry having its property and business at Camden, in that state, except that it received and landed passengers and freight at a dock which it leased in Philadelphia, and it did no other business in Pennsylvania. The tax was based upon dividends paid, and the law under which it was levied applied to domestic as well as foreign corporations. It was held that the tax was a tax upon the commerce between the two states, and that the corporation was entitled to the same protection against its exaction as an individual engaged in interstate commerce.

"The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority": *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737, 31 L. ed. 650; *Pensacola Telegraph Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 708; *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. Rep. 403, 36 L. ed. 164.

An act of the legislature of Kentucky prohibited the agent of every express company not incorporated by the laws of Kentucky from carrying on the business of transportation ³³¹ in the state without first obtaining a license from the auditor of public accounts and filing in his office a copy of the charter of the company, and a statement showing, among other things, its assets and liabilities, and that it is possessed of an actual capital of one hundred and fifty thousand dollars in cash or safe investments. The act was held invalid, being a regulation of interstate commerce: *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851, 35 L. ed. 649. The court said: "If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business nor require them to take out a license therefor. To carry on interstate commerce is not a franchise or privilege granted by the state. It is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

In the late case of *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. Rep. 190, 54 L. ed. 355, the supreme court of the United States holds that the exaction from a foreign telegraph company of a charter fee of a given per cent of its authorized capital as a condition of continuing to do local business in the state of Kansas is invalid under the commerce and due processes of law clauses of the federal constitution, as necessarily amounting to a burden and a tax on the company's interstate business and on its property located outside of the state. The same rule was announced in *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 30 Sup. Ct. Rep. 280, 54 L. ed. 423, where a statute of the state of Arkansas somewhat similar to the Kansas statute was under consideration. The Kansas statute was again before the court in the case of *Pullman* ³³² *Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. Rep. 232, 54 L. ed. 378, and the rule announced in the *Western Union Tel. Co.* cases was applied to a foreign sleeping-car company. In each of the cases above cited the supreme court held that the corporations were engaged in interstate commerce, and that the state statutes imposing conditions upon foreign corporations before such corporations could be permitted to transact business in the state could not be applied to such foreign corporations.

The latest expression of the United States supreme court, so far as we are advised, is found in the case of *International Text-book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. Rep. 481, 54 L. ed. 678. The International Text-book Company is a Pennsylvania corporation and conducts a correspondence school from its principal office at Scranton, Pennsylvania. Its officers and instructors are located at Scranton, where instruction papers are published and forwarded from time to time to students residing in different parts of the United States. In the conduct of its business local or traveling agents are employed, whose duties are to procure and forward to the company at Scranton, on blanks furnished by it, applications for scholarships in its correspondence school and to collect and forward to the company deferred payments on scholarships. The solicitor-general in Kansas maintains his office in that state at his own expense, being paid a salary by the company and a commission on the number of applications obtained and collections made. Pigg subscribed for a scholarship at Topeka, Kansas, and having failed to pay an installment due the company under the contract, suit was brought by the International Text-book Company against him for the unpaid installment. The Kansas court held that by reason of the company's failure to comply with certain provisions of the statute of Kansas, it was not entitled to maintain an action in the courts of Kansas. This decision was reversed by the supreme court of the United States and the following propositions were decided: (1) That under the facts appearing in the record the International Text-book Company ³³³ was doing business in the state of Kansas within the meaning of the Kansas statute; (2) that the business of the International Text-book Company was in its essential characteristics commerce among the states within the meaning of the constitution of the United States; (3) that the requirement of the statute to be filed with the Secretary of State by the Kansas statute imposed a burden on the right of the company to do interstate business, and was therefore unconstitutional; (4) that the clause in the Kansas statute prohibiting foreign corporations which had not complied with the state statute from maintaining suits in the state courts was so dependent upon and connected with that part of the act imposing conditions as to be meaningless when standing alone, and that the prohibition against the right to maintain suits in the state courts was likewise unconstitutional.

Section 6 of chapter 32 of Hurd's Revised Statutes of 1909, which is relied upon to sustain appellants' plea, by its terms only applies to such foreign corporations as are "amenable to the provisions of this act." Under the rules

announced in the decisions above referred to, this section cannot have any application to foreign corporations which are engaged in interstate commerce. Such corporations are consequently, by the terms of the act itself, excepted from the penalties provided in said section for a failure to comply therewith. It would be manifestly illogical to hold that a foreign corporation engaged in interstate commerce was exempt from all those provisions of the act imposing conditions upon the right to do business in the state, yet such corporation might nevertheless be penalized by denying it access to our state courts. A penalty ought not to be imposed upon foreign corporations for a failure to comply with a statute that has no application to them.

The judgment of the appellate court is affirmed.

Jurisdiction of Foreign Corporations is the subject of a note to *Abbeville etc. Co. v. Western etc. Co.*, 85 Am. St. Rep. 905. The tendency of the statutes and decisions has been toward putting corporations on the same footing as natural persons in regard to the jurisdiction of suits by or against them: *Showen v. J. L. Owens Co.*, 158 Mich. 321, 133 Am. St. Rep. 376.

As to the *Enforceability of Contracts of a Foreign Corporation* that has not complied with the requirements of the local statutes, see *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 131 Am. St. Rep. 1074, and cases cited in the cross-reference note thereto.

CORRELL v. GREIDER.

[245 Ill. 378, 92 N. E. 266.]

PROCESS—Constructive Service—Strict Compliance.—A party claiming the benefits of a decree upon constructive service must show a strict compliance with every requirement of the statute. Nothing less will invest the court with jurisdiction or give validity to the decree when it is called into question in a direct proceeding. (pp. 328, 329.)

PROCESS—Constructive Service.—The Affidavit upon which service by publication is had under section 12 of the chancery act is jurisdictional, and the statute must be strictly complied with. (p. 329.)

PROCESS—Constructive Service.—An Affidavit for service by publication under section 12 of the chancery act is insufficient, which states that the defendant, if living, is a nonresident, and "that he (affiant) has made diligent inquiry to ascertain his residence, as also the names and addresses of his bodily heirs, if any, but without success." The words "without success" are not equivalent to a statement that upon such diligent inquiry the place of residence of the defendant could not be ascertained. (p. 329.)

APPEARANCE.—Where There are Several Defendants, one of whom is not served, an appearance by a solicitor for the "defendants" will be limited to those only who have been served. (p. 329.)

APPEARANCE.—The Filing of a Petition to Open a Decree by a defendant who was not served, which petition is denied, is not an entry of appearance and waiver of the right to question the jurisdiction of the court. The only remedy of the petitioner, after the denial, is by writ of error. (p. 330.)

Thomas L. Jarrett, for the plaintiff in error.

T. J. Condon and William L. Patton, for the defendant in error.

379 VICKERS, C. J. This is a writ of error sued out by Hugh M. Greider to obtain a review of a decree of the Sangamon county circuit court reforming a deed executed by Sam D. Scholes to Annie E. Correll. The deed conveyed the premises to Annie E. Correll in fee simple. After her death Levi S. Correll filed a bill to correct said deed, alleging that the scrivener had made a mistake in writing the deed; that it was the intention of all the parties concerned that the deed should convey to Annie E. Correll a conditional fee, with a right of remainder in fee to Levi S. Correll in case he survived his wife. Annie E. Correll died testate and devised the lands in controversy by her last will. The devisees and heirs at law of Annie E. Correll were made parties defendant to said bill. All of the defendants except Hugh M. Greider and Cornelius Correll, two of the heirs of Annie E. Correll, were served personally. Hugh M. Greider and Cornelius Correll being non-residents of the state, an attempt was made to obtain jurisdiction of them by publication. The following affidavit was filed under section 12 of the chancery act: "Levi S. Correll, being first duly sworn, under oath states that he is the complainant in the above-entitled cause, and that the defendant Hugh Greider, if living, is a nonresident of the state of Illinois; that he has made diligent inquiry to ascertain his residence, as also the names and addresses of his bodily heirs, if any, but without success. The last known residence of said Hugh Greider was Wedderford, in the state of Texas. The affiant further states that the defendant Cornelius Correll is also a nonresident of the state of Illinois, and that his residence is in the town of Sheldon, in the state of Missouri." Under this affidavit publication ³⁸⁰ was had, and a notice addressed to Hugh M. Greider, Wedderford, Texas, was mailed. There is no evidence in the record showing that Hugh M. Greider received any actual notice of the pendency of the suit. A decree by default was entered in accordance with the prayer of the bill, and this writ of error is sued out to reverse that decree.

The rule is too well established to require the citation of authorities that a party claiming the benefits of a de-

cree upon constructive service must show a strict compliance with every requirement of the statute. Nothing less will invest the court with jurisdiction or give validity to the decree when the same is called into question in a direct proceeding: *Boyland v. Boyland*, 18 Ill. 551. The affidavit upon which service by publication is had under section 12 of the chancery act is jurisdictional, and the statute must be strictly complied with: *Anderson v. Anderson*, 229 Ill. 538, 82 N. E. 311. The affidavit filed in this case does not comply with the statute, either literally or substantially. After stating that Hugh M. Greider, if living, is a nonresident of the state of Illinois, the affidavit recites "that he [affiant] has made diligent inquiry to ascertain his residence, as also the names and addresses of his bodily heirs, if any, but without success." The words "without success" are not equivalent to a statement that upon such diligent inquiry the place of residence of Hugh M. Greider could not be ascertained. Affiant having stated that he made diligent inquiry to ascertain the place of residence of Hugh M. Greider and also as to his bodily heirs, might conclude that if he had failed to ascertain information respecting both classes of persons inquired about he had been unsuccessful. If the affiant were indicted for perjury for false swearing in this affidavit, he could not be convicted by showing that he had ascertained the place of residence of Hugh M. Greider, since that might well be, and still if he had failed to obtain information respecting his bodily heirs, he might well conclude that his inquiries had been unsuccessful. To say ²⁸¹ that his inquiries were unsuccessful is to permit the affiant to substitute his own conclusion for a statement of the facts which the statute requires. The affidavit was insufficient to confer jurisdiction over the person of Hugh M. Greider.

The record recites that "on motion of the defendants, by their solicitor, leave is hereby given them to answer by the 18th inst." Defendant in error contends that the word "defendants" in this motion must be held to include all of the defendants of record. This contention cannot be sustained. Where there are several defendants, one of whom is not served, an appearance by a solicitor for the "defendants" will be limited to those only who have been served: *Gardner v. Hall*, 29 Ill. 277. It cannot be presumed that a defendant who knows nothing of the pendency of a suit would employ counsel to appear for him.

Within three years after the rendition of this decree plaintiff in error filed a petition, under section 19 of the chancery act, for the purpose of opening up the decree and for permission to defend. This petition was denied. Defendant in error contends that the filing of this petition is

an entry of appearance, and that plaintiff in error thereby waived his right to question the jurisdiction of the court. This contention cannot be sustained. Had the petition been granted, plaintiff in error would have been in court, but where the petition is denied, it would be a hard rule to hold that the petitioner was in court for the purpose of waiving a right to question the jurisdiction of the court but out of court for all other purposes. Having been denied the right to open up this decree, the only remedy left was to sue out a writ of error.

The decree of the circuit court of Sangamon county is reversed and the cause remanded.

Service by Publication, Being Highly Technical, must be strictly pursued in order to acquire jurisdiction; constructive service must be viewed critically, to prevent, so far as can be, irreparable injury: *Ohlmann v. Clarkson Sawmill Co.*, 222 Mo. 62, 133 Am. St. Rep. 506; *Empire Real Estate etc. Co. v. Beechley*, 137 Iowa, 7, 126 Am. St. Rep. 248; *D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 124 Am. St. Rep. 615. As to the sufficiency of the affidavit for service by publication, see *Becker v. Linton*, 80 Neb. 655, 127 Am. St. Rep. 795; *Finn v. Howard*, 77 Kan. 421, 127 Am. St. Rep. 420; *Knapp v. Wallace*, 50 Or. 348, 126 Am. St. Rep. 742; *Chapman v. Moore*, 151 Cal. 509, 121 Am. St. Rep. 130. If a plaintiff in his affidavit for publication of summons shows clearly that the defendant resides out of the state at the time, it is unnecessary for him to show that he has exercised any further diligence in attempting to find the defendant within the state: *McKnight v. Grant*, 13 Idaho, 629, 121 Am. St. Rep. 287. But under a statute providing that an order may be made for service by publication upon a defendant who is a nonresident of the state, provided "the plaintiff has been or will be unable with due diligence to make personal service" within the state, an affidavit which avers that a defendant resides in an adjoining state, but which discloses no effort to find or serve him, and no reason why such effort if made would be useless, is insufficient to authorize an order for publication: *Kennedy v. Lamb*, 182 N. Y. 228, 108 Am. St. Rep. 800.

SCHREFFLER v. CHASE.

[245 Ill. 395, 92 N. E. 272.]

WITNESS.—A Husband Could not at Common Law be a witness for or against his wife as to any matter, nor could he, either during the marriage or after its termination by death or divorce, be called as a witness to testify to communications between them, or to any fact or transaction the knowledge of which was obtained by means of the marriage relation. (p. 333.)

WITNESS.—The Common-law Rule Prohibiting a Husband from testifying for or against his wife has been modified by sections 1 and 5 of the evidence act of Illinois, but neither of these sections renders him a competent witness except in the cases enumerated in the excep-

tions in section 5, which apply only where the husband or wife of the witness is a party to the suit. (p. 333.)

WITNESS—Divorced Husband.—In a Will Contest on the ground of mental incapacity the divorced husband of the testatrix cannot testify of facts which came to his knowledge by reason of the marriage relation and which tend to show that she was of unsound mind. (p. 334.)

W. R. Hunter and E. B. Gower, for the appellants.

H. L. Richardson and Cooper & Hobbie, for the appellees.

³⁹⁶ COOKE, J. Etta Schreffler and Ulysses Schreffler, her husband, the appellees, filed their bill of complaint in the circuit court of Kankakee county to contest the validity of the will of Rosella C. Paine, deceased, on the ground of mental incapacity. An issue at law was made up whether the writing produced was the will of the deceased or not. The first jury to whom this issue was submitted failed to agree and the issue was submitted to another jury, resulting in a verdict finding that the writing produced was not the will of Rosella C. Paine, and that she was not of sound mind and memory at the time of executing said writing. The court ³⁹⁷ overruled appellants' motion for a new trial and entered a decree setting aside the probate of the will and declaring the purported will null and void. The defendants to the bill have prosecuted an appeal to this court.

The instrument in question was executed by Rosella C. Paine April 16, 1904, and by its terms all her property was, subject to the payment of debts and funeral expenses, devised and bequeathed to St. Paul's Episcopal Church of Kankakee City, Illinois, one of the appellants. Benjamin F. Chase, another of the appellants, was nominated as executor of the will. Rosella C. Paine died on December 23, 1907, and the will was admitted to probate by the county court of Kankakee county on February 3, 1908. She left her surviving appellee Etta Schreffler, her daughter, as her only heir at law. Testatrix was married to Tim C. Dickinson about thirty-five years before her death, and on May 17, 1900, she obtained a divorce from him. She left an estate consisting of a house and lot in the city of Kankakee, valued at five thousand dollars, and about one thousand dollars in notes and cash.

The evidence offered by appellants, if considered alone, would establish beyond question the validity of the will and the mental capacity of the testatrix. Appellees offered the testimony of a large number of witnesses, many of whom testified to facts and circumstances which were entirely consistent with the sanity and mental capacity of Rosella C. Paine, and which merely tended to prove that she be-

came angry upon slight provocation and had frequent quarrels with tenants of her property. Many of these witnesses expressed no opinion regarding the mental condition of the deceased. From the testimony of the witnesses, both for appellants and for appellees, it appears that the daughter, Etta Schreffler, had arrayed herself with her father in the divorce proceedings instituted by her mother, and that thereafter the mother had refused to have anything to do with her daughter.

³⁹⁸ Appellees called as a witness in their behalf Dickinson, the divorced husband of the testatrix, who, over the objection of appellants to his competency, was permitted to testify to the conduct of his wife as observed by him from the time of his marriage to her up to the time of the separation. He testified that within a year or two after the marriage she became subject to violent fits of anger about once a month, which increased in frequency after the birth of their daughter; that at such times she looked wild-eyed, made quick motions, jerked chairs around and slammed the doors after her; that on one occasion she attempted to attack him with a butcher knife and at other times with sticks of wood, and that on these occasions he forced her into a chair and held her there until her passion subsided; that she prepared no clothes for her child before its birth; that frequently, for periods extending from two days to two weeks, she refused to speak to him, and secluded herself in her room for periods of from one to two weeks and at one time for a period of three months; that at such times, although he had men working for and with him on the farm, she prepared no meals and refused to eat at the table with the other members of the family; that these periods of isolation increased during the latter part of their married life, recurring every two or three weeks; that when visitors or relatives of the family came to the house she frequently locked the door and refused to admit them; that she often refused to sit at the table during meals when guests were at the house, and at such times, after preparing the meals, went into another room or outdoors and paid no attention to the persons at the table; that the same thing frequently occurred when no one was present except members of the family; that she became very angry at the witness when death occurred among the stock on the farm; that during her fits of anger she frequently left the house and roamed through the fields and woods for hours at a time, and sometimes went to her mother's home at Kankakee, ³⁹⁹ where she would stay for a week or more and then return to her home by hailing some neighbor and riding home with him; that she locked the witness out of the house a number of times and kept him out several days;

that from the daughter's birth until she left home, at the age of twenty, he does not remember of ever seeing his wife kiss or caress the daughter, and that on the final separation the testatrix locked him out of the house and he did not return. In addition to the above testimony the witness made a great many statements and testified to a number of facts and conclusions which, upon motion by the appellants, were stricken out by the court. Most of these answers and statements made in the presence of the jury and stricken out by the court were of a nature much more prejudicial to appellants' cause than those which were permitted to stand.

It is obvious that the testimony of this witness must have been a material factor in the finding of the jury that the testatrix was not of sound mind and memory at the time of executing the will, and if such testimony was improperly admitted, the decree based on such verdict cannot be permitted to stand. At common law a husband could not be a witness for or against his wife as to any matter, nor could he, either during the marriage or after its termination by death or divorce, be called as a witness to testify to communications between them, or to any fact or transaction the knowledge of which was obtained by means of the marriage relation: *Reeves v. Herr*, 59 Ill. 81; *Pyle v. Oustatt*, 92 Ill. 209; *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756; *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 798; 1 Greenleaf on Evidence, sec. 337. This rule of the common law prohibiting a husband from testifying for or against his wife has been modified by sections 1 and 5 of the evidence act of this state, but neither of those sections renders the husband a competent witness except in the cases enumerated in the exceptions found in section 5 of the act: *Mitchinson v. Cross*, 58 Ill. 366. The testimony of Dickinson in this case does ⁴⁰⁰ not fall within any of those exceptions, because the exceptions only apply to cases where the husband or wife of the witness is a party to the suit.

It is urged, however, that section 5 of the evidence act only prohibits a husband or wife, in case the other be dead, from testifying to any admission or conversation of such other made by him to her or by her to him or by either to third persons, and that as Dickinson was not asked to state, and did not state, any admission made by the wife or any conversation between himself and wife or between a third person and the testatrix, his testimony was competent. The fallacy of this argument lies in the fact that the statute does not create the disability. It existed at common law, and by reason thereof is a part of the law of this state until repealed by statute. The statute has expressly removed the disability imposed by the common law in certain cases, of which this is not one, and has expressly retained the

common-law disability with reference to admissions and conversations between the husband and wife, except in suits between the husband and wife, but it does not necessarily follow that the statute has removed the common-law disability of the husband to testify to any fact or transaction, the knowledge of which was obtained by means of the marriage relation. That such disability still continues in this state has been recognized by this court since the enactment of section 5 of the evidence act as now in force.

In *Griffeth v. Griffeth*, 162 Ill. 368, 44 N. E. 820, a bill was filed by the wife for a divorce on the ground of the impotency of the husband. The evidence of a former wife of the defendant, from whom he was divorced, was admitted showing that she had lived with the defendant as his wife for a period of five weeks, and that during that period he was impotent and was addicted to self-abuse, and that she had, while his wife, witnessed his acts of self-abuse. In holding that the evidence of the divorced wife was incompetent we said: "Whether the divorced wife's knowledge of her ⁴⁰¹ husband's conduct in the respect here referred to came to her as the result of his admissions to her or of her conversations with him, or as the result merely of her own observation, it was acquired in the confidence of the marriage relation, and, therefore, her evidence in regard to it should have been excluded upon principles of public policy. The protecting seal of the law is placed upon all confidential communications between the husband and the wife, except so far as our statute has changed the rule. It makes no difference that the marriage relation no longer exists between them. 'Whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires cannot be afterward divulged in testimony, even though the other party be no longer living': 1 Greenleaf on Evidence, sec. 337. Accordingly, in *Croze v. Rutledge*, 81 Ill. 266, we said (page 268): 'The defense offered the divorced wife of the plaintiff as a witness to prove a fact which must have come to her knowledge, from the very nature of the fact, during the existence of the marital relation. This testimony was properly excluded: *Wadams v. Humphrey*, 22 Ill. 661.' "

Dickinson necessarily obtained his knowledge of the facts about which he testified by reason of the marriage relation which existed between him and the testatrix, and he cannot be permitted to divulge these facts as evidence of the insanity or mental incapacity of his former wife. We express no opinion upon the sufficiency of the remainder of the evidence offered by appellees to support the verdict and the decree, as the issue between the parties must be submitted to another jury.

The decree is reversed and the cause will be remanded to the circuit court for a new trial upon the issue at law whether the writing produced be the will of the testatrix or not.

The Competency of Husband or Wife to Testify for or against each other is considered in the notes to *Commonwealth v. Sapp*, 29 Am. St. Rep. 411; *State v. Burt*, 106 Am. St. Rep. 763. The matter that the law prohibits either the husband or the wife from testifying to as witnesses includes any information obtained by either during the marriage or by reason of its existence. It should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, which, but for the confidence growing out of it, would not have been known: *Mercer v. State*, 40 Fla. 216, 74 Am. St. Rep. 135. See, also, *Robinson v. Robinson*, 22 R. I. 121, 84 Am. St. Rep. 832; *Heckman v. Heckman*, 215 Pa. 203, 114 Am. St. Rep. 953; *Belknap v. Platter*, 54 Wash. 1, 132 Am. St. Rep. 1097.

Privileged Communications Between Husband and Wife are not rendered admissible in evidence by their subsequent divorce: *Robinson v. Robinson*, 22 R. I. 121, 84 Am. St. Rep. 832; *State v. Kodat*, 158 Mo. 125, 81 Am. St. Rep. 292; *Hanselman v. Dovel*, 102 Mich. 505, 47 Am. St. Rep. 557; note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 418. In an action by a divorced wife against her former husband to recover possession of a note, neither is competent to testify whether it was given for money expended or services performed by him or her: *Johnson v. Johnson's Committee*, 122 Ky. 13, 121 Am. St. Rep. 449.

MORRISON HOTEL AND RESTAURANT COMPANY v. KIRSNER.

[245 Ill. 431, 92 N. E. 285.]

JURY TRIAL.—The Constitutional Right of Trial by Jury is not a right to command the services of a jury without cost, but is of the same nature as the right to have official services performed by public officers, and a requirement for the payment of a reasonable amount for jury fees, such as will necessarily be required in every jury trial, is not a denial or encroachment upon the right. (pp. 336, 337.)

JURY TRIAL.—Statute Requiring Payment of Fees.—The provisions of the municipal court act requiring a party who desires a jury to file a demand therefor with the clerk and pay six dollars for jury fees, at the time of entering his appearance, are valid. But the statute should be liberally construed in favor of the right, and the inclination of the court should be to protect and enforce it. (p. 337.)

JURY TRIAL.—Confession of Judgment.—A Statute Providing that a cause shall be tried by the court unless a demand for a jury trial is filed at the time the defendant enters his appearance and pays the jury fees can have no application to the confession of a judgment. (p. 337.)

JURY TRIAL.—Demand for After Vacation of Judgment by Confession.—When a judgment by confession under power of attorney has been vacated on motion, because the power was not sufficient to

authorize the attorney to appear for all the defendants, a demand by them for a jury trial, with a tender of fees therefor, is in apt time if made immediately upon the vacation of judgment. It need not be made at the time the court is asked to set aside the judgment. (pp. 337, 338.)

A. G. Dicus, for the appellants.

Defrees, Buckingham, Ritter & Campbell, for the appellee.

⁴³² CARTWRIGHT, J. On January 21, 1908, an attorney entered the appearance of the three appellants in the municipal court of the city of Chicago by virtue of a power of attorney signed by one of them for all, purporting to authorize a confession of judgment for the amount that might be due on a lease executed by appellee to appellants. The attorney confessed a judgment against appellants for \$686.66, the amount alleged to be due on the lease in the declaration of appellee. The power of attorney was not sufficient to authorize the attorney to enter the appearance of all the defendants, and four days afterward they appeared and entered their motion to set aside and vacate the judgment. The court was unable to take up the motion at that time and continued it until February 8, 1908, when it was granted and the judgment was vacated. Thereupon the defendants entered their motion for a trial by jury, and filed with the clerk a demand in writing for such trial, and offered and tendered to the clerk, in open court, six dollars for the fees of the jury. The record recites that it appeared to the court that a demand for a jury trial was not made at the time the appearance of the defendants was filed in the case, and for that reason the motion was denied and the demand refused. The plaintiff was given leave to amend its statement of claim by increasing the ad damnum to \$1,000, and leave was given the defendants to file a setoff instant. A bill of particulars of the setoff was filed and the trial of the issues was set for a later day and continued from time to time until May 19, 1908, when the issues were tried by the court against the protest of the defendants and a renewed demand for a jury trial, and judgment was entered in favor of the plaintiff for \$333.33. The defendants appealed ⁴³³ to the appellate court for the first district, and that court affirmed the judgment but granted a certificate of importance and an appeal to this court.

The constitution secures to the citizen the right of trial by jury, and unless he waives that right, it is his privilege to have controverted questions of fact decided by a jury and not by a judge sitting as a court. It is not a right to command the services of a jury without cost, but is of the same nature as the right to have official services performed by public officers, and a requirement for the payment of a

reasonable amount for jury fees, such as will necessarily be required in every jury trial, is not a denial or encroachment upon the right. Accordingly, we have held that provisions of the municipal court act requiring a party to a suit of this class, at the time of entering his appearance, to file with the clerk a demand in writing for a trial by jury and to pay six dollars for jury fees are valid, and that otherwise the cause may be tried by the court: *Williams v. Gottschalk*, 231 Ill. 175, 83 N. E. 141, 12 Ann. Cas. 376. In view, however, of the provision of the constitution that the cherished right of trial by jury shall remain inviolate, the statute should be liberally construed in favor of the right, and the inclination of the court should be to protect and enforce the right.

Of course, the statute providing that a cause shall be tried by the court unless a written demand for a jury trial shall be filed at the time the defendant enters his appearance and the six dollars be paid can have no possible application to the confession of a judgment. It would be absurd to say that there must be a demand for a jury trial of a cause of action confessed where there is no issue, or the right be forfeited if there should ever be an issue concerning the same cause of action. When an attorney entered the appearance of the defendants, waived service of process and confessed the cause of action alleged in the declaration and the damages alleged, there could be no trial either by jury or by the court without a jury.

⁴³⁴ After the judgment was entered there was no suit by the plaintiff against the defendants pending in the court to which the defendants could enter their appearance. The suit was ended, and all the defendants could do was to invoke the aid of the court to set aside the judgment, either upon showing equitable grounds for setting it aside and a meritorious defense, or upon showing that the judgment was void for want of jurisdiction to enter it. The only question to be determined was whether the judgment should be vacated and the defendants should have an opportunity to make a defense, and that was the only proceeding to which they entered their appearance. On the motion to vacate the judgment there was no question which a jury could try, and it would be unreasonable to say that the defendants, when they asked the judge to set aside the judgment, should tender the fees for a jury trial. The court could not submit to a jury the question whether the judgment should be set aside, and the question before the court was whether or not there should be any issue for trial. As the court said in *Borchsenius v. Canutson*, 100 Ill. 82, if the judgment should be vacated, it was then to be looked upon as if it were not, and the cause of action would be

in the same state as any ordinary action by summons, with the defendants at liberty to plead their setoff. When the court set aside the judgment, the appearance and confession were annulled, and for the first time there was a legal and valid appearance by the defendants to the action, and immediately upon the vacation of the judgment the written demand for a jury was filed and the fees tendered, which was in apt time to preserve the right to a jury trial. The power of attorney purported to give the attorney authority to waive a jury, and it is contended that the waiver stood although the judgment was vacated. As already stated, there was no issue for a jury on the confession, and if there had been, the setting aside of the confession destroyed in toto the acts of the attorney.

⁴³⁵ The judgments of the appellate court and municipal court are reversed and the cause is remanded to the municipal court, with directions that the clerk accept the money tendered as fees for a jury trial and that the court award to the defendants their right to a trial by jury.

The Right of Trial by Jury is discussed with respect to the conditions and restrictions which the legislature may impose upon it in the note to *Eckrich v. St. Louis Transit Co.*, 98 Am. St. Rep. 538.

BELL v. MATTOON WATERWORKS COMPANY.

[245 Ill. 544, 92 N. E. 352.]

EMINENT DOMAIN—Amount of Land Condemned.—A Corporation having the power to exercise the right of eminent domain must be permitted, in a modified degree, to determine for itself the amount of land necessary for the use for which it is sought to be taken. But this right is subject to all statutory and constitutional restrictions on the subject, and the further limitation that the courts are clothed with power to prevent any abuse of the right. (p. 340.)

EMINENT DOMAIN—Taking More Land Than Necessary.—The question whether the amount of land sought to be condemned is greatly in excess of what is necessary is for the court, and must in some manner be presented to it for decision before compensation is assessed by the jury. (p. 340.)

EMINENT DOMAIN—Abuse of Power by Corporation.—Corporations will not be permitted to abuse the power given them to condemn private property. (p. 341.)

EMINENT DOMAIN—Taking More Land Than Necessary.—A defendant in eminent domain proceedings who was defaulted cannot afterward try in ejectment the question whether more land than necessary was taken. (p. 341.)

EMINENT DOMAIN—Reverter—Use of Land Impossible.—Where the Use of property for the purpose for which it was con-

demned becomes impossible, the effect is the same as an abandonment, and there is a reverter to the owner of the fee. (p. 342.)

EMINENT DOMAIN—Amount of Land That may be Taken.—

It is permissible for the condemner to take not only sufficient land for the present need, but he may anticipate the future increased needs and demands for the public use to which the land is to be devoted. (p. 342.)

EMINENT DOMAIN—Use of Land Impossible.—A Land Owner

who was defaulted in eminent domain proceedings may subsequently recover in ejectment a portion of the land rendered impossible for present or future use for the purpose for which it was condemned. (p. 343.)

J. H. Marshall and A. C. Anderson, for the plaintiff in error.

Craig & Kinzel, for the defendant in error.

⁵⁴⁵ **FARMER, J.** This was an action of ejectment brought by plaintiff in error in the circuit court of Coles county to recover something over twenty acres of land described in the declaration. The land described constitutes substantially one-third of sixty-six acres condemned in December, 1907, by the defendant in error for use for reservoir purposes, for impounding water to be supplied to the city of Mattoon, the inhabitants thereof and commercial and railroad interests.

Defendant in error is a corporation duly organized "for the purposes of building and maintaining reservoirs on land to be acquired by the said company, to furnish a visible surface supply of water and any other supply hereinafter demonstrated and developed, for the city of Mattoon and the inhabitants and commercial and railroad interests thereof, and to own, acquire or construct, operate or lease waterworks in said city and vicinity for such purposes." In December, 1907, it filed a petition in the county court of Coles county to condemn sixty-six acres of land belonging to plaintiff in error. The petition averred that it was necessary to take said land for the purposes of constructing a reservoir in which to impound water to be supplied to the city of Mattoon and its inhabitants. The petition alleged petitioner had been unable to acquire an easement ⁵⁴⁶ in the land by agreement and purchase or to agree with the owner upon a reasonable compensation for an easement in said land. A summons issued on the filing of the petition, returnable as required by law. It was duly served on plaintiff in error, who failed to appear on the return day and was defaulted. A jury was thereupon impaneled, and after hearing the evidence fixed the just compensation for the land taken at five thousand two hundred and eighteen dollars and fifty cents. Judgment was duly entered on the verdict and the damages paid by petitioner to the county

treasurer of Coles county, who still has the money, plaintiff in error never having accepted it. On the trial of the case a jury was waived and the cause heard by the court by agreement.

Plaintiff in error contends that the land described in the declaration is not now, and cannot be, used by defendant in error as a reservoir, or part thereof, in which to store defendant in error's water supply, and that it therefore has no right to the use of the land sued for. On the trial plaintiff in error offered proof that the land described in the declaration lay at such an elevation above the spillway of the dam to defendant in error's reservoir that it is a physical impossibility to raise the water in the reservoir so as to require the use of any portion of said land. On objection by defendant in error this proof was denied and a judgment rendered against plaintiff in error for costs. To review that judgment this writ of error was sued out.

The question presented for determination by this record is whether a corporation having acquired an easement in land by condemnation which cannot, by reason of natural barriers and obstacles, be used for the purposes for which it was acquired, can retain and hold the possession thereof against the owner of the fee.

⁵⁴⁷ It has been decided in many cases by this court that a corporation having the power to exercise the right of eminent domain must be permitted, in a modified degree, to determine for itself the amount of land necessary for the use for which it is sought to be taken. But this right is subject to all statutory and constitutional restrictions on the subject, and the further limitation that the courts are clothed with power to prevent any abuse of the right: *Tedens v. Sanitary District*, 149 Ill. 87, 36 N. E. 1033; *Smith v. Chicago etc. R. R. Co.*, 105 Ill. 511; *Pittsburg etc. Ry. Co. v. Sanitary District*, 218 Ill. 286, 75 N. E. 892, 2 L. R. A., N. S., 226; *Chicago etc. R. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Chicago etc. R. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223; *Schuster v. Sanitary District*, 177 Ill. 626; *Lewis on Eminent Domain*, secs. 239, 279; *Smith v. Claussen Park Drainage District*, 229 Ill. 155, 82 N. E. 278.

In *Smith v. Chicago etc. R. R. Co.*, 105 Ill. 511, it was held that no answer to the petition is authorized or necessary for the purpose of controverting the truth or falsity of the averments of the petition if their truth or falsity depends upon the existence or nonexistence of facts not appearing in the petition. Where it is sought to raise the question that the land sought to be taken is greatly in excess of the quantity necessary for the uses to which it is to be appropriated, it must in some manner be presented to the court for decision before the just compensation is assessed by the

jury. In the same case it was also held that this question could not be made to depend on the opinions of witnesses, but was for determination by the court, and that in determining the question the court would take into consideration the section of the country, the particular locality, the uses to which the land was to be devoted, etc. All the cases hold the question is one to be determined by the court, and that corporations will not be permitted to abuse the power given them to condemn private property. ⁵⁴⁸ In *O'Hare v. Chicago etc. R. R. Co.*, 139 Ill. 151, 28 N. E. 923, it was said that it was not intended to be held in the *Smith* case (105 Ill. 511) that the allegations of the petition are conclusive on the land owner, and cannot be traversed or disputed by him, but where the allegations of the petition are not denied or controverted in any manner, and it is not made to appear that a greater amount of land is sought to be taken than is necessary, the court may treat the petition as admitted, as in case of default, and proceed to fix the compensation without proof of its allegations. In the case at bar the defendant to the petition, plaintiff in error here, was defaulted. The petition to condemn the land in controversy alleged that petitioner was constructing a dam and reservoir for the purpose of impounding water for supplying it to the city of Mattoon and its inhabitants, and that it was necessary to take the property of plaintiff in error (describing it) for a reservoir for that purpose. Plaintiff in error cannot now, in an ejectment suit, try the question whether more land was taken by defendant in error than was necessary for the use for which it was taken. His contention is that defendant in error's right to the property is dependent upon its use for the purpose for which it was taken; that such use of the portion of the property condemned in controversy in this suit is impossible, and as defendant in error cannot retain it for any other use, it reverts to the original owner. Plaintiff in error sought to prove that the land described in the declaration—about one-third of the whole amount of his land condemned—lay at such elevation above the dam that it was a physical impossibility to use it as a portion of a reservoir in which to impound defendant in error's water supply, but the court refused to permit the proof to be made. If the facts proposed to be proved by plaintiff in error, undisputed, would not have authorized a recovery, then the ruling of the court was right, but if the converse is the law, then the ruling was wrong.

⁵⁴⁹ We have been referred by counsel to no case where the question here involved has been passed upon. Cases are to be found where a corporation has, after condemnation and use of the property for a time, ceased to use it, and

where the facts showed an abandonment, it was held it reverted to the original owner or his grantee. We are of the opinion no reasonable distinction, in principle, can be drawn between abandonment after user and the failure to use property condemned because its use is impossible. *Chicago etc. R. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223, was an action of ejectment to recover a strip of land that had been condemned by the railroad company and used for a time as a right of way. The company ceased running trains over the land and took up the rails of its track. The trial court submitted to the jury to determine from the evidence whether the railroad company had abandoned the land. The jury found it had and returned a verdict for plaintiff, and the judgment rendered on that verdict was affirmed by this court. This court held that abandonment meant the relinquishment of the property with the intention of abandoning it, and that this was a question of fact for a jury. In the same case the court said (page 424): "The law is that 'when a corporation, in the exercise of the right of eminent domain, acquires for a public purpose a mere easement in land, its right and title to the property so acquired are dependent upon the use of the property for public purposes, and when such public use becomes impossible or is abandoned, its right to hold the land ceases and the property reverts to its original owner': 10 Am. & Eng. Ency. of Law, 2d ed., p. 1198; *Kansas Central R. R. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190; *Helm v. Webster*, 85 Ill. 116."

Property condemned for public use cannot be devoted by the condemner to any other use than that for which it was taken. Where its use for that purpose becomes impossible, the effect is the same as an abandonment, and there is a reverter to the owner of the fee. While the law has⁵⁵⁰ clothed courts with power to determine whether taking all the land sought to be condemned by the corporation is an abuse of its power, it is evident that this question may not always be one that can be determined with absolute accuracy. If it should turn out that the corporation could not use a substantial portion of the land for the purpose for which it was taken, the fact that the court had, on the showing made before it, been of opinion the land sought to be taken was not unreasonable or unnecessary and permitted it to be condemned, would not give the corporation the right to retain the land for other uses or to retain it without using it for any purpose. It is, of course, permissible for the condemner to take not only sufficient land for the present need, but it may anticipate the future increased needs and demands for the public use to which the land is to be devoted: *Lewis on Eminent Domain*, sec.

279. But the question raised on this record is not whether the twenty acres in controversy is necessary for the uses for which it was condemned, but whether its use for that purpose is impossible. If it is reasonably capable of being used for the purposes for which it was condemned, the necessity for it for such use cannot be inquired into in this suit. If, however, it is, as was sought to be proven by plaintiff in error, rendered impossible for present or future use for the purpose for which it was condemned, then certainly the corporation ought not to be allowed to retain it.

We are of the opinion the court erred in refusing to permit the proof offered that the land sued for is incapable of being used for reservoir purposes, and therefore cannot be devoted to the uses for which it was taken.

The judgment of the circuit court is therefore reversed and the cause remanded.

In the Exercise of the Power of Eminent Domain, expressly delegated by the legislature to railroad companies, they represent the sovereignty of the state, and may decide, within certain limitations, what and how much land of the citizen they will condemn for their purposes. Within such limitations their discretion is practically absolute, and while it is competent for the courts to supervise the exercise of the power delegated, they cannot invade the bounds set by the legislature, and will not undertake to control the discretion of the railroad companies in taking property for their use, unless there has been a very clear abuse of power: *Zircle v. Southern Ry. Co.*, 102 Va. 17, 102 Am. St. Rep. 805; *State v. District Court*, 34 Mont. 535, 115 Am. St. Rep. 540.

Where the Fee to Land has Been Acquired by Condemnation, there can be no reversion to the former owner, whether or not the land is devoted to the purpose for which it was taken. Where a city by condemnation decree has acquired the fee to land for a water system, the former owner cannot object to the city granting an easement therein to a railroad company: *Reichling v. Covington Lumber Co.*, 57 Wash. 225, 135 Am. St. Rep. 976.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

WALKER'S EXECUTOR v. LUXON'S ADMINISTRATOR.

[138 Ky. 14, 127 S. W. 489.]

LIMITATION OF ACTIONS—Note and Mortgage—Remote Vendees.—The commencement of an action by the holder of a note secured by mortgage to enforce the debt and lien does not stop the running of the statute of limitations as against remote vendees of the land, although they are afterward brought in by amendment, but not until the statute has run its course. (pp. 345, 346.)

J. A. Sullivan and S. M. Wallace, for the appellant.

John C. Chenault and Henry C. Hazelwood, for the appellees.

¹⁵ **BARKER, C. J.** On March 5, 1887, W. E. Luxon and his wife, Sallie B. Luxon, executed and delivered to J. Stone Walker their promissory note for \$450, and to secure its payment executed and delivered a mortgage on the real estate described in the petition, which is situated in Richmond, Kentucky. Afterward, on June 25, 1887, Luxon and wife sold and conveyed the mortgaged property to S. D. Parish for \$400 cash, \$200 due in sixty days, and the further consideration that Parish assume the debt of \$450 due J. Stone Walker. On January 24, 1888, S. D. Parish made a payment of \$240.25 on the note. In 1890 he sold a part of the mortgaged property to Lyman Parish, and in 1892 appellee W. L. Arnold purchased a portion of it.

On the ninth day of January, 1902, the appellant's testator, Sallie E. Walker, claiming to be the owner of the note executed by the Luxons to J. Stone Walker, instituted this action by filing in the Madison circuit court a suit against W. E. Luxon and wife. In the petition the payment of \$240.25 as of January 24, 1888, is admitted, and judgment prayed for the balance of the debt and an enforcement of the lien upon the mortgaged property. Afterward, in August,

1904, an amended petition was filed, setting up the fact that the appellees Lyman Parish and W. L. Arnold had purchased portions of the mortgaged property, and making them parties defendant. The two last-named defendants filed separate answers, each containing six paragraphs. In the first paragraph they denied certain allegations of the petition. In the second, they pleaded payment in full to J. Stone Walker of the debt sued on. By the third, ¹⁶ fourth, fifth and sixth paragraphs they pleaded several statutes of limitation. A general demurrer to the third, fourth, fifth and sixth paragraphs to the answers was sustained. The deposition of J. Stone Walker was then taken on the issues remaining, and the case submitted for judgment. The trial court adjudged that the plaintiff was entitled to a judgment against the Luxons for the amount claimed in her petition, and that she was entitled to enforce her mortgage against all of the property except that claimed by the appellees Parish and Arnold. As to them the fifteen year statute of limitation barred the right of action in plaintiff to enforce her mortgage against property owned by them. Therefore, the petition was dismissed as to them. Of this part of the judgment the appellant, Sallie E. Walker's executor (she having died pendente lite), now complains.

The circuit judge evidently changed his opinion as to the validity of the plea of the fifteen year statute of limitation between the time the general demurrer to the paragraphs of the answer pleading that statute and the rendition of the judgment. But we assume that plaintiff was not prejudiced by this change, in so far as the preparation of her case was concerned. Of course, the court would have permitted her to reply to the several paragraphs of the answer, if she had so desired, after he changed his opinion and overruled the demurrer to them; but, as all of the facts upon which the plea of the statute of limitation was based are admitted in the pleadings, no reply could have been made. The right of action on the note was clearly barred as to appellees at the time the action was instituted against them. The note was dated March 5, 1887, and the action ¹⁷ as to appellees was instituted in 1904. If we assume that the payment made in January, 1888, extended the life of the note for the full period of fifteen years, still the debt was barred in 1904; more than sixteen years having elapsed between that date and the time the action was commenced against appellees: *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181; *Kendall's Admr. v. Clarke*, 90 Ky. 178, 11 Ky. Law Rep. 980, 13 S. W. 583; *Cook v. Union Trust Co.*, 106 Ky. 803, 21 Ky. Law Rep. 454, 51 S. W. 600, 45 L. R. A. 212.

Appellant seeks to avoid this conclusion by pointing out that the action was instituted against the Luxons just a few

days before the statute of limitations barred the claim against them; and it is said that, because the running of the statute was stopped against the Luxons, it was also stopped as against appellees. This position is manifestly unsound. The appellees were not sued until they were made parties defendant by the amended petition filed in August, 1904, and the statute ran as to them until that time. When the amended petition was filed, making them parties, more than sixteen years had elapsed since the payment in January, 1888, from which time the running of the statute must be dated. The unsoundness of appellant's position was held both in the cases of *Tate v. Hawkins*, 87 Ky. 577, 50 Am. Rep. 181, and *Kendall's Admr. v. Clarke*, 90 Ky. 178, 11 Ky. Law Rep. 980, 13 S. W. 583. In neither of these cases did the statute of limitations run as between the immediate parties to the debt sued for, but in each it was held that the remote vendees were protected by the running of the statute. Indeed, this proposition is so plain that it does not need the citation of authorities to support it. If the statute runs in favor of the remote vendees at all, it runs until stopped by the institution of an action against them. There was no action instituted¹⁸ against them until the amended petition was filed, in 1904, making them parties defendant, and the issuance of summons thereon.

The conclusion we have reached on this question makes it unnecessary for us to consider the sufficiency of the plea of payment made in the second paragraphs of the answers of appellees, to which no reply seems to have been filed.

Judgment affirmed.

Limitation of Actions.—As to the Effect of Amending a Pleading to bring in a new party as to whom the action is barred by the statute of limitations, see East Line etc. Ry. Co. v. Culberson, 72 Tex. 375, 13 Am. St. Rep. 805; *Leatherman v. Times Co.*, 88 Ky. 291, 21 Am. St. Rep. 342; *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278. If, in proceedings to enforce a mechanic's lien, a necessary party is made a party by amendment of the bill after the statutory time for bringing suit has expired, he is the only person who can take advantage of the fact that he was not made a party to the bill within the time limited: *Casserly v. Wayne Circuit Judge*, 124 Mich. 157, 83 Am. St. Rep. 320.

When an Amendment to a Declaration Sets Up No New Matter or Claim, but merely restates in a different form the cause of action, it relates to the commencement of the suit, and the statute of limitations is arrested at that point. But when the amendment introduces a new or different cause of action, it is treated as a new suit begun at the time when the amendment is filed: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278. See, also, *Nelson v. First Nat. Bank*, 139 Ala. 578, 101 Am. St. Rep. 52; *North Chicago St. R. R. Co. v. Aufman*, 221 Ill. 614, 112 Am. St. Rep. 207.

FLOWERS v. LOGAN COUNTY.

[138 Ky. 59, 127 S. W. 512.]

COUNTY—Estoppel to Recover Money Illegally Expended.—Where the fiscal court of a county and the taxpayers have for many years allowed public money to be expended in an irregular manner, the county is estopped to recover the money from the officer making the expenditure, if he has made it in good faith for an authorized purpose and the county has received the benefit. (pp. 349, 350.)

COUNTY—Estoppel to Recover Money Illegally Expended.—An officer who has expended county funds for a legal purpose, but in an irregular manner, has the burden, in a suit against him by the county to recover the money, to show a proper application thereof. (p. 350.)

COUNTY—Recovery of Funds Expended by Officer.—The fact that a public officer, who has been directed to make repairs on certain roads, in paying the costs thereof uses money appropriated to construct a bridge, does not entitle the county to recover the same from him, if it is a part of the "road and bridge fund" of the county. (p. 351.)

COUNTY—Recovery of Compensation Paid Officer.—Where a member of a fiscal court as committeeman has been paid for services ordered by the court and rendered in good faith in maintaining roads, the county cannot recover the money so paid, on the theory that members of the fiscal court cannot be allowed anything for their services except their attendance upon sessions of the court. (p. 353.)

CONSTITUTIONAL LAW.—There is No Public Policy which prohibits the legislature from doing anything which the constitution does not prohibit. (p. 353.)

OFFICER—Whether can Employ Himself.—The idea that a public official cannot employ himself to do work for the public is the common-law view of the implied limitations on the powers of a trustee, but where a statute expressly authorizes the act in question, the common law on that point stands repealed. (p. 353.)

Bowder & Bowder and S. R. Crewdson, for the appellant.

R. W. Davis, J. S. Rhea and S. Y. Trimble, for the appellee.

O'REAR, J. Appellant was a justice of the peace, and a member of the fiscal court of Logan county from January, 1898, to January, 1906. During that time the county built a new courthouse, demolished the old building, and sold the material, and made other improvements upon the public square, by grading it, putting down concrete walks, setting out trees, and so forth. There was not a supervisor of roads or bridges during the period. The county poorhouse was managed by a committee appointed by the fiscal court. That body also levied a road and bridge tax, which was apportioned to the several magisterial districts for the maintenance of the public roads therein, including certain turnpikes. Squire Flowers was appointed a committee of the fiscal court to expend the money appropriated to the Russellville district

for repairing roads, and for building a bridge. He was also appointed a member of the committee to superintend the building of the new courthouse, and of the poor farm committee. He was appointed sole committee to sell the old material in the abandoned courthouse building and to grade and have made the other named improvements upon the public square at the county seat. The orders of the fiscal court making these appointments sometimes denominated the members as "commissioners," and sometimes as "committee." Squire Flowers sold the old material, and applied the proceeds to the county purposes under the orders appointing him committee—either to roads or to the poor farm. The fiscal court from time to time entered orders appropriating gross sums for the public work; that is, for such and such road districts, and for grading and paving the public square, and the like, and for building bridges. The orders allowed the sums to the members of the committee, or to the ⁶² "commissioner" or "commissioners" as they were sometimes called. Some thirteen thousand dollars were thus placed in the hands of Squire Flowers to be expended for the purposes named. From time to time he reported his actions to the fiscal court showing how the money had been applied. The court by orders of record approved his conduct. The court also allowed him various sums by way of compensation for his extra services as road committee, courthouse committee, and poor farm committee. These allowances in no instance exceeded three dollars a day, and sometimes were less. After the change of administration, the county brought this action against appellant Flowers to recover from him all the money allowed to him as above stated. This action was based upon the notion that the appropriations to Flowers as commissioner or committee to be expended upon public improvements were unauthorized, and were void. Likewise, that the allowances to him for his services other than for those rendered in attending sessions of the court were illegal and void as being in excess of the statutory regulation, as well as being in contravention of public policy.

The affairs of the county, whether honestly administered, had been, to say the least of it, loosely conducted; that is, there were not such records of accounts kept as would be a proper check upon the public expenditures, and in many instances no record at all was kept. The practice of letting individuals of the fiscal court expend the public money as they deemed necessary was irregular as well as dangerous. Confusion necessarily resulted. Opportunity was undeniably made for speculation and extravagances. Public accountants employed by the new administration made up a balance-sheet of the county's affairs ⁶³ covering the period in question. It did not show, nor is there proof here now to show, that any

of the public money had been misspent. It merely pointed out what had been appropriated, what raised by taxation and otherwise, and how applied, so far as the records then disclosed. It included a well-grounded criticism of the loose methods of bookkeeping which had prevailed, as well as the irregular and illegal procedure by which the appropriations had been attempted to be applied.

Appellant by his testimony, and by what is a more satisfactory character of evidence, his passbooks kept by the bank where he deposited the money, shows satisfactorily that every dollar which had been placed in his hands by the fiscal court had been applied for the purposes designated by the court, and where none was designated, as in the instances where he sold the material in the old courthouse building, it was applied to other county purposes, all of which was reported to the fiscal court, and approved by that body by entries of record. Logan county contends in this suit that, notwithstanding such application, it ought to recover the money, because the manner of its appropriation by the fiscal court was contrary to the statute, and was therefore void. The opinion in *Boyd County v. Arthur*, 118 Ky. 932, 26 Ky. Law Rep. 906, 82 S. W. 613, is relied on by appellee as controlling authority. In that case the Boyd county fiscal court had done, so far as appropriating public money for public road purposes, apportioning it among the magisterial districts, and appointing the magistrates commissioners to expend it, just what had been done by Logan county here. But the proceeding in the Boyd county case was radically different from the nature of this action. We held in ⁶⁴ *Boyd County v. Arthur* that the attempted delegation of power of the court and jurisdiction over the public roads by the fiscal court to its several members was contrary to the statute, and on appeal by the county judge we held that the orders should be reversed and set aside; furthermore, we held that injunction would lie to prevent the irregular application of the public money. We are yet as firmly of the opinion there expressed as when it was written. Further observation has confirmed the unwisdom, the impolicy, the illegality of the course pursued by those fiscal courts. But where the fiscal court and the taxpayers have stood by for many years and allowed the public money to be expended by that kind of proceeding, and it has actually been applied to the purposes for which it was raised and appropriated, it is quite a different question whether the county will be permitted to recover the money. The vice in the proceeding was not in doing something not authorized by, or forbidden by, the law, but was doing that which was allowed in a manner not authorized by law. If the thing done had been illegal, or not warranted by law, however beneficial it might have been, the public ought to be estopped to deny

the validity of the expenditure; or where the thing is authorized, but it is proposed to do it in an unauthorized manner, upon seasonable complaint those charged with doing the thing will be compelled to execute it as the law directs, and prohibited from doing it otherwise. But where the thing is authorized to be done, and is done by the party charged with doing it, but done in a manner contrary to that directed by the statute, the court will not compel the official to pay back the money and let the public continue to enjoy the benefits of its expenditure. If it ⁶⁵ is made to appear that the expenditure was in good faith, and the public has got that which it was entitled to, good conscience forbids the recovery. The law therefore denies it.

Upon the facts in this record the circuit court found that the public money in the hands of Squire Flowers had all been accounted for, had been applied to legal ends, and that the county had received, and the public enjoyed, the benefits from the expenditures in as full a manner as if the most exact compliance with the statute had been observed. We do not feel authorized from this record to disturb that finding. The burden was upon appellant to show a proper application of the money. No presumption is indulged in his behalf under such circumstances. He did not keep accounts of his dealings, nor separate accounts of the various funds given into his charge. Ordinarily, that circumstance would warrant an inference unfavorable to him. He was an old man, a farmer who had large business interests, and who was a successful business man. He did not know how to keep books, it seems. But his knowledge of how to build and how to repair roads, and how to buy material and employ labor, how to sell what he had to sell, and how to drive a good bargain in making contracts for public works, was first class. He was also diligent, attentive to the public affairs, and exacting on its behalf. He was a forceful, practical man, whose judgment and services in these matters appear to have been really valuable. It seems as if he was the leading spirit in the movement in his county for public improvements. No charge is made against his honesty. No doubt is entertained as to his business sagacity. No question was suggested as to his vigilance. The only point now urged is that ⁶⁶ he, in ignorance, followed the course which had obtained in his county for many years, and assumed to discharge a trust which ought not to have been delegated by the fiscal court, and that he failed to keep books of itemized entry of all his receipts and expenditures. What he did concerning his accounts was to deposit to his credit in bank as commissioner or committee (the account was "Jas. S. Flowers, Com.") all money appropriated for his disbursement. Against these deposits he drew checks to those persons performing labor on the public works under his charge, or

who furnished material. With the burden imposed on him to show satisfactorily the proper expenditure of the money, appellant has done that to the satisfaction of the trial court and to this court.

One of the items which was originally embraced in the suit, but later withdrawn, was the appropriation to the appellant of sixteen hundred and fifty dollars to build a bridge across Muddy river at Duncan's. Appellant had discounted that warrant to Geo. L. Gillum & Son. He used eleven hundred and eight dollars and seventeen cents in building the bridge. Two hundred and sixty dollars he paid out in repairing public roads in his district, which he had been directed by the fiscal court to have repaired. The remainder he asked to have applied on account of his services. The warrant which he had sold to Gillum & Son was repudiated by the county. Gillum & Son brought suit upon it against the county treasurer, and against this appellant Flowers. The court adjudged that although the warrant was void, and the assignment of it was without authority, yet as all the parties had acted in good faith, and the county had actually received the benefit of the expenditure of eleven hundred and eight dollars and seventeen cents in the building of the bridge, it was compelled to pay to Gillum & Son that much of the warrant sued on: *Milliken v. Gillum & Son*, 135 Ky. 280, 122 S. W. 151. No opinion was expressed on the claim of Flowers against the county. That was a question reserved. Upon the same principle as announced in that case, the sum expended upon the road should be credited to appellant. He was ordered to have the work done, and had it done. He has paid for it out of the public money (a part of the "road and bridge fund" of the county.) No good could come of letting the county recover the money not spent on the bridge, and then repay it to the same person because it was owing him for work for which the county was legally responsible.

The several fiscal courts of the state are given jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair necessary public buildings; to build bridges and keep them in repair; to provide a poorhouse and farm (Ky. Stats., sec. 1840 [Russell's Stats., sec. 2795]); and by section 4306 of Kentucky Statutes (Russell's Stats., sec. 5439), those courts have general charge and supervision of the public roads and bridges of the county. The section continues: "The public roads shall be maintained either by taxation or by hands allotted to work thereon (or both) in the discretion of the respective counties." The roads and bridges of Logan county were kept up by taxation and allotment of hands. Most of the roads were not macadamized. But especially in Russellville precinct there were some six or eight turnpike roads, aggregating considerable mileage.

They had been built many years ago at the expense of the precinct in which they were located, under a provision of a special statute. There had never been toll-gates upon them. They were a part of the public road system of the county, free to public travel, maintained by the fiscal court in the ⁶⁸ manner in which in its discretion was thought best; that is, whether by taxation or by allotment of hands. Section 1845 of Kentucky Statutes (Russell's Stats., sec. 2979) reads: "The members of the court, except the county judge, shall be entitled to three dollars per day for each day they are engaged in holding fiscal court, and also for each day in which they are engaged in actual attendance at the meetings of the committees of the said court, said compensation to be allowed by said court and to be paid out of the county levy: Provided, that no compensation shall be allowed members of said court for attendance at the meetings of the committees thereof except in those counties that maintain a free system of turnpikes under the control and supervision of the fiscal court."

The contention of appellees is, and such was the view seemingly entertained by the court below, that the members of the fiscal court cannot be allowed anything for their services except their attendance upon sessions of the court. It was held that Logan county does not maintain a free system of turnpikes under the control and supervision of the fiscal court. The county does maintain a system of turnpike roads, although the system has not yet been extended to every part of the county. These roads are free for public travel. The turnpikes of this state as originally operated were toll-roads, whether owned by the state or the counties, or private corporations, or by the counties, state and private ownership jointly, as was frequently the case. In later years provision had been made by law for the counties acquiring the entire ownership of such roads, and when so acquired, as has been done in most instances, they may be operated by the counties as toll-roads or as free roads. If operated as free roads, then they are ⁶⁹ kept up at the public expense, by taxes levied, or by hands allotted from the citizenship of the county. Logan county never had any toll-roads, yet it did contain turnpike roads. These roads, forming a part of the system of public highways, are operated without toll-gates, and are therefore free turnpike roads. The county has been extending the system a little at a time, until now it is said that it has nearly one hundred miles of such roads. As that class of highways requires more care and attention than the ordinary dirt road, and as they are directly under the supervision of the fiscal courts, the legislature has deemed it expedient to allow the counties the option of two ways of superintending the work: One, by appointing road supervisors; the other, by direct control by the fiscal court without supervisors. Where the latter method is

adopted, obviously, much additional work is thrown upon the members of the fiscal court. Unless the court traveled over the county as a body, accompanied by its clerk and records, it must do its work through committees, which the section of the statute just quoted allows to be done, as well as allows the members of the committees, although members of the court, to be paid three dollars a day for each day they actually attend upon such committees. The size of the committees is wholly within the discretion of the court, as is the necessity for them. Nor does the statute confine the pay to members of road committees. In counties where the fiscal courts have so much work to do, as where there are free turnpikes in the county, the legislature has seen fit to allow the members of all committees to be paid. Whether that was judicious legislation is not for the determination of this court. Whether the persons named as committees are called commissioners, or ⁷⁰ committee, does not seem to us to be material. The fact is their relation to the court and its work is that of committees. It was seemingly so construed by the fiscal court and its members. Misdescriptions will not be allowed to defeat a manifest intention to do a legal thing, where, if the misdescription was literally applied, it would operate to defeat it. Appellant rendered the services; they were received by the fiscal court, and ordered by it; it allowed the statutory compensation, and has paid it. The services were valuable, and rendered in good faith. Appellant ought not to have been required, as by the judgment appealed from he was, to pay back the money paid to him for his work as member of various committees of the fiscal court.

Boyd County v. Arthur, 118 Ky. 932, 26 Ky. Law Rep. 906, 82 S. W. 613, is again cited and relied upon by the appellee. That case does not show whether there was a system of free turnpike roads in Boyd county. The court assumed, in absence of such allegation, that there was not, and held that in that event the members of the court could not be appointed to do work for the court and to be paid by the county. That was because a statute forbade it in that state of case (section 1749 of Kentucky Statutes, as frequently applied by this court): Wortham v. Grayson Co. Ct., 13 Bush, 53; Mitchell v. Henry Co., 124 Ky. 833, 30 Ky. Law Rep. 1051, 100 S. W. 220; Pulaski Co. v. Sears, 117 Ky. 249, 25 Ky. Law Rep. 1381, 78 S. W. 123; Daviess Co. v. Goodwin, 116 Ky. 891, 25 Ky. Law Rep. 1081, 77 S. W. 185. There is no public policy which prohibits the legislature from doing anything which the constitution does not prohibit. The idea that a public official cannot employ himself to do work for the public is the common-law view of the implied limitations on the powers of a trustee. But ⁷¹ where the statute expressly authorizes the act, then the common law on that point stands repealed, and,

as there is nothing in the constitution forbidding it, the question becomes one solely of legislative discretion, into the wisdom of which this court has neither the jurisdiction nor the inclination to inquire.

Whereupon the judgment is reversed on the original appeal and affirmed on the cross-appeal. Remanded, with directions to dismiss the petition.

ON THE ESTOPPEL OF A COUNTY OR MUNICIPAL CORPORATION TO CONTEST ILLEGAL CLAIMS OR EXPENDITURES.

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I. Preliminary Observations on Equitable Estoppel.

"Corporations, quite as much as an individual, are held to a careful adherence to truth in their dealings with mankind, and cannot,

by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced." No more appropriate introduction to the theme of the operation of the great equitable doctrine of estoppel on the county or municipal corporation which is contesting illegal claims and expenditures could have been found than this closing sentence in the famous opinion in *Zabriskie v. Cleveland etc. R. R. Co.*, 23 How. 381, 16 L. ed. 488, which has been cited many times, but not more times than its luminous terms have merited. In *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656, the court, in citing it, say that the doctrine is applied for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act, ultra vires, has been accomplished. Leaving executory contracts out of consideration, the corporation is never excused from payment on the plea that the contract was beyond its power, if the other party has performed his part of it, spent his money and put in his labor in the production of values which the corporation has appropriated. The opinion contains this, that "While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though ultra vires, of which they have received the benefit. This is demanded by the plainest principles of justice: 2 Kent's Commentaries, 11th ed., 381, note; *Zabriskie v. Cleveland etc. R. R. Co.*, 23 How. 381, 16 L. ed. 488; *Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Cary v. Cleveland etc. R. R. Co.*, 29 Barb. 35; *Parish v. Wheeler*, 22 N. Y. 494; *De Groff v. American L. T. Co.*, 21 N. Y. 124; *Argenti v. San Francisco*, 16 Cal. 255; *McCluer v. Manchester & L. R.*, 13 Gray, 124, 74 Am. Dec. 624; *Chapman v. Mad River & L. E. R. Co.*, 6 Ohio St. 119; *Hale v. Mutual Fire Ins. Co.*, 32 N. H. 295, 64 Am. Dec. 370; *Chicago etc. R. R. Co. v. Howard*, 7 Wall. 413, 19 L. ed. 121." It was cited again in *Commissioners of Leavenworth County v. Miller*, 7 Kan. 479, 12 Am. Rep. 425, and in *Davis v. Old Colony R. R.*, 131 Mass. 258, 41 Am. Rep. 221. In the latter case, which dealt with the ultra vires doctrine as applied to corporations, the court said: "There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland etc. R. R. Co.*, 23 How. 381, 16 L. ed. 488, by Mr. Justice Hoar in *Monument Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322, and by Lord Chancellor Cairns and Lord Hatherley in *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 668, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party."

We had occasion very recently to deal with the subject of equitable estoppel in *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88, and it has been dealt with as applied in a large number of cases repeatedly through this series. No necessity exists, therefore, for again furnishing the various definitions of terms and divisions of estoppel generally, but Mr. Pomeroy's definition had best be

kept before the reader in the consideration of the subject of our note. He says that equitable estoppel is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law and in equity, from asserting rights which might, perhaps, have otherwise existed, either of property, of contract or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part acquires some corresponding right either of property, of contract or of remedy: Vol. 2, sec. 804. Our own definition founded on that of Lord Coke—an estoppel is where a man is concluded by his own act or acceptance to say the truth—is that if a man by his statements or behavior leads another to do something which he would not have done but for the expression of that language or the exhibition of such behavior, such first man shall not be allowed to deny his utterance or act to the loss, injury or damage of the other one. He shall neither say what is not true nor by his demeanor act so as to mislead another. If he does either, it is fraud, which is the pilot to the haven of equitable estoppel, which, under the doctrines of the courts, affords shelter to the intended victim, who might else be wrecked upon the shores of injustice. In dealing with the matter of the present essay, we have advisedly refrained from presenting that phase of the subject which relates specially to the application of the doctrine to cases arising out of the bond issues of municipal corporations, which is reserved on account of want of space for future publication.

II. The Application of the Doctrine to Governmental Bodies.

There appears to be no good reason why the doctrine should not be applied without any limitations to counties and municipal corporations in the same way as it is to corporations and individuals; and probably the right to apply it would not have been questioned if it had not been originally for the exclusion from its range of the public government, and the extension of the principle was soon sought to be made with forms of government on a lower plane. In the *United States v. Willamette Val. & C. M. Wagon-road Co.*, 54 Fed. 807, we find authority to the effect that the government is not ordinarily bound by an estoppel, and that though individuals may be estopped by the unauthorized acts of their agents, apparently within the scope of their agency, the sovereign power, being the trustee of the people, is rarely, if ever, bound by the acts of its agents. The case referred to then cites authority for the exceptional cases in which the government may become susceptible to the influence of the doctrine. "While it is true that for the neglect or the illegal or unauthorized acts of its agents the government should not ordinarily be estopped to show the truth, there is good authority, based upon sound reasoning, to support the doctrine that where the government has acted by legislative enactment, resolution, or grant, or otherwise than through the unauthorized or illegal acts of its agents, and the parties dealing with the government have relied upon the same, and in good faith have so changed their relation to the subject matters thereof that it would be inequitable to declare such action or grant illegal, the government will be estopped: *Commonwealth v. Andre's Heirs*, 3 Pick. 224; *Cahn v. Barnes*, 7 Saw. 48, 5 Fed. 326; *State of Indiana v. Milk*, 11 Biss. 197, 11 Fed. 397; *Pengra v. Munz*, 29 Fed. 830; *Woodruff v.*

Trapnall, 10 How. 190, 13 L. ed. 383. No good reason can be offered why the United States, in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. The defense of estoppel stands upon different ground from that of laches," and in *United States v. Stinson*, 125 Fed. 907, 60 C. C. A. 615, it is laid down that the substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals (*Chope v. Detroit Plank Road Co.*, 37 Mich. 195, 26 Am. Rep. 512); that when the government seeks its rights at the hands of a court, equity requires that the rights of others should be protected as well (*Carr v. United States*, 98 U. S. 433, 25 L. ed. 209) and that the government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. In *Booth v. State*, 131 Ga. 750, 63 S. E. 502, it is, however, laid down with the strictness of the old rule that acts of negligence or wrong conduct, even if such exist on the part of a state officer, cannot be pleaded as an estoppel to prevent the state from asserting its right to collect a debt. Even if the acts alleged constituted negligence or misfeasance, it is well settled that the state can only be estopped by legislative act or resolution (*Alexander v. State*, 56 Ga. 478), because it is not to be presumed that the state will do or has done injustice to any of her citizens. The same principle is adopted in *State v. Portland General Electric Co.*, 52 Or. 502, 95 Pac. 722, 98 Pac. 160, and in *City of Chicago v. Illinois Steel Co.*, 229 Ill. 303, 120 Am. St. Rep. 258, 82 N. E. 286, the court said that while municipal corporations are not within the statutes of limitation except as to private rights, the courts would enforce an equitable estoppel against them to prevent the operation of the rule in cases of long acquiescence. The question now arises whether a corporation and especially a county or municipal corporation may repudiate its contract by alleging its want of power to enter into such contract. Bigelow says that confusion among the earlier authorities will be found in the answer to this question, and that the recent cases do not harmonize, but that it appears to be agreed by latter day and better authorities, that if the act undertaken was in and of itself ultra vires of the corporation, no act of the body can have the effect to estop it to allege its want of power to do what was undertaken: Bigelow on Estoppel, 5th ed., 466. *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897, 29 L. ed. 1026, is the authority for that position. In that case a bondholder sued the county on bonds and coupons issued under a statute incorporating a railroad company, under which there was authority to issue bonds to the extent fixed by certain named county commissioners and approved by the voters of the county. The amount was fixed at two hundred and fifty thousand dollars and approved by the voters. The county court, through its presiding judge and clerk, signed bonds for a total of three hundred and twenty thousand four hundred and fifty dollars, and the county paid the coupons on the whole issue, including the excess. This is to be noted as being subsequently relied on as ratification when the question of the estoppel of the county from denying its liability was raised. Mr. Justice Gray said that the certificate of the judge of the county court upon the back of each bond, that it was issued as authorized by the statute and by an order of the country court in pursuance thereof

could not estop the county to deny that the particular bond was void because the county court, at the time of issuing it, had exhausted the powers conferred by the act of the legislature and the vote of the people. "The certificate is not a recital in the bond. It is not the act of the county court, is not under its seal, nor signed by its clerk; but is simply the certificate of the person holding the office of judge of that court. Neither the statute, nor the vote of the people, nor the order of the county court, empowered him to make such a certificate, or to determine the question whether the county court had exceeded the power conferred upon it. An officer's certificate of a fact which he has no authority to determine is of no legal effect: *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315, 28 L. ed. 360. Nor can the payment of interest on all the bonds have the effect of ratifying bonds issued beyond the lawful limit; for a ratification can have no greater force than a previous authority, and the county cannot ratify what it could not have authorized: *Marsh v. Fulton Co.*, 10 Wall. 676, 19 L. ed. 1040."

III. The Application of the Doctrine to Counties and Municipal Corporations.

For a long while it was considered a moot point whether the doctrine of equitable estoppel could be legally applied to counties and municipal corporations, either in their public or other character. Dillon calls this their private character for want of a better descriptive word, and in section 675, fourth edition, of his *Municipal Corporations*, he says that as to property not held for public use, and as respects contracts of a private nature, there is no reason why such corporations should not fall within and be affected by limitation statutes. In actions of contract or tort, corporations may avail themselves of the statute and it may be used against them: *Piatt County v. Goodell*, 97 Ill. 84; *School Directors v. School Directors*, 105 Ill. 653; *People v. Oran*, 121 Ill. 650, 13 N. E. 726; *Strosser v. Fort Wayne*, 100 Ind. 443; *Preston v. Louisville*, 84 Ky. 118; *Reining v. Buffalo*, 102 N. Y. 308, 6 N. E. 792; *Simplot v. Chicago M. & St. P. Ry. Co.*, 5 McCrary, 158, 16 Fed. 350. After dealing with the question of public rights and announcing his opinion that, in that regard, municipal corporations are impliedly within ordinary limitation statutes (*District of Columbia v. Washington & G. R. R. Co.*, 1 Mackey (D. C.), 361), the learned judge draws the conclusion in section 676 of his work referred to, that "there is no danger in recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the court to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice may require."

Specific instances of the application of the doctrine are to be found in the reported cases. In *Chicago etc. R. R. Co. v. City of Joliet*, 79 Ill. 25, which was a bill to restrain the operation of a railroad over the streets and square of a city, we find: "From all these positive acts of recognition on the part of the city of Joliet of the right claimed by the railroad company, and long acquiescence in its exercise, there must be held to be an estoppel in pais against the city, if that principle be applicable at all to municipal corporations as respects public rights." In *Logan County v. City of Lincoln*, 81 Ill. 156, the court directly recognizes that the doctrine may have its application to

municipal corporations, but adds that before it can be invoked there must be some positive acts by the municipal officers which have induced the action of the other party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done. The mere nonaction of the officers would not be sufficient to work such an estoppel; it must be "positive acts": See, also, post, VI, b. In *Chicago & N. W. Ry. Co. v. People*, 91 Ill. 251, which was a petition for mandamus to compel the company to remove a stone arch out of a street in the city of Elgin, which arch was built by the company as a part of its roadbed, nineteen years previously, and the city had expressly agreed that the arch should remain until such time as it became necessary for the company to rebuild, when it should be so constructed as to leave the entire width of the street free to the public, the court considered that the city was estopped. It not only acquiesced in the right of the company to occupy the street for nineteen years, but "made a solemn written contract which continued the right. . . . The fact that the proceedings are in the name of the people does not affect the question here involved. The fee of the streets rested in the city of Elgin in trust for the public, and the public will be bound by whatever may have been lawfully done in regard to the streets by the city." The principle has been recognized also in *City of Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316; *Sims v. City of Frankfort*, 79 Ind. 446; *Greene County Commrs. v. Huff*, 91 Ind. 333; *Cheek v. City of Aurora*, 92 Ind. 107; *Simplot v. City of Dubuque*, 49 Iowa, 630; *Sims v. Chata-nooga*, 2 Lea, 694.

Having thus established that the doctrine may be applied to such municipal corporations, we shall proceed to inquire into the mode of its application in cases of so-called contracts and its mode of operation.

The rule now in force is practically that stated in *State Board of Agriculture v. Citizens' Street R. W. Co.*, 47 Ind. 407, 17 Am. Rep. 702, and adopted into *Hitchcock v. Galveston*, 93 U. S. 341, 24 L. ed. 659, that although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract.

In speaking of the defect of power it is suggested by some of the decisions that there is a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case where legislative power to do the act has not been granted. In the case last mentioned the city of Galveston, which, under its charter, had authority to construct sidewalks, directed the mayor and chairman of the committee on streets to make a contract for the city to get the work done. The contract involved a larger expenditure than the limit allowed by the charter for borrowing for general purposes, and the city agreed to pay for the work in bonds which it had no power to issue. The work was commenced, and after proceeding for about seven weeks, the contractors were compelled by force and by authority of the city to abandon their work without any fault of their own. The city council then declared the contract void, and so notified the contractors,

who brought suit to recover damages for the breach of contract. The questions were all raised on demurrer to the plaintiff's petition that the city had no power to make the contract nor bind itself to pay with bonds for the sidewalk improvements and that the power of borrowing was exceeded. It was held that the city council had lawful authority to construct the sidewalks, and therefore the right to direct the mayor and chairman of the committee on streets to make the contract. The council had not delegated all its power, but like every other corporation, it would do its ministerial work by agents, and even if there had been unlawful delegation, there was a sufficient ratification averred. As to the amount of the contract being in excess of that which the city had power to borrow for general purposes, the special purpose of the construction of the sidewalks was outside of it. The limitation of the borrowing power for general purposes implies that there may be lawful purposes which are not general. "It is in no sense a limitation of the debt of the city. If it is, the grant of power the charter contains was an idle thing, and the duties imposed could not be performed. The council, as we have seen, is empowered to grade and pave the streets and to construct sidewalks. There is no express limitation of these powers. Their exercise necessarily involves large expenditure. Such expenditure is, therefore, authorized. It is a plain incident of the power, and it is a special expenditure. . . . It cannot be regarded as a general purpose; for, if it is, all purposes of the charter are general. . . . By another article of defendant's charter, the city council was authorized to provide by ordinance special funds for special purposes. . . . For these reasons we are of opinion that the limitation upon the power of the council, to borrow for general purposes, did not make the agreement with the plaintiffs invalid." The court, having found so far, proceeded then to consider the question of estoppel as proposed to be applied to the city's claim of the illegal issue of the bonds which were to be used in payment under the contract. The conclusion of the court was readily reached that, conceding that the city had no lawful authority to issue the bonds, it did not follow that the contract was bad or that the contractor had no rights under it. The contractor was not suing on the bonds. "It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay, and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful."

IV. The Distinction Between the Application to Counties and to Municipal Corporations.

Very frequently difficulty is experienced in marking the difference of the result of the application of the doctrine to the different kinds of public corporations, and it is well to keep before us the points

of difference. They appear very clearly in *Hamilton County Commissioners v. Mighels*, 7 Ohio St. 109: "Municipal corporations proper are called into existence, either at the direct solicitation or by the free consent of the people who compose them. Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for; . . . the latter is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large." Keeping the difference of the constitution of these corporations in view, it will be interesting to note how the proposition that the doctrine of absolute immunity of the government, meaning thereby the state and its subdivision the county, is being gradually dissolved into the great general rule which will come to be established, that, where the corporation, county or municipal, does an act not prohibited by its charter or by the statute creating it, or does an act within the scope of its power but in an illegal way, whereby the position of the other party would be changed to his disadvantage if the corporation, having received the benefits of the act, were permitted to repudiate, the doctrine of equitable estoppel shall be always available as a deterrent.

V. Illustrations of the Doctrine as Applied to Counties.

a. **Where County, Defendant in Suit, had Pleaded That Mandamus was the Proper Remedy for Plaintiff to Pursue.**—A suit was brought against a county on warrants drawn by the ordinary, and the county demurred on the ground that the plaintiff's remedy, if any, was by mandamus against the county treasurer, and the suit was dismissed on that ground. The treasurer sought and was refused to be heard, when he was subsequently made the defendant in a petition for mandamus to require him to pay the warrants, to urge that the plaintiff had a complete remedy at law, other than by mandamus. Having in one court set up matter from which it received a benefit by an adjudication in its favor, it was estopped from repudiating its position in a subsequent action, and it made no difference that in one court the county was a party and in the other its treasurer: *Neal Loan & Banking Co. v. Chastain*, 121 Ga. 500, 49 S. E. 618.

b. **Where County Issued Illegal Orders for Payment of Interest.**—A county order drawn upon the county treasurer contained an authority for paying interest upon it, although the order was issued for current expenses and for interest upon prior orders given for similar current expenses. The county, having refused to pay, became defendant in a suit to enforce payment, and objected that it was incompetent for the county court to allow or pay interest on common county orders for current county expenses (*Hardin County v. McFarlan*, 82 Ill. 138, deciding they have no such power). In its opinion the court sustained the objection and said that the case was totally unlike those where it has been held that a corporation will be estopped to set up the plea of *ultra vires*. "Without saying that those cases can have no application to counties, it is sufficient to say they can have no application to the facts of the present case. The county has not here borrowed money, which it retains and refuses to pay, nor in

any other respect obtained that which it could not have obtained had its want of power in the respect here urged been made known": *Hall v. Jackson County*, 95 Ill. 352.

c. **Where County Officers Illegally Compromised Action at Law.**—The county commissioners of Perry county accepted from their auditor a sum of money in settlement of an action against him for money illegally detained by him, and dismissed the action, the sum being smaller than the amount detained. The statute contains an express limitation upon their power, *Burns' Annotated Statutes of 1901*, section 7913, providing that no settlements made by the board of commissioners of any county with any county officer shall be binding where such officer has failed to account for moneys received. The county was not estopped from maintaining a subsequent action against the auditor to recover the true amount due by him, the law being well settled that the allowance of illegal claims by the board to the officer does not furnish a justification to him for the retention of the amounts: *Tucker v. State*, 163 Ind. 403, 71 N. E. 140; the settlement of the first suit being accomplished in the absence of any practice of fraud upon the auditor, or any payment which he was not bound to make, or of any ignorance of facts. The agreement to discharge a debt on part payment is nudum pactum as to the balance: *Zuelly v. Casper*, 37 Ind. App. 186, 76 N. E. 646.

d. **Where the Fiscal Court of a County has Permitted Illegal Expenditure for Legal Purposes.**—The principal case, *Flowers v. Logan*, 138 Ky. 59, ante, p. 347, 127 S. W. 512, deals with this aspect of estoppel in a manner distinguished alike for thoroughness and unswerving accuracy. The facts appear in the opinion that the county sought to recover back moneys illegally expended but for a legal purpose, and O'Rear, J., has put the law concisely and well when he says that after the fiscal court and the taxpayers have stood by for years and have seen public money expended in an admittedly illegal way, but actually applied to the very purpose legally intended, the question of their estoppel is presented in quite a different light than if the thing done, irrespective of the means, had been illegal or not warranted by law. In the latter event, no matter how beneficial the result, the public ought not to be estopped from denying the validity of the expenditure, "but where the thing is authorized to be done, and is done by the body charged with doing it, but done in a manner contrary to that directed by the statute, the court will not compel the official to pay back the money and let the public continue to enjoy the benefits of its expenditures." The learned judge then concludes with the wise statement, worthy of a judge, broad in its terms and consonant with the tenets of the greatest judge of all—plain common sense, unhampered by the petty and trivial considerations which so often and so truly brand the cunning technicalities brought into play—"If it is made to appear that the expenditure was in good faith, and the public has got that which it was entitled to, good conscience forbids the recovery. The law therefore denies it."

A case very similar in facts comes from the same state and county in *Clark v. Logan County*, 138 Ky. 676, 128 S. W. 1079, in which the court practically adopted the opinion last cited and used the same excerpts as we have pleasure in reproducing, and we find in the opinion the dictum: "As to the remaining items, consisting of moneys placed in J. W. Clark's hands and which it is claimed he did not

account for, the trial court was of the opinion that he made a full and complete showing to the effect that these moneys were all expended for the purposes for which they were intended, and that Logan county received and enjoyed the full benefit thereof."

e. Illegal Payments on the Advice of the County Attorney.—The fact that the county attorney had advised the board of commissioners that compensation derived from statements furnished to abstract companies and commercial agencies containing information from the files and records in the clerk's custody, was not a part of the emoluments of the office, but belonged to the clerk, and the further fact that the county commissioners acquiesced in such advice and neglected to interfere with the appropriation of such sums by the clerk, did not estop the county from collecting the sums so appropriated by suit: *Board of Commrs. of Hennepin County v. Dickey*, 86 Minn. 331, 90 N. W. 775. This case is to be regarded as a very important one, outside of the chicanery by which the officer in question sought to establish his rights on the opinion of the county attorney. That phase of it may be dismissed by us as it was by the court: "It is of vital importance to the welfare of the commonwealth that its servants be imbued with a genuine civic spirit. . . . No theory is to be tolerated that permits the insidious vice of apathy to the interests of those who are served, or encourages by officials an importunate insistence in obtaining personal advantages to the public servant himself, for a public office is not to be treated as a 'private snap.'" Its importance arises from the attempt to utilize as against *Seymour v. Van Slyck*, 8 Wend. 403, *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199, *United States v. Van Zandt*, 11 Wheat. 184, 6 L. ed. 448, *Gibbons v. United States*, 8 Wall. 269, 19 L. ed. 453, *Day Land etc. Co. v. State*, 68 Tex. 526, 4 S. W. 865, and *Conwell v. Voorhees*, 13 Ohio, 533, 42 Am. Dec. 206, the case of *United States v. Hill*, 120 U. S. 169, 7 Sup. Ct. Rep. 510, 30 L. ed. 627, as supporting the contention that the advice of the county attorney and neglect of the commissioners to assert the rights of the county should be sufficient to create an estoppel. An examination of the latter case shows the want of analogy, and this want was surgically exposed in the splendid opinion of *Lovely, J.*

In *Caldwell v. Board of Commrs. of Boone County*, 41 Ind. App. 40, 83 N. E. 355, it was sought to estop the county from recovering money paid in a similar way—on the advice of the county attorney—and the effort met with the same fate of denial, and the court referred to the well-considered case of *Board of Commrs. etc. v. Heaston*, 144 Ind. 583, 55 Am. St. Rep. 192, 41 N. E. 457, 43 N. E. 651. On the power of the attorney to bind the county so as to estop them, the court said that the board were not empowered by law to employ legal counsel to make representations to appellant as to how much time he could be allowed for his services as county assessor, and if appellant advised with the county attorney on the subject, the said attorney, in advising him upon the matter, was his own attorney and not the county's. He was bound to know his duties and his rights under the law, and he had no right to look either to the board of commissioners or the county attorney for advice on the subject.

f. Void or Illegal Acts.—Without going into the details of the famous *Missouri* case, we cannot do better than cite its concluding

paragraph: "But it is said that, inasmuch as the bridge commissioner received and accepted the abutments and pier built by plaintiff, and the county court accepted said report, and paid the Bullen Bridge Company for its work, that thereby the county is estopped from resisting a recovery by plaintiff. The doctrine of estoppel does not apply to counties. Nor could the county, even by an order entered of record, ratify the void act of the bridge commissioner (*Wolcott v. Lawrence Co.*, 26 Mo. 272), for the reasons that, his acts being void, they were incapable of ratification: *Wolcott v. Lawrence Co.*, 26 Mo. 272, *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50, and cases cited; *Johnson v. School District*, 67 Mo. 319; *Maupin v. Franklin County*, 67 Mo. 327, and cases cited. These views result in affirming the judgment": *Heidelberg v. St. Francois County*, 100 Mo. 69, 12 S. W. 914.

A county was held not to be estopped from asserting title by the fact that the county court had levied, and the collector had collected, taxes upon lands over which the court was given control: *Hooke v. Chitwood*, 127 Mo. 372, 30 S. W. 167.

In a later case, however, *Missouri & S. W. Land Co. v. Quinn*, 172 Mo. 563, 73 S. W. 184, the court, while announcing the doctrine of the courts that counties were not estopped where the acts of the county officers in obtaining judgment and selling certain lots under execution were wholly unauthorized and void, said that where the officers had power to act, but acted irregularly, and the county by its conduct and laches in asserting its rights, in an appropriate proceeding for that purpose, sought to prejudice the rights of an individual, the court would rigidly enforce the doctrine of estoppel and laches. Later on in *Palmer v. Jones*, 188 Mo. 163, 85 S. W. 1113, we find almost a complete recognition of the extent of the application of the doctrine, for that case says that not only does the statute of limitations run against the county in respect to its swamp lands, but, by way of analogy, it had been ruled that the doctrines of estoppel and laches also apply to a county in such respect, the same as they do to individuals in regard to similar transactions, and there are cited in support of this: *Simpson v. Stoddard County*, 173 Mo. 421, 73 S. W. 700; *Dunklin County v. Chouteau*, 120 Mo. 577, 25 S. W. 553; *American etc. Cooperage Co. v. Butler County*, 93 Fed. 301; and *Rummell v. Butler County*, 93 Fed. 304.

In *People v. Board of Supervisors of St. Lawrence County*, 101 App. Div. 327, 91 N. Y. Supp. 948, we find a very sweeping statement: "If a private corporation, through its officers or an individual, had done what the board of supervisors did in 1898, and the town had acted on the faith of such recommendations and promises, and incurred expense, the principles of estoppel might apply to at least a part of the bill finally presented. The county, however, is a municipal corporation, and municipal corporations cannot be estopped by the unauthorized or illegal agreements or acts of their agents: *Dillon on Municipal Corporations*, 4th ed., secs. 457, 936; *Moore v. Mayor*, 73 N. Y. 238, 246, 29 Am. Rep. 134." With all respect to the learned writer of the opinion in question, Judge Dillon is at special pains to point out that a county is not a municipal corporation. He says in section 22 of the edition of his work cited that an incorporated school district, or county, as well as city, is a public corporation, but the school district or county, properly speaking, is not, while the city is, a municipal corporation. "All municipal corporations are

public bodies, created for civil or political purposes; but all civil, political or public corporations are not, in the proper use of language, municipal corporations. The phrase, 'municipal corporations,' in the contemplation of this treatise, has reference to incorporated villages, towns, and cities, with power of local administration, as distinguished from other public corporations, such as counties and quasi corporations."

g. Receiving Dividends from Receiver of Insolvent Bank.—In *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28, we find a case of nonestoppel by receipt of dividend. In that case it was held that a county treasurer was a trustee of moneys which came into his hands by virtue of his office; and if he wrongfully deposited them to his own credit in a bank, aware of their character, and such bank became insolvent and the county received a dividend from the receiver, it was not estopped thereby from having its claim decreed a first lien upon any asset of the insolvent bank, which it would show was the product of its own moneys.

h. Illegal Contract of County Board of Supervisors Ineffectual.—Where a county board of supervisors made an agreement that the county pay such expenses as a town might become liable for in sustaining an assessment, and subsequently passed a resolution not to comply with such agreement, it being ultra vires, it was held that as to a very large proportion of the expenditure no estoppel could be invoked, even if the principles of estoppel were applicable to the county, because the county board withdrew from its former position and by resolution gave distinct notice that such claims were not a county charge, and that the agreement to pay them was beyond the scope of the powers of the board: *People v. Board of Supervisors of St. Lawrence County*, 101 App. Div. 327, 91 N. Y. Supp. 948.

i. Representations as to Boundary Lines.—When a certain intending purchaser of land from the county was negotiating with it, its commissioner represented to him where a certain line of the boundary ran, and in a later purchase the representation was repeated, and the land purchased thereon. The county was estopped from setting up a claim to lands against those claiming under the purchaser, which was in conflict with the representations so made by their commissioner: *Colonial etc. Mtg. Co. v. Tubbs* (Tex. Civ. App.), 45 S. W. 623.

j. Mistakes of Officers.—Certain lands were exempt from taxation as lands of the county, but by official errors they were returned as delinquent, and were sold and a tax deed made to the purchaser. At the sale the county treasurer announced that the county had no interest in the land. In a suit to quiet title it was urged that the county was estopped by the acts of its officers. The opinion contains the rule that a public corporation is not estopped by acts of its officers and agents in excess of their power, nor by omissions or mistakes of officers in performing duties specifically enjoined upon them by law as distinguished from duties imposed upon the corporation itself; and that every person dealing with an officer of a corporation is presumed to know the extent of his powers and the capacity in which he is at the time acting: *Gilbert v. Pier*, 102 Wis. 334, 78 N. W. 566. The opinion in that last-named case is the more valuable in that it points out that the case of *Adams County v. B. & M. Ry. Co.*, 55 Iowa, 94, 2 N. W. 1054, 7 N. W. 471, is a corrective of some of the

earlier views of the court on the subject, and that that case calls attention to the fact that the early decisions are contrary to the general rule given above, which also finds support in *Smith v. Board*, 44 Wis. 686; *Hoffman v. Chippewa County*, 77 Wis. 214, 45 N. W. 1083, 8 L. R. A. 781; *Town of Cady v. Bailey*, 95 Wis. 370, 70 N. W. 285.

k. Recovery of Fees Illegally Paid.—Perhaps the clearest exposition of the law relating to the recovery back of fees, discovered to have been illegally paid to a county official is to be found in *St. Croix County v. Webster*, 111 Wis. 270, 87 N. W. 302. In that case the claimant was clerk of the circuit court, and received his compensation in the shape of fees for certain enumerated services set forth in the Revised Statutes of 1898, section 747; and at the end of the section there is a provision that whenever the county board should think the compensation therein provided insufficient, they might order an additional sum to be paid out of the county treasury. As a fact, the board never acted under this provision, but nevertheless sanctioned payment for services not contained in the schedule to the section referred to, and the county sued for the return of the amounts. The opinion lays down a golden rule when it says: "Whatever uncertainty may exist in the decisions of other courts upon the main question presented in this action, there is no uncertainty as to the position of this court, and that position may be briefly stated as follows: A public officer takes his office cum onere, and all services performed by him within the scope of his official duties, or which are voluntarily performed as such officer, are covered by his salary or compensation as fixed by law. A municipal corporation has no jurisdiction to allow to such officer additional compensation not authorized by law for the performance of such services, and if such allowance be in fact made, it is a void act. If such officer receives such additional compensation from the municipal corporation whose officer he is, even with its consent, he obtains no title thereto, but it may be recovered by the corporation in a proper action at law. If the proper corporate officers in such case refuse or neglect to bring such action, an equitable action may be successfully maintained by any taxpayer to recover such moneys for the benefit of the corporation, if the action be a timely one, and there are no equitable considerations which will operate as an estoppel: *Supervisors v. Knipper*, 37 Wis. 496; *Frederick v. Douglas Co.*, 96 Wis. 411, 71 N. W. 798; *Quaw v. Paff*, 98 Wis. 586, 74 N. W. 369; *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 258, 69 Am. St. Rep. 925, 75 N. W. 964; *Webster v. Douglas Co.*, 102 Wis. 181, 72 Am. St. Rep. 870, 77 N. W. 885, 78 N. W. 451. When the action is brought by the corporation itself, there can be no doubt that the proper form thereof is that of an action for money had and received."

In *Tarrant County v. Rogers* (Tex. Civ. App.), 125 S. W. 592, a similar state of facts existed. There the clerk in charge of records and indexes made marginal notes of the description of land conveyed by the instruments recorded, a matter of great convenience to the public, but not such work as the commissioners could require him to do, and if without authority to do so, the county was not bound by their action in undertaking to make a contract with him for such service. The county was not estopped in any manner from asserting that the contract was unlawful, and recovering the amount which

had been paid on the basis of the contract, on the authority of *Tarrant County v. Butler*, 35 Tex. Civ. App. 421, 80 S. W. 656; *Baldwin v. Travis County*, 40 Tex. Civ. App. 149, 88 S. W. 480; *Delta County v. Blackburn*, 100 Tex. 51, 93 S. W. 419, and *Bell County v. Felts* (Tex.), 120 S. W. 1065.

1. Claim on Contract Executed in Advance of Appropriation.—In *State v. Goldthait*, 172 Ind. 210, 87 N. E. 133, a contract was made with a county board by the claimant of the nature of what is known as a tax ferret contract—a percentage contract under which the claimants were to get thirty-five per cent of moneys collected for the treasurer from omitted unassessed taxable property in the county, and by their efforts they became entitled to about seven hundred dollars. No appropriation was made for the purpose of dealing with this work, and it was established that it fell within the category of the ordinary assessor's duties, and therefore could not be contracted to be done by third persons as a matter of public policy. The court held that there was nothing upon which to ground an estoppel by the county receiving the money, and that there was no question of equitable cognizance with respect to enforcing payment from a fund in obtaining or preserving it—first, because the claim was grounded on the contract referred to, and second, that no estoppel could grow out of dealing with public officers of limited authority: *Moss v. Sugar Ridge Township*, 161 Ind. 417, 68 N. E. 896; *Lee v. York School Township*, 163 Ind. 339, 71 N. E. 956; *Daily v. Board of Commrs.*, 165 Ind. 99, 74 N. E. 977; *Hord v. State*, 167 Ind. 622, 79 N. E. 916.

VI. Illustration of the Doctrine as Applied to Municipal Corporations.

a. The General Rule.—It may be taken that as a general rule municipal corporations may be estopped by their own acts exactly the same as a private individual: *Marshall County Supervisors v. Schenck*, 5 Wall. 772, 18 L. ed. 556; but no estoppel can arise from an act of the municipal authorities done without authority of law: *Seeger v. Mueller*, 133 Ill. 86, 24 N. E. 513; *Stevens v. Training School*, 144 Ill. 336, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832; *Snyder v. City of Mt. Pulaski*, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407; *Pettis v. Johnson*, 56 Ind. 139; *Day v. Green*, 4 Cush. 433; or beyond the scope of its municipal power: *Cedar Rapids Water Co. v. City of Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081. The rule is stated in a more restricted way in *Union Depot Co. v. City of St. Louis*, 76 Mo. 393, that when a municipal corporation enters into a contract which it has authority to make, the doctrine of estoppel applies to it with the same force as against individuals: *Grant v. City of Davenport*, 18 Iowa, 179; *Hannibal & St. J. R. R. Co. v. Marion County*, 36 Mo. 294; *Hale v. Union Mutual Fire Ins. Co.*, 32 N. H. 295, 64 Am. Dec. 370; *State v. Union Township*, 8 Ohio St. 394; and in *Board of County Commrs. v. City of Denver*, 30 Colo. 13, 69 Pac. 586, it is given: "The defense of equitable estoppel may be asserted against a municipal corporation when the character of the action and the facts and circumstances are such that justice and equity demand the corporation should be estopped: *Dillon on Municipal Corporations*, 4th ed., sec. 675; *Monat Lumber Co. v. City of Denver*, 21 Colo. 1, 40 Pac. 237; *Denver v. Girard*, 21 Colo. 447, 42 Pac. 662; *Board of Supervisors of Logan Co. v. City of Lincoln*, 81 Ill. 156; *Town of Fairplay v. Board of Commrs. of Park Co.*, 29 Colo. 57, 67 Pac. 152."

In *Moore v. City of New Orleans*, 32 La. Ann. 726, in the virile opinion of Mr. Justice Fenner, occurs a fine broad statement of the general rule for the application of the doctrine of estoppel in pais. He says: "The doctrine of estoppel is unquestionably subject to some important restraints and qualifications in its application to public corporations; but such juridical persons are not emancipated from those great duties imposed by the law of nature, recognized in every system of morals and religion, and consecrated in universal jurisprudence. . . . Against an innocent party, the maxim holds, 'Nemo suam turpitudinem allegans audiendus est,' and it is equally true that against such innocent party the other party, even to an illegal contract, cannot invoke its nullity as a defense against his obligation, without restoring, or offering to restore, the consideration which he has received. Such an estoppel was enforced by the supreme court of the United States; *Pendleton Co. v. Amy*, 13 Wall. (U. S.) 297, 20 L. ed. 579."

b. **Mere Nonaction of Officers.**—Although the doctrine of estoppel in pais may have its application to municipal corporations, it cannot be based simply on the nonaction of the officers. In *Logan County v. City of Lincoln*, 81 Ill. 156, Chief Justice Scott says it would be a pernicious doctrine to establish that public rights of municipalities could be extinguished by the neglect of the officers, who had been appointed by the corporation, to enforce them for any unreasonable time. "Before the doctrine of estoppel can be invoked, there must have been some positive acts by the municipal officers, which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done. But mere nonaction of its officers is not sufficient to work an estoppel against a municipal corporation." The acts must be positive on the part of the officers, and the claim founded as justice and right may require. This is emphasized in *Martel v. City of East St. Louis*, 94 Ill. 67, which follows and adopts *Roby v. City of Chicago*, 64 Ill. 447, *Chicago etc. R. R. Co. v. City of Joliet*, 79 Ill. 39, and *Logan City v. City of Lincoln*, 81 Ill. 156. The positive act, referred to in *Martel v. City of East St. Louis*, 94 Ill. 67, was the issuance to Martel of a license to keep a dramshop for which he paid fifty-six dollars and twenty-five cents, and also gave a bond for three thousand dollars as required by law; and it was during the currency of this license that he was prosecuted for selling without a license, because a question had arisen whether the ordinance under which the license was granted was valid, and whether the agents acting on behalf of the city were officers de facto, de jure, or at all. As the court put it, before Martel would be subjected to the penalties imposed by the ordinance, the city should have returned him the money paid and revoked the license issued to him by those assuming to exercise official acts on the city's behalf, and it was according to right and justice, in such a case, that the corporation should be held to be estopped from prosecuting the defendant for exercising a privilege he had bought and paid for. In *Guilfoyle's Exr. v. City of Maysville*, 129 Ky. 532, 112 S. W. 666, the rule is reasserted, that generally the public is not estopped by the mere nonaction of the public officials, and that there must be some positive, overt official act of the legislative body in a matter within the

legislative discretion before it will be said to have acted on the matter.

c. Issuance of Invalid Certificates of Indebtedness.—Where the trustee of a school township issued an order or certificate of indebtedness in the name of his township, without any consideration whatever therefor, such order or certificate was invalid and void and could not be enforced against the township. The fact that the holder of the order forbore from suing the township on the agreement of the trustee or his successor in office to pay the order at some later date, or as soon as the township had funds in hand, did not affect the liability of the township so as to bind it nor estop it from pleading the want of consideration as a defense to an action on the instrument: *Axt v. Jackson School Township*, 90 Ind. 101.

d. Errors in Taxation.—The fact of error in taxing property of the city being that of the assessor, who is a public officer and not merely the private agent of the corporation, does not estop the city from claiming its own land, notwithstanding dealings consequent on the error of the official: *Rossire v. City of Boston*, 4 Allen, 57. The town of New Durham purchased under the law certain land sold for taxes. Two years afterward, and before the deed had been given by the collector, the premises were taxed to the former owner. The town was not estopped from setting up its title by assessing the tax upon the land to the former owner: *Berry v. Bickford*, 63 N. H. 328.

e. Error in Discharging Tax Lien.—The case of *Curnen v. City of New York*, 79 N. Y. 511, furnishes an excellent illustration of the rectification of an error between two parties not being permitted to prejudicially affect an innocent third party, owing to the merciful result of the application of equitable estoppel. In that case the plaintiff bought a lot, and, before paying the purchase price, she ascertained from the official source that two assessments were marked upon the record as "paid by Killian Brothers March 7, 1873," in the column of the book headed "By whom paid." On the faith of that entry she paid over the purchase money. Subsequently, alleging a mistake as to the lot, Killian Brothers brought suit against the city for repayment of the amount paid on the lots, and obtained a judgment therefor, which also directed that the entries of payment be canceled, which was so done. The plaintiff was not made a party to that action, and brought suit to compel the city to discharge her lot from the lien for those assessments and to discharge them of record. The court said that a fact once admitted by a corporation, through its officer, duly and properly acting within the scope of his authority, is evidence against it, and cannot be withdrawn to the prejudice of anyone, who in reliance upon it, has changed his situation in respect to the matter affected thereby, and that in such a case, the doctrine of estoppel applied to a corporation as well as to an individual. The fact that in making and receiving the payment, the parties were acting under a mistake concerning the lot, could not make any difference so far as the plaintiff was concerned. She was misled by the defendant's act through its agent; and the defendant city was estopped from setting up, as against her, that the fact was different from the representation made by the record. There was negligence at the outset, laches in exposing the mistake, and an intervening purchaser in good faith, relying upon the record. To have

held that the city was not estopped would have opened the door to gross frauds, seeing that the money was actually paid and the lien then and there discharged.

This case is to be distinguished from *Philadelphia Mtg. & Trust Co. v. City of Omaha*, 63 Neb. 280, 65 Neb. 93, 93 Am. St. Rep. 442, 88 N. W. 523, 57 L. R. A. 150, because in the case just named the taxes were marked "paid" by mistake, whereas in the former case the money was paid for the identical lots and the suggestion of mistake was improperly made. The rule as laid down in the latter case is that the doctrine of estoppel in pais cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of one of its agents or officers which has been relied upon by a third person to his detriment, and that it can be appealed to effectively only where the municipality is acting in its private, as contradistinguished from its public or governmental, capacity.

f. Money had and Received.—The well-known case of *Board of County Commrs. v. City of Denver*, 30 Colo. 13, 69 Pac. 586, gave ample scope for the discussion of the application of the equitable doctrine. Under Laws 1874, page 285, section 4, the county treasurer is *ex officio* the collector of city taxes, and his duty is to pay over monthly the moneys collected, so that when moneys were collected by him and paid into the county treasury, the county was only liable for money had and received and not as trustee for the city. For a period of about twenty-three years money was wrongly, but not fraudulently, paid into the county treasury by the officer in question, and no reason was assigned why the city should not have been aware of the action of the treasurer, and no demand was made until just before action brought. The lapse of time made it almost impossible to ascertain the amount, because from time to time certain of the moneys had been refunded. The statute of limitations was pleaded. The court, in dealing with the position, after stating that the statutes of limitation were intended for the repose and peace of society and were grounded upon equitable considerations, said: "By the positive acts of its own official, without fraud or collusion, or in circumstances which would prevent the city from having full knowledge of his action, money belonging to it has been paid to the county, the aggregate of which is made up of a great number of items. After the lapse of so many years it is impracticable to determine these items with certainty, or to ascertain what arrangement existed between the parties with respect to these matters, or what sums may have been paid on this account. The action is not to enforce the performance of any governmental or public duty, or liability of the county; and where, in actions of this character, the same equitable reasons exist to estop a municipal corporation from asserting stale claims which obtain in actions at law barred by the statute of limitations, equity, by analogy to the latter, will stay the municipality for the same reasons, and limit it to the same period: *Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14."

g. Denial of Ordinances.—While the acts, doings and averments of municipal councils, and those of officers of municipalities, may, perhaps, not ordinarily operate as estoppel against such bodies, the doctrine cannot be carried to the extent of permitting a municipality, after judicially enforcing against a grantee of franchise rights the

obligations such grantee had undertaken in consideration of the grant made, to single out and repudiate that part of the ordinance, evidencing the grant, which provides for an extension of the time limit of the franchise. A city cannot be heard to hold to an ordinance in part and repudiate it in part: *New Orleans S. F. & L. R. Co. v. City of New Orleans*, 109 La. 194, 33 South. 192.

A railroad company had, on the strength of the acts of the city, and relying on the certified copies of the ordinance and other proceedings of the city council, duly attested, been to an extra expenditure of a large sum of money—facts presenting a strong foundation for the application of the doctrine of equitable estoppel. City officials testified that they had no book in which to record the ordinance and they were kept on file till a proper book should be purchased. Other circumstances connected with the ordinance having been proved, the court said: "Under all these corroboratory circumstances, and with the pressure of the equitable estoppel, we cannot say that the district court erred in admitting parol proof that the ordinance did, as a matter of fact, pass the council, and receive the approval of the mayor: *City of Troy v. Atchison & N. R. Co.*, 13 Kan. 70.

The city of Marion, within its powers, adopted an ordinance granting to the Marion Water Company the right to lay mains in the streets, and providing for the rental of hydrants, and all the usual powers of a water company; and the company executed its works and carried on for nearly twenty years on the faith of such ordinance, receiving from and yielding to the city the usual interchange of contractual results. An error was discovered by the city in the ordinance, and it sought to defeat its liability for the water actually furnished, received, and used at the contract rate. "The irregularity asserted did not involve a want of power. Had such been the case, the other contracting party might well be held to have acted in the premises at his peril. But it cannot be true, in reason or authority, that he may be despoiled of the fruits of the contract after the same has been fully performed on his part, simply because the city council is now able to point out that the draftsman employed by it had unintentionally and carelessly omitted to make reference in the title of the ordinance adopted by it to certain of the provisions contained therein. Every principle upon which the law of estoppel is based may be invoked to override a defense thus sought to be interposed. The situation may fairly be likened to that of a principal who has accepted and retains all the benefits of a contract, but who seeks to avoid liability on his own part by asserting that the agent who acted for him in making such contract had failed to conform to his letter of authority. . . . To allow him to repudiate, and at the same time retain, would be to give sanction to an act of injustice and put a premium on fraud: *Illinois T. & S. Bank v. Arkansas City etc.* (C. C.), 67 Fed. 196; *Moore v. New York*, 73 N. Y. 238, 29 Am. Rep. 134; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Knox Co. v. Aspinwall*, 21 How. 539, 16 L. ed. 208; *Marsh v. Fulton Co.*, 10 Wall. 676, 19 L. ed. 1040; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659; *City of Camden v. Mulford*, 26 N. J. L. 49; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215; *City of Keokuk v. Ft. Wayne Elec. Co.*, 90 Iowa, 67, 57 N. W. 689; *Dillon on Municipal Corporations*, sec. 457"; *Marion Water Co. v. Marion*, 121 Iowa, 306, 96 N. W. 883. A recent case, *Missouri River Telephone Co. v. City of*

Mitchell, 22 S. D. 191, 116 N. W. 67, adopts this rule and lays it down that a city may be estopped from denying the validity of its own ordinance, which it has held out as legally adopted.

This denial of an ordinance or part of an ordinance, however, is to be distinguished from the case of no ordinance at all, as occurred in *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088. In that case there was no ordinance to authorize the work sued for. The council had passed a resolution that the work, certain grading, should be done, but it was a simple resolution and not passed with the formalities of an ordinance and therefore unavailing. In like manner a general ordinance could not authorize it where the law demanded a special ordinance: *City of Cape Girardeau v. Fougau*, 30 Mo. App. 551; *City of Poplar Bluff v. Hoag*, 62 Mo. App. 672. A resolution is only the preliminary expression of opinion of the council that the improvements are necessary and not intended to dispense with the ordinance. Each has its separate function: *City of Nevada v. Eddy*, 123 Mo. 546, 27 S. W. 471. It was insisted that as the work was done according to contract and the city received it and derived its benefits, it should be estopped from denying the validity of the contract. The court, however, following *State v. Murphy*, 134 Mo. 548, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, and authorities therein cited, ruled that the doctrine of estoppel could not be applied to validate a contract which the corporation had no power to make.

When rights, however, have been acquired by third persons under municipal action without notice of an existing infirmity in it, where such action is not *ultra vires*, such persons are protected by the doctrine of estoppel, and not by the rule pertaining to *de facto* officers: *State v. Perkins*, 139 Mo. 106, 40 S. W. 650; *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184.

h. Unauthorized Consents to Judgment.—A judgment, on its face for a railroad subscription and by consent against the town commissioners, will not estop the town from showing that there was no authority shown for the indebtedness, because town commissioners have no authority to bind the town by submitting to a consent judgment for a matter appearing on the face of the judgment to be not for town purposes. Since consent judgments are merely contracts of the parties, acknowledged in open court and ordered to be recorded, they bind only those parties, but when the parties are representatives, the judgments only bind the *cestuis que trustent* when the trustees have power to act. So, when the town authorities consented to a judgment without authority they could not bind the town. With the authority the consent judgment would be an estoppel, without it the judgment was void: *Union Bank v. Commrs. of Town of Oxford*, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487. A recital of facts which corporate officers have no right to determine, or a recital of matters of law, does not estop the corporation: *Northern Bank v. Porter Township Trustees*, 110 U. S. 608, 4 Sup. Ct. Rep. 254, 28 L. ed. 258; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315, 28 L. ed. 360.

i. Breach of Contract.—Where the contract for furnishing lights to a city within certain hours provided for a rebate pro rata according to the time lights were not so furnished, and the contractor sued for light supplied and the city pleaded nonperformance of his contract, in that he had failed to light the city within the hours named

in his contract and the city had never complained of the failure until it was sued, it was estopped from alleging the failure to perform and forfeited the right of recovery under the contract: *Kennedy v. City of New York*, 99 App. Div. 588, 91 N. Y. Supp. 252.

j. Unauthorized Acts and Declarations of Municipal Officers.—It will have been gathered from what we have said, and from the illustrative cases, that municipal corporations are not estopped by statements or acts made by their officers outside of the scope of their authority, which is to that extent strictly limited and iron-bound, but there is a very important qualification to this proposition. The doctrine is that the unauthorized acts of municipal officers are regarded as the acts of the corporation, provided the acts are performed by that branch of the municipal government which is vested with jurisdiction to act for the corporation upon the subject to which the matter relates: *Chicago v. McGraw*, 75 Ill. 570; *Chicago v. Chicago & W. I. R. R. Co.*, 105 Ill. 73; *Thayer v. City of Boston*, 19 Pick. 511, 31 Am. Dec. 157; *Buffalo & Hamburg Turnpike Co. v. City of Buffalo*, 58 N. Y. 639. The true measure of the test is thus always before the lawyer, whose chiefest difficulty will be in appreciating the adjustment of the test to cases on the border line. We have selected at random such as may be relied on as safe indicia for his conclusions.

In *Re Prince & Walter*, 131 Fed. 546, the municipality was held entitled to certain taxes from the trustee of a bankrupt's estate, notwithstanding the tax collectors had agreed that the bankrupt's exemptions might be paid to him, although it exhausted the money in the trustee's hands which should have been paid for taxes. In *Blake Crusher Co. v. Town of New Haven*, 46 Conn. 473, the defendant was not estopped from denying its indebtedness because its agent had made a declaration to the contrary. In *Abell v. Prairie Civil Township of Henry County*, 4 Ind. App. 599, 31 N. E. 477, the statement of one of the town trustees was equally powerless to estop the township, the court stating the principle to be, that such a corporation could not be estopped by the conduct of an officer whose duties are defined by law, except to the extent that such officer is authorized to act for the corporation. In *Sanitary District of Chicago v. George F. Blake Mfg. Co.*, 179 Ill. 167, 53 N. E. 627, the municipality was estopped from setting up a resolution limiting the expense of certain work, the person employed by the proper officer to do such work not having informed him of the limitation. It was fairly put that if the municipality's engineer exceeded his authority, it should have called him to account, and stopped the illegal expenditures, instead of availing itself of the benefit of them and then refusing payment. In *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263, a draftsman in the office of the superintendent of buildings, in charge of the plans of a building the city was about to erect, handed to the plaintiff a wrong tracing, upon which bids were to be founded. The contract being made and litigation arising out of it, the city was held bound by the error. "The city owed the duty to have a competent person in charge of this office, and to see that he discharged his duty. His act in selecting and handing out plans and tracings was its act. There is nothing new in thus holding a municipality responsible for the want of fidelity of those who act for it. Suits of that kind are of daily occurrence. The liability thus imposed is not within the constitutional and statutory limitations in regard to the creation of indebted-

ness." In *City of Chicago v. Roth*, 26 Ill. 456, Roth sued the city for his work in constructing street crossings. The city defended on the ground that the appropriation was exhausted and the street commissioner had been so notified by the controller. The court held, that if the agent of the city disobeyed the lawful order of the city authorities, the officer and not the laborer, who had been properly employed and had performed the work for the city, was responsible for the disobedience. We have already cited the cases of *Martel v. City of East St. Louis*, 94 Ill. 67, and *Logan County v. City of Lincoln*, 81 Ill. 159; and *City of Litchfield v. Litchfield Water Supply Co.*, 95 Ill. App. 647, and *Millard v. Webster City*, 113 Iowa, 220, 84 N. W. 1044, are to the same effect. *City of Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954, is on the alteration of an original contract by the proper officer of the corporation binding his principal. Where the officers and council of a city contracted for the services of a special attorney in violation of an ordinance, the city was not estopped from denying its liability: *Hope v. City of Alton*, 214 Ill. 102, 73 N. E. 406; *Burkett v. City of Athens* (Tenn. Ch. App.), 59 S. W. 667; but where there was originally power to engage special counsel, and he was irregularly engaged, but the city had the benefit of his services, the city is estopped from claiming the benefit of the irregularity: *Edwards v. City of Kirkwood*, 147 Mo. App. 599, 127 S. W. 378. In *Wormstead v. City of Lynn*, 184 Mass. 425, 68 N. E. 841, the fact that an officer who had theretofore legally made contracts on behalf of the city made an unauthorized contract on their behalf did not estop the city from showing his want of authority to bind it. In *Indiana Road Mach. Co. v. City of Sulphur Springs* (Tex. Civ. App.), 63 S. W. 908, the illegal act of the mayor in signing an unauthorized contract did not estop his city from repudiating it, they not having received any benefit under it. In *City of Providence v. Comstock*, 27 R. I. 537, 65 Atl. 307, it was held that assessors of taxes are not empowered to make admissions of title on behalf of the city. Their acts only bind the city when within the scope of their official employment, and *Renter v. Lawe*, 94 Wis. 300, 59 Am. St. Rep. 892, 68 N. W. 955, 34 L. R. A. 733, was utilized by the court in distinguishing *Simplot v. Dubuque*, 49 Iowa, 630, which is cited with disapproval in the Wisconsin case.

k. Where the Power to Contract Exists and is Irregularly Exercised.—A municipal corporation, which has retained the benefits of a contract, invalid not because it was beyond the scope of its powers, but because in the making or performance of the agreement the power of the municipality was illegally exercised, may be estopped from denying the validity of the contract as against an innocent party, who has changed his position in reliance upon the action of the municipality. But no such estoppel can arise in favor of one who knowingly agrees to assist the municipality in the illegal exercise of its power. The city of Ft. Scott was bound under the law to invest the surplus of its sinking fund in the bonds of those parties who offered them at the lowest price. It made a contract with a brokerage company to repay it the amount it should expend in the purchase of the city's bonds, not exceeding their par value and ten per cent premium, and to pay the company for its services in addition more than sixteen per cent of the par value of the bonds it bought. As the statute prescribing the method of investing the sinking fund was exclusive, the contract with the brokerage company was ultra vires of the city and void, and a contract to pay the

reasonable value of such services was void for the same reason: *City of Ft. Scott v. W. G. Eade Brokerage Co.*, 117 Fed. 51, 54 C. C. A. 437. If the work done was within its power, it may be estopped from raising the defense of ultra vires, notwithstanding the failure to comply with some regulation for the exercise of the power: *City of Chicago v. Norton Nutting Co.*, 196 Ill. 560, 63 N. E. 1043; *City of Chicago v. Pittsburgh C. C. & St. L. Ry. Co.*, 244 Ill. 220, 91 N. E. 422; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Ludington Water Supply Co. v. City of Ludington*, 119 Mich. 480, 78 N. W. 558; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427. Where an electric light company assigned its franchise to a city and had previously contracted with an electric power company for the purpose of carrying the wires of the power company on its poles, and the city continued to carry the wires and for a short period demanded and received pay therefor, the city was estopped from denying the contract and treating it as a license which was revoked by the assignment: *Commercial Electric Light & Power Co. v. City of Tacoma*, 20 Wash. 288, 72 Am. St. Rep. 103, 55 Pac. 219. In *Book v. Polk & Goerke*, 81 Ark. 244, 98 S. W. 1049, where a sale of land was made by the St. Francis levee district, the deed executed and notes taken for part of the purchase money, the district was estopped from repudiating the sale on the ground that it was authorized only to sell for cash, and was held to its bargain, having received the benefits of it.

L. Contract Under Unconstitutional Statute.—Where a municipal corporation has entered into a contract with an individual under and by virtue of a statute which is unconstitutional, and the subject matter of the contract is not ultra vires, illegal, or malum prohibitum, and the facts are such, as against the corporation, as would estop an individual from setting up as a defense the unconstitutionality of the statute, the municipal corporation will also be so estopped. The principle of estoppel applies as well where proceedings of a municipal corporation are questioned on the ground of the unconstitutionality of the statute under which they are had, as where they are attacked on other grounds; and where a majority of abutting lot owners petition a city council to pave a street, and, after due notice, proceedings are taken for its paving, and bids are made for doing the proposed work, all before any question of the constitutionality of the statute arises, but thereafter, and after a decision has been made by the supreme court under which it is probable that such statute may be declared unconstitutional, the bids are accepted and a contract entered into, without objection, for doing the work, the city cannot, after obtaining the benefit of the contract, claim that they had no power to enter into it, because the statute authorizing it is unconstitutional: *City of Mt. Vernon v. State*, 71 Ohio St. 428, 104 Am. St. Rep. 783, 73 N. E. 515.

M. Where No Power to Contract Exists.—Where one enters with a municipal corporation into a contract, which is void because opposed to the constitution and laws of the state, and contrary to its settled public policy, complete performance of such contract on the part of such person will not prevent the municipal corporation from pleading its want of power or the illegality of the contract: *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907; *Edwards Hotel & City R. Co. v. City of Jackson (Miss.)*, 51 South.

802; *City of Unionville v. Martin*, 95 Mo. App. 28, 68 S. W. 605; *La France Fire Engine Co. v. City of Syracuse*, 33 Misc. Rep. 516, 68 N. Y. Supp. 894; *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588. Nor will the expenditure of money on the faith of such contract or the fact of the corporation receiving the benefit of the contract strengthen the position against the municipal corporation: *Hope v. City of Alton*, 214 Ill. 102, 73 N. E. 406; *Mealey v. City of Hagerstown*, 92 Md. 741, 48 Atl. 746; *Paul v. City of Seattle*, 40 Wash. 294, 82 Pac. 601; nor the fact that as the result of a compromise between certain municipal and railway officials, a bridge had been built and kept in repair for years at their joint expense: *State v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656. In *Shaw v. City and County of San Francisco (Cal.)*, 110 Pac. 149, the employes in a department were appointed in violation of the civil service provision of the charter of the municipality. The court held that to permit a liability to be imposed upon the municipality for services admittedly rendered under appointments void under the law would be to fritter away the entire civil service scheme; and that though the services were rendered, the city was not estopped from repudiating liability. The court, too, took occasion to point out that *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189, cannot be said to overrule *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96.

n. **Erroneous Construction of the Law.**—The incorrect construction of the law by city authorities, and the consequent forbearance by them of certain acts within their powers, do not estop them from asserting their rights on proper occasion. In 1890 the plaintiffs paid their legal portion of the cost of paving one of the streets in the city, adjacent to their property, and the city misconstrued the laws of 1885 as not empowering it to charge an abutting owner with the cost of a subsequent pavement. When the city awoke to its rights, the plaintiffs claimed they were forever immune from any special charge against their properties on account of such street paving. The argument was plausible to the ear, but not convincing to the judgment of the court, which held the city was not thereafter estopped from making a special assessment to defray the expense of a new pavement: *Carstens v. City of Fond du Lac*, 137 Wis. 465, 119 N. W. 117.

VII. Summary.

Instances and illustrations might be given in much greater number than our limited space will allow, but those given will be found ample for comparison. When some *casus omissus* occurs, the student should, by the light of the accepted principles of the application of the doctrine, which we have collected and classified, be enabled to judge for himself whether the state of facts surrounding the new case is such as to raise the right to an equitable estoppel. Keeping before him the nature of the corporation, the compass of the authority of the officer, the acts performed with regard to their absolute prohibition or qualified permission, the resulting benefits, the knowledge or ignorance of illegality, and, above all, guiding himself by the light of the common sense which should regulate business matters, and of the fair play which the courts seek through the intricate mesh of complicated circumstances and only too often prolix technicalities, he will have little difficulty in deciding whether his case is one which he, of good conscience, can present to a court of equity for relief.

LEVI v. LOEVENHART & COMPANY.

[138 Ky. 133, 127 S. W. 748.]

BANKRUPTCY—Discharge of Debt.—Where Employers accept an order from an employé directing them to pay to his creditor a stated amount each week from his wages until the debt is settled, but subsequently the debt is satisfied by the discharge of the employé in bankruptcy, the employers are thereby relieved from liability on account of accepting the order. (p. 379.)

Samuel A. Ledeman and Kohn, Baird, Sloss & Kohn, for the appellant.

Nathan Kahn, for the appellees.

133 **LASSING, J.** On October 1, 1906, Albert G. Metzler, who was then in the employ of Loevenhart & Co., gave to Joseph Levi the following order: "Louisville, Kentucky, October 1, 1906: Messrs. Loevenhart & Co., Louisville, Ky.—Gentlemen: Kindly pay to Mr. Jos. Levi \$7.50/100, seven and 50/100 dollars each week, out of my salary as long as I am in your employ, or until my indebtedness of \$500 to Mr. Jos. Levi is settled. [Signed] Albert G. Metzler"—directing **134** them to pay to said Levi out of his wages the sum of seven dollars and fifty cents per week until a debt due him, amounting at that date to \$500, and evidenced by a promissory note, was satisfied. Loevenhart & Co. accepted this order, as appears from the following indorsement thereon: "Accepted. Loevenhart & Co. Oct. 1st, 1906." Thereafter, Metzler filed his petition in bankruptcy, and was in due time adjudged a bankrupt and discharged. After he became a bankrupt, Loevenhart & Co. discontinued the payment of the weekly stipend to Levi, and on March 10, 1908, he filed suit in the Jefferson circuit court to compel Loevenhart & Co. to comply with the terms of the order and to pay him a balance alleged to be due on his debt, amounting to \$237.50. He pleaded, further, that Metzler was still in the employ of the defendants, and had been ever since they ceased paying him as per the order, and that, under the terms of the order, there was then in their hands, or should have been, more than enough money, if they had complied with their agreement, to satisfy the balance of his debt.

A special demurrer and certain motions to strike were disposed of, and the defendants answered, in five paragraphs. The first is a traverse. The second pleads payment by Metzler. The third pleads usury in the note to the amount of \$265.50. The fourth pleads, substantially, that Levi had taken advantage of the embarrassed financial condition of Metzler, and had overreached him, and induced him to execute an unconscionable contract, the enforcement of which was

against a sound public policy, and that, because of the advantage thus taken of him in procuring him to execute the contract for \$500, when, as a matter of fact, he only received \$222.85, the ¹³⁵ same should not be enforced. In the fifth paragraph he set up the discharge of Metzler by the bankruptcy court, and filed with his answer copies of the order of the federal court for the western district of Kentucky, showing his adjudication and discharge in bankruptcy, together with a schedule filed by him in said court, in which plaintiff is given as a creditor, and he sought to be relieved from the payment of plaintiff's claim along with others. This adjudication and discharge they pleaded in bar of plaintiff's right to recover.

Plaintiff replied, traversing the allegations of the first, second, third, and fourth paragraphs, and pleaded, in response to the fifth, that he had taken no part in the bankruptcy proceedings, had filed no claim, and, in short, had ignored the proceedings therein. A demurrer was sustained to the fourth and fifth paragraphs of his reply. He declined to plead further, and, over his objection, his petition was dismissed, with judgment for costs. He appeals.

There is really but one question involved on this appeal, and that is whether or not the discharge in bankruptcy satisfied plaintiff's debt and relieved him, and Loevenhart & Co. for him, of any further liability on account of the order and acceptance above set out. It is not seriously denied that the adjudication in bankruptcy discharged the \$500 debt which plaintiff held against Metzler; but it is argued that, by this order, plaintiff acquired a property right in Metzler's wages, of which he could not be deprived by the discharge of the bankrupt, and on this theory rests his right to recover. This court has, in a number of cases, held that such an order, given by a debtor to his employer in favor of a creditor, operates as an equitable assignment of the wages designated ¹³⁶ in the order, and that the title of the creditor to the wages covered by the order is superior to that of any attaching or execution creditor: *Holt v. Thurman*, 111 Ky. 84, 98 Am. St. Rep. 399, 23 Ky. Law Rep. 92, 63 S. W. 280; *Manly v. Bitzer*, 91 Ky. 596, 34 Am. St. Rep. 242, 13 Ky. Law Rep. 166, 16 S. W. 464; *Boone v. Connelly*, 12 Ky. Law Rep. 190. This is the extent to which these cases have held, and the question has arisen only as to the rights of creditors to subject wages that have been earned. The terms of the order were literally complied with by appellees at all times before Metzler's discharge, and it is only with the right of plaintiff to hold them liable for wages not then earned, but to be earned in the future, that we are now called to pass upon.

Undoubtedly the order in question secured to plaintiff an equity—suspended, as it were—which attached immediately

that the wages were earned, and secured to him a priority in the earned wages to the extent stipulated in the order superior to that of any other creditor; but such right did not attach until the wages were earned. The order was valid only so long as the indebtedness of plaintiff remained unsatisfied. It is of no higher or greater dignity than the debt. It is merely an agreement that there shall be appropriated out of the debtor's wages a stipulated sum, to be credited on his debt until it is satisfied; i. e., paid or discharged. By his discharge in bankruptcy Metzler settled every debt that he owed—was entirely, completely and finally relieved from any and all liability on account thereof; and as plaintiff's claim was set up and described in the proceeding in the bankruptcy court as a debt owing by Metzler, it was likewise canceled, satisfied and settled, and, being settled, the conditions of the order ¹³⁷ were fully satisfied, and appellee relieved from all liability thereunder.

This being so, it becomes unnecessary to discuss the further questions of interest raised by counsel in their briefs.

Judgment of the lower court is affirmed.

A Discharge in Bankruptcy, according to *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, does not release a prior assignment of wages to be earned in the future nor destroy the lien created by such assignment. This is perhaps the more persuasive view, because by the assignment a lien is created, and the operation of the statutes of bankruptcy is not to destroy liens, except to the extent that they so provide, but merely to prevent the maintenance of any personal action against the bankrupt; while on the other hand, the view as expressed in the principal case rests on a solid foundation of sound law.

MADISONVILLE, HARTFORD AND EASTERN RAILROAD COMPANY v. CATES.

[138 Ky. 257, 127 S. W. 988.]

SURFACE WATER—Right to Accelerate or Retard Flow.—

Where two estates, one lower than the other, join, the lower is subject to the easement or servitude of receiving the natural flow of surface water from the upper one. Therefore the owner has no right to create obstructions causing such water to back upon or overflow the upper ground. And the owner of the upper estate must not, by operations on his land, divert the water from its natural channel and thereby make a new channel on the lower ground, nor collect in one channel waters usually flowing off on his neighbor's land by several channels and thereby increase the flow upon the lower ground. (p. 383.)

SURFACE WATER—Right to Accelerate or Retard Flow.—

Where a railroad company negligently diverts surface water from

its natural channel, or obstructs its usual course, and causes it to overflow an adjoining estate in greater and unusual quantities than was its wont, to the injury of crops thereon, the company will not be heard to complain that the owner does not minimize his damages. He is under no duty to relieve the company from the consequences of its negligence. (p. 383.)

SURFACE WATER—Damages for Flooding Crops.—The measure of damages for injury to growing crops by causing surface water to overflow the land is the value while standing, of so much of them as are wholly destroyed, and the depreciation in the value of the remainder. (p. 385.)

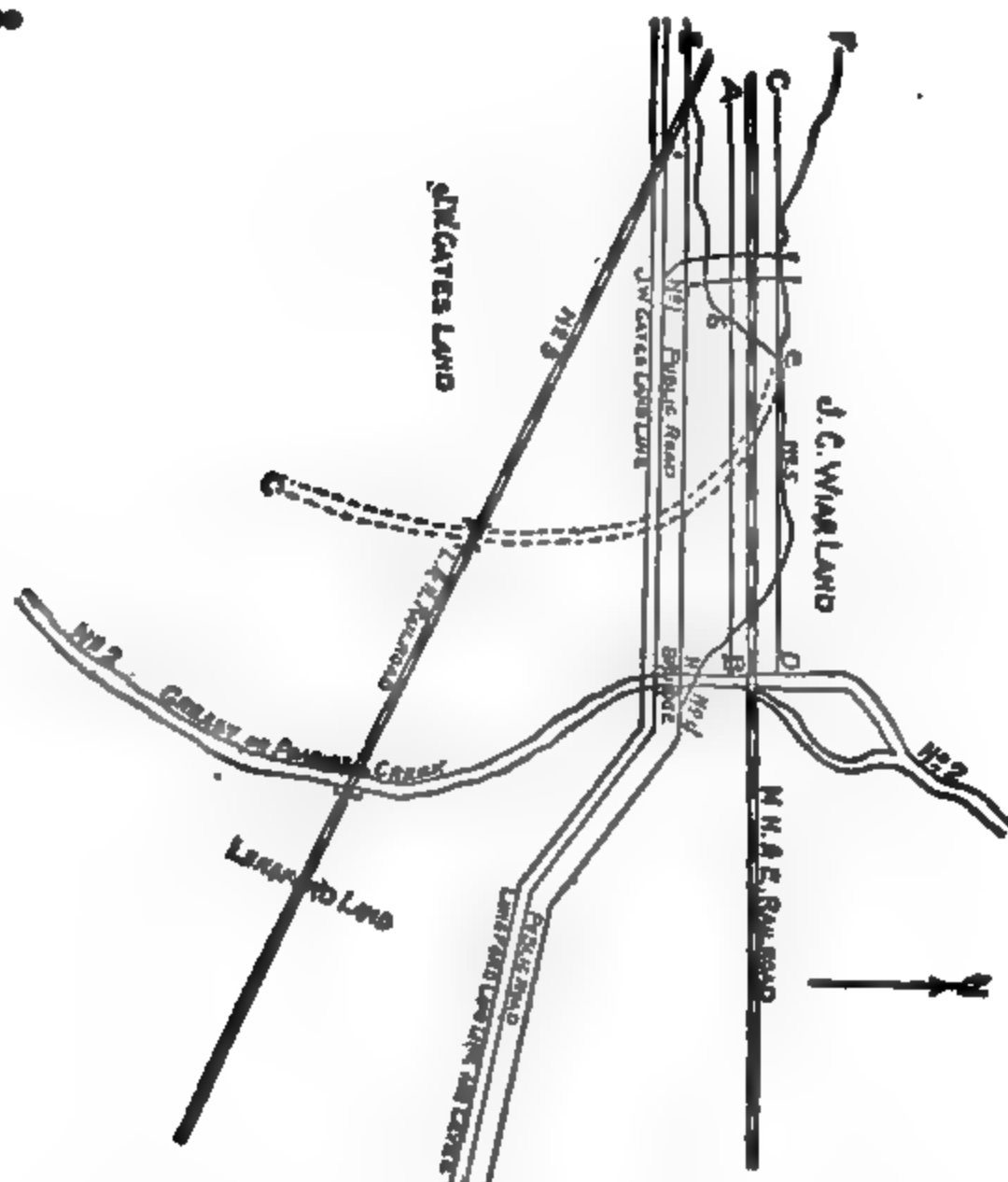
TRIAL.—To Refuse an Instruction is not Error if those given contain the whole law of the case. (p. 385.)

C. J. Waddle, Benj. D. Warfield and Charles H. Moorman, for the appellant.

Gibson & Kincheloe, for the appellee.

²⁵⁸ SETTLE, J. Appellee recovered of appellant in the court below a verdict and judgment for \$500 damages, resulting from the flooding of his land, and injury to certain crops produced and growing thereon, caused, ²⁵⁹ as alleged, by the wrongful acts of appellant's servants in negligently diverting the waters of a stream called "Greasy creek," and those of a tributary branch, from the natural beds or channels in which they were accustomed to stand and run, and causing them, in unusual volume and quantity, to overflow and stand upon appellee's land and crops. Appellant filed an answer of two paragraphs; the first containing a traverse and the second a plea of contributory negligence, based upon appellee's alleged failure to ditch his land and construct fills or levees on and along the banks of the creek. The plea of contributory negligence was controverted by reply. The several items of damage claimed in the petition amounted in the aggregate to \$1,027.50, consisting, as alleged, of injuries from overflows to the following crops destroyed in whole or in part in the year 1907: Eleven acres of tobacco; four and one-half acres of millet; seven acres of stock peas; and twenty acres of growing grass, in the year 1908. The evidence did not sustain the entire claim of damages asserted by the appellee, but a number of witnesses testified that his damages amounted to as much as the jury awarded him; therefore no ground exists for appellant's contention that the verdict was unsupported by the evidence, or that it was excessive. Appellee's farm of eighty acres lies one mile west of Madisonville on the south side of appellant's line of railroad, which was constructed between the beginning of the year 1906 and the end of the year 1909. We make a part of this opinion the map used on the trial in the court below, which appears in the record:

200



201 Appellee's farm is crossed by the Providence Branch Railroad, which leaves appellant's main line, the Madisonville, Hartford and Eastern Railroad, near where it enters appellee's land; and also a county road leading into Madisonville which runs parallel with and a short distance from the Madisonville, Hartford and Eastern Railroad. Greasy creek constitutes the eastern boundary of appellee's farm, and on the east of Greasy creek lies the land of Lunsford. The branch filled by appellant in constructing its roadbed is designated on the map by the figure "5." This branch before it was filled crossed appellant's railroad twice; first, from the south to the north side thereof at figure "6" on the map, and, after running in an easterly course north of the railroad a distance of several hundred yards, again crossed it from the north to the south side near the point where it emptied into Greasy creek. It was claimed by appellee that twenty-five acres of his land lying south of appellant's railroad and west of Greasy creek, three acres of it being between

the Providence Branch Railroad and the public road, was, during and following ordinary rains, subjected to overflow by the negligent acts of appellant complained of, and that such overflow injured the crops thereon as alleged in the petition. Appellee further claimed, and his evidence conduced to prove, that the branch or ditch north of appellant's railroad which appellant filled in constructing its roadbed was ten feet in width and seven or eight feet in depth, and had been in existence for forty years; that all that time it and Greasy creek together, during the usual and excessive rains and high water, carried off all water that fell or gathered upon appellee's land; that when the quantity of water that flowed into the creek was too great to be contained within its banks, ²⁶² it would back up and into the branch, whose great depth and width would accommodate the extra volume of water, as well as what ran into it from the adjacent lands on either side, without overflowing its banks, and thus hold the water until the flood in the creek would subside, and by this means appellee's land was drained of the water.

We think it reasonably apparent from the evidence as a whole that if appellant had left the branch open, and provided a culvert at each of the two places where it is crossed by its roadbed, the branch and Greasy creek would have continued to carry off the water from appellee's land, and thereby prevented the injury to his crops complained of, but by filling the branch the water which had been wont to flow from appellee's land into its bed, and that which had been accustomed to temporarily back into it from Greasy creek when that stream overflowed its banks, was by the obstruction afforded by the bed of the railroad which constituted a fill along the entire north boundary to appellee's land, forced and backed upon his land in such unusual quantities as to inundate it and overflow his crops. It likewise appears from some of the evidence that appellant further added to the increased flow of the water upon appellee's land by leaving unfilled that part of the branch south of its railroad and opening a ditch on the south side of its railroad from the mouth of the branch and Greasy creek at the northeast corner of appellee's land, to a point beyond the west line of his land; in doing which a part of the west bank of the creek, at figure "4" on the map, was removed or lowered to such an extent as to cause much of the water when the creek was high to leave its bed and channel, and run into the branch and ditch on the south side of the railroad, ²⁶³ from which, on account of their want of capacity to hold the water, it overflowed appellee's land in increased and unusual quantity. The jury evidently accepted the evidence adduced in support of the theory upon which appellee sought a recovery. We cannot

say that the verdict was without support from the evidence, and there can be no controversy as to the law of the case.

In *Pickerill v. City of Louisville*, 125 Ky. 213, 100 S. W. 837, a case much like the one before us, it was said: "This court has in effect, though not in express terms, adopted, in respect to such cases as this, the rule of the civil law, which only subjects the lower estate to the easement or servitude of receiving the natural flow of surface water from the upper estate. That is to say, the doctrine seems to be that where two estates join, and one is lower than the other, the lower must necessarily be subject to the natural flow of surface water from the upper one; if this proves to be an inconvenience, it arises only from the position of the lower estate, and in the nature of the case is unavoidable. Therefore, the owner of the lower ground has no right to erect embankments, or create other obstructions, whereby the natural flow of the surface water from the upper ground is stopped or caused to back upon and overflow the upper ground. On the other hand, the owner of the upper ground has no right to make excavations, barriers or drains upon his ground by which the flow of surface water is diverted from its natural channel, and a new channel made on the lower ground, nor can he collect into one channel waters usually flowing off into his neighbor's land by several channels, ²⁶⁴ and thereby increase the flow upon the lower ground."

The greater part of appellant's evidence was directed to showing that appellee's land was subject to overflow, or at any rate standing water, before the construction of its railroad, and that by ditching his land or erecting on the bank of Greasy creek, near its railroad, an embankment or levee, he might have prevented its overflow, or at least have lessened the injury to his crops, and thereby minimized his damages. While it is true some of appellee's land was wet land, and for that reason more liable to injury from overflow of water in greater quantity than was natural or usual, it was not, according to the evidence, so wet as to interfere with its profitable cultivation, until the wrongful acts of appellant complained of caused its overflow; and if, as alleged in the petition and in large measure shown by the evidence, appellant, by negligently diverting the water from its natural and customary channels, or by obstructing its natural and usual course, caused it to overflow in greater and unusual quantity upon appellee's land than was its wont, and to the injury of his crops, it does not lie in its mouth to complain that appellee did not minimize his damages. Indeed, he was under no duty to relieve appellant of the consequences of its negligence, and could have done nothing in the matter of minimizing his damages that would have been so effectual as the restoration by appellant of the natural channels by which his land was

drained and its overflow prevented, before they were closed or changed by appellant.

If the evidence had shown that the damages sustained by appellee from the overflowing of his land were inconsequential, or that he might at slight expense ²⁶⁵ have avoided the injury to his crops, there might be some reason for insisting that he was guilty of negligence in failing to do so, but such were not the facts in this case, the injury was more than trivial, and the expense of restoring the drains would have been considerable and more than appellee should have been required to bear.

Appellant's objections to the instructions are not well founded. The four instructions given read as follows:

"(1) The court instructs the jury that if they believe from the evidence that the defendant at the time complained of in the petition herein built and constructed its roadbed on the north side of plaintiff's land therein described, and thereby negligently, unlawfully or without right filled or obstructed or diverted the channel of Greasy creek, or the branch running along the north side of plaintiff's land, and thereby unlawfully and negligently diverted the flow of waters running in said creek or branch from their natural course, and caused them to overflow the plaintiff's said land, and by reason thereof the plaintiff's crops, or any portion thereof which were being cultivated by him during the years 1907 and 1908, were flooded, destroyed or injured by ordinary rainfalls, then the jury should find for the plaintiff, provided they believed from the evidence that the said branch was at the time of the diversion of the waters therefrom, if there was such diversion, a natural watercourse, and in assessing the plaintiff's damages, if any they should find, they will be governed by instruction No. 2.

"(2) If the jury find their verdict for the plaintiff, they will award him such sum in damages as will reasonably ²⁶⁶ compensate him for any loss he may have sustained by reason of the unlawful or negligent diversion of the waters of Greasy creek or of the branch running north of plaintiff's farm mentioned in the pleadings and in the evidence, if there was such a diversion to his crops then being cultivated by him on said land, and not exceeding in damages, if any they should find, such a sum as will reasonably compensate him for the diminution in value to said crops at said time they were damaged, not exceeding the sum of \$687.50, damage to his tobacco crop in the year 1907; to his millet crop in the year 1907, the sum of \$75; to his pea crop in the year 1907, \$25; to his hay crop in the year 1908, the sum of \$240—and in all not exceeding the sum of \$1,027.50.

"(3) The defendant cannot be held responsible for any injury or damage to his crop or crops caused by extraordinary floods or overflows.

“(4) By the term ‘negligence,’ as used in these instructions, is meant the failure to exercise ordinary care, and ordinary care is that degree of care which an ordinarily prudent person will usually exercise under the same or similar circumstances.”

Instruction No. 1 is predicated upon the cause of action stated in the petition, and is, we think, in proper form. It is insisted, however, that instruction 2 does not correctly give the measure of damages. The only damage asked in the petition, or shown by the evidence, was for injury to appellee's crops; the instruction confined the recovery, if any damages should be allowed, to reasonable compensation for the diminution in value to the crops, giving the limit in amount to each crop, and the limit as to the whole. Manifestly, this was a substantially correct statement ²⁶⁷ of the law; the measure of damages for injury to appellee's crops by the overflowing of his land was the value, while standing upon the ground, of so much of the crops as were wholly destroyed, and the depreciation in the value of the remainder. No injury was shown to the land, and consequently no instruction was given on that subject.

We do not understand that instructions 3 and 4 are objected to; they are, however, substantially correct. We do not think the court erred in refusing the instructions asked by appellant, as those given contained the whole law of the case, and, when this is so, unnecessary instructions, however correct, are calculated to confuse or mislead the jury.

Judgment affirmed.

As to the Right of a Land Owner to Interfere With the Flow of Surface Water to the injury of adjoining proprietors, see the note to Mizell v. McGowan, 85 Am. St. Rep. 726. For recent authorities in support of the doctrine announced by the Kentucky court in the principal case, see Sanguinetti v. Pock, 136 Cal. 466, 89 Am. St. Rep. 169; Brandenburg v. Zeigler, 62 S. C. 18, 89 Am. St. Rep. 887. According to Mason v. Commissioners of Fulton Co., 80 Ohio St. 151, 131 Am. St. Rep. 689, surface water may not be collected into a ditch and discharged upon the land of another to his damage, but a land owner may, in the reasonable use of the land, drain the water from its natural outlet, whether that be a watercourse or a natural drainage channel, and thus increase the volume and accelerate the flow of the water of such watercourse and channel without incurring liability for damages to owners of lower lands. See, also, the authorities cited in the cross-reference note to this case. But according to Rielly v. Stephenson, 222 Pa. 252, 128 Am. St. Rep. 804, the owner of a city lot in grading and improving it may shut out the surface flow of water upon his lot with no obligation to prevent it from flowing over adjacent lots, provided he does not proceed negligently so as to do unnecessary damage to others, nor obstruct a natural channel for the flow of water, nor a channel that has acquired the character of an easement, nor gather water into a body and discharge it on the adjoining land.

DEAVENPORT v. GREEN RIVER DEPOSIT BANK

[138 Ky. 352, 128 S. W. 88.]

BILLS AND NOTES — Warranty — Holder Without Notice.—Purchasers for value before maturity of a promissory note are not affected by a warranty, of which they have no notice, in the sale of a chattel for which the note was given. (p. 387.)

BILLS AND NOTES—Effect of Purchase by Joint Maker.—Although a joint maker of a note cannot purchase it, and an assignment to him will not pass title but only the right to contribution for its payment, courts will, in his suit upon the note, allow him to amend in such a manner as to enforce contribution. (p. 388.)

PARTNERSHIP.—When a Firm Note Comes into the Hands of an Individual Partner by assignment, this operates as an extinguishment of the note. He cannot sue upon the note, and can pass no such right to another. His remedy is to be credited upon the partnership books with the amount paid. (p. 388.)

PARTNERSHIP—Purchase of Firm Note by Partner.—A partner will not be permitted to purchase a partnership note and thereby profit at the expense of the firm. The firm will be given the benefit of any discount from the face of the note which he obtains. (p. 389.)

PARTNERSHIP—Purchase of Firm Note by Partner.—A partner who purchases a firm note cannot sue his copartners and obtain judgment in an action at law. His remedy is an action for the settlement of the partnership, wherein the rights of all the parties may be adjudged. (p. 389.)

PARTNERSHIP—Purchase of Firm Note by Partner.—If a bank discounts a partnership note, and sells a one-half interest in it to one of the partners, he and his comakers are still liable to the bank for the other half of the note. (p. 389.)

N. T. Howard, J. D. Bronch and N. W. Gore, for the appellants.

W. A. Helm and A. Thatcher, for the appellees.

353 CLAY, C. Appellants, S. A. Deavenport and others, and appellee, W. M. Brown, purchased of High Smith Bros., of Illinois, a German coach horse. The purchase price was two thousand two hundred dollars. They executed to High Smith Bros. one note for seven hundred and thirty-four dollars, dated November 29, 1905, and payable on or before the first day of September, 1907. For the balance they executed two notes payable at a later day. These notes were discounted by appellee, Green River Deposit Bank, before maturity. After the purchase of the notes by the bank, it sold a half interest in them to appellee W. M. Brown. The Green River Deposit Bank sued upon the first note. Appellee W. M. Brown filed an answer and cross-petition against his co-obligors. Appellants defended on the ground of breach of warranty and of notice of this fact to the bank and W. M. Brown. They also defended on the ground that High Smith Bros. were itinerant persons and peddlers, and that the note

was ³⁵⁴ void because not marked "peddler's note." As a third ground of defense, they pleaded the assignment by the bank to appellee Brown, and claimed that Brown was thereby released, and therefore they, as his co-obligors, were also released. Upon submission of the case appellee Green River Deposit Bank was given judgment against appellants and appellee Brown for one-half of the note, with interest thereon. Appellee Brown was given judgment against appellants for the sum of three hundred and four dollars and two cents, with interest thereon until paid, which was one-half of the note, less eight per cent and one-eleventh part of the same owing by him. From this judgment this appeal is prosecuted.

In the absence of any evidence to the contrary, we think the evidence of the pedigree of the horse and the fact that he got with colts fifty per cent of the mares served is sufficient to show a compliance with the warranty in these respects. Appellants contend, however, that the agent who effected the sale represented that the horse purchased would get only black, bay, and mahogany-bay colts. It is a sufficient answer to this contention to say that the evidence does not show that any notice of such warranty was brought home to the bank or to appellee Brown. We therefore conclude that the bank and Brown were innocent purchasers for value before maturity, and that no setoff or counterclaim is available as a defense. Nor is there any merit in appellants' contention that the note in question was not marked "peddler's note." High Smith Bros. were not itinerant persons and peddlers within the meaning of the statute.

We shall next consider the question: What was the effect of the sale and assignment of one-half interest in the note to appellee Brown, one of the co-obligors? In the early case of *Long v. Bank of Cynthiana*, 1 Litt. 290, 13 Am. Dec. 234, this court said: "As it regards this point, it is immaterial, we apprehend, whether the note be considered as an ordinary note for the payment of money or as possessing the character of a bill of exchange. The same principles must apply to it in both cases; and in either case the indorsement of the note to the defendants must operate as an extinguishment of their obligation to pay it; for by the indorsement to them they became its proprietors, and they could not be bound to themselves. Nor could the obligation thus extinguished be resuscitated by the indorsement and delivery of the note by them to the bank; for it cannot be revived. A new obligation of the same nature and extent may indeed be created; but this could only be done in the same way in which the original obligation was created. Even an indorsement of the note to Brown, the original payee, would not, we apprehend, have revived the obligation, which had become extinct by the indorsement to the defendants. The indorsement in that case

might, as the indorsement to the bank in this case no doubt did, create a new obligation upon the defendants; but it would be such an obligation as the law would imply from the nature of the transaction, and not such as the note upon its face imports."

In the case of *Logan County National Bank etc. v. Barclay*, 104 Ky. 97, 20 Ky. Law Rep. 733, 46 S. W. 675, this court approved the doctrine announced in *Long v. Bank of Cynthia*, 1 Litt. 290, 13 Am. Dec. 234, and held that the assignment of a note of two obligors to a firm of which one of them was a member operated to extinguish the debt as to the obligor who thus became both obligor and obligee, and that the extinguishment of the debt in such a case as to one of the ³⁵⁶ obligors operated to release the other from liability on the note.

But although a joint maker of a note cannot purchase it, and an assignment to him will not pass title, but only the right to contribution for its payment, the court will, however, in a suit brought by him upon the note, allow him to amend in such manner as to enforce contribution: *G. S. Williams v. S. S. Johnson*, 1 Ky. Law Rep. 420. To the same effect is *Davis v. Stevens*, 10 N. H. 186, where the court said: "But where one of two joint promisors, who is liable directly on the note for the whole amount, pays such note, the note is necessarily extinguished. Whenever he declares himself from the note by such payment, the payment goes to the whole promise of the note; and when the entire promise of the note is met and extinguished, it cannot afterward be revived as a subsisting contract against a cosigner. New rights and liabilities arise betwixt the cosigners, but the original contract is at an end. . . . The cosigner has his appropriate remedy for contribution, but no suit can be sustained on the original contract": See, also, *Gordon v. Wansey*, 21 Cal. 77.

When a firm note comes into the hands of an individual member of the firm by assignment, this operates as an extinguishment of the note, and his assignee will take nothing by such assignment. He cannot sue upon the note, and he can pass no such right to another. His remedy is to be credited upon the partnership books with the amount so paid: *Gardner v. Salyer*, 1 Ky. Law Rep. 420. The same rule is laid down in the case of *Easton v. Strother*, 57 Iowa, 506, 10 N. W. 877, where the court said: "The first question raised is as to the sufficiency of the count of *Strother & Conklin*'s answer setting up the ³⁵⁷ purchase of the note by *Strother*. It was *Strother*'s duty to take up the note for the firm by payment or compromise as best he could. The amount paid by him became a charge in his favor against the firm. This was all that he was entitled to. He could not by purchase become the owner of a note against the firm. The rule contended for by the appellants would afford a direct temptation to partners

to attempt to evade their duty in respect to firm paper, and speculate therein by first depreciating it, and then buying it." It is apparent from the record that this whole transaction is one of partnership. The note, therefore, was not only a joint, but a partnership, note. When appellee Brown purchased a half interest in the note and took an assignment thereof, this operated to release him and his cosigners to the extent of one-half of the note; in other words, the note to that extent was extinguished. The only right remaining in him is the right to enforce contribution against the appellants. He cannot, of course, recover on the basis of one-half of the face of the note and interest. He can only recover on the basis of the amount actually paid by him. A partner will not be permitted to purchase a partnership note, and thereby profit at the expense of the firm. The firm will be given the benefit of any discount from the face of the note which he himself obtained. However, appellee Brown cannot sue his copartners and obtain judgment in an action at law. His only remedy is to institute an action for the settlement of the partnership, wherein the rights of all parties may be adjudged. It appears from the record that appellee Brown, and perhaps two others, obtained in some manner a rebate from the amount which they agreed to pay. Neither Brown nor the others will be permitted to enjoy these rebates to the ³⁵⁸ exclusion of their copartners. In the settlement of the partnership all the partners alike will participate in the rebate so obtained. Upon the return of the case, the parties may settle upon the basis above set forth. If not, appellee Brown will be permitted to file an amended answer and cross-petition, and have the partnership settled.

As the bank sold and assigned to appellee Brown a half interest only in the note in question, it follows that he and his comakers were still liable to the bank for the other half of the note. That being the case, the bank was entitled to the judgment which it obtained against appellants and appellee Brown.

The judgment is affirmed as to the Green River Deposit Bank, and reversed as to appellee Brown, for proceedings consistent with this opinion.

Where a Partner Buys a Claim Against or Acquires Property belonging to the firm, he acquires it for the benefit of the partnership, and can assert it only for the amount which it actually costs him: Miller v. Ferguson, 110 Va. 217, 135 Am. St. Rep. 934.

**MERCHANTS' ICE AND COLD STORAGE COMPANY
v. ROHRMAN.**

[138 Ky. 530, 128 S. W. 599.]

MONOPOLY—Amalgamation of Ice Plants.—When One Corporation purchases some fifteen ice plants which manufacture all but five or ten per cent of the ice made in the city of Louisville, the contract of purchase providing that the vendors shall not engage in that business in the city for ten years, and then, as part of the scheme to control the ice trade, another corporation is organized and a conveyance of the properties is made to it, the contract is illegal and cannot be enforced by the last-named corporation, because in unreasonable restraint of trade, and opposed to the act of 1906 relating to trusts and combines, although the price of ice has not been raised above its fair value, nor has the control of the output or price of the independent companies been attempted. (p. 394.)

MONOPOLY.—The Validity of a Contract in Restraint of Trade depends upon whether the restraint is reasonable. If it is, the contract is legal; if it is not, the contract is illegal. (p. 401.)

MONOPOLY—Opposition to Constitutional Rights.—Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the state and federal constitutions. (p. 403.)

MONOPOLY—Destruction of Individual Rights.—Monopoly is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it. (p. 403.)

MONOPOLY.—A Contract for the Consolidation of the Ice Plants in a city will not be upheld because the avowed purpose of the consolidation is to economize the cost of production and sale and prevent competition that was destructive to the business, and not to fix or regulate the price of the article. (p. 404.)

MONOPOLY.—Ice in Large Cities is one of the common necessities of life. (p. 404.)

Gibson, Marshall & Gibson and Dodd & Dodd, for the appellant.

L. S. Leopold and Kohn, Baird, Sloss & Kohn, for the appellee.

531 **CARROLL, J.** This action was brought by the appellant ice company to restrain the appellee Rohrman from violating a contract entered into by him, in which he obligated himself not to engage for a period of ten years in the business of manufacturing or selling ice in Jefferson county, Kentucky. Rohrman in his answer set up several defenses, but

we deem it necessary only to notice the one pleading that the contract was illegal, in restraint of trade and against public policy. Upon hearing the case, the chancellor dismissed the petition, and this appeal is prosecuted from the judgment.

⁵³² To understand fully the nature of the case it will be necessary to relate somewhat in detail the facts disclosed by the record. On the first day of March, 1905, the National Ice and Cold Storage Company, a corporation engaged in the manufacture and sale of ice, sold its plant, goodwill, and business to the Merchants' Refrigerating Company, a corporation organized under the laws of this state in April, 1904, for the purpose of manufacturing and selling ice and carrying on a cold storage business. On the 25th of March, 1905, a few days after its purchase of the National Ice and Cold Storage Company, the Merchants' Refrigerating Company by amended articles of incorporation increased its capital stock from \$200,000 to \$1,000,000. On January 2, 1906, the appellant Merchants' Ice and Cold Storage Company was incorporated with a capital stock of \$1,500,000. It may here be noted that the principal stockholders in each of these companies were the same persons, and that Charles H. Inman was the president of each of them.

It is averred in the petition that prior to the said "first day of March, 1905, the Merchants' Refrigerating Company had been incorporated and organized at the instigation of, and for the benefit of, the persons interested in the National Ice and Cold Storage Company, including the defendant Rohrman and others, for the purpose of acquiring the plant, goodwill and business of the said National Ice and Cold Storage Company, and the plants, business and goodwill of other ice manufacturers of Louisville, with a view to consolidating them under one management and control through and by the said Merchants' Refrigerating Company." And further, that "the Merchants' Ice and Cold Storage Company was incorporated ⁵³³ in January, 1906, at the instigation of, and for the benefit of, the persons interested as stockholders in the Merchants' Refrigerating Company, for the purpose of having the said Merchants' Ice and Cold Storage Company acquire the assets and contracts of the Merchants' Refrigerating Company and other manufacturers of ice, and continue their business. . . . And that the Merchants' Ice and Cold Storage Company on the 9th of January, 1906, acquired and had conveyed to it all of the real estate of the Merchants' Refrigerating Company, and paid a large consideration therefor, of which the defendant Rohrman received his due proportion."

The Merchants' Refrigerating Company, in pursuance of the plan for which it was organized, purchased the plant, business, assets and goodwill of the National Ice and Cold

Storage Company under the following contract, which was signed by all of the stockholders, including the appellee Rohrman:

"This article of agreement, made and entered into by and between the National Ice and Cold Storage Co., and the undersigned stockholders thereof, parties of the first part, and the Merchants' Refrigerating Company, party of the second part, of the city of Louisville, Jefferson county, Kentucky, Witnesseth: That whereas the said National Ice and Cold Storage Co. has sold, transferred, and delivered to the second party its certain real estate, with the improvements thereon, situated in the city of Louisville, Jefferson county, state of Kentucky, and all the machinery, fixtures, furniture, wagons, horses, harness, and all other property of every kind or description, connected with or used in its business of dealing in, manufacturing and delivering of ice, together with the goodwill and business of the said first parties ⁵³⁴ as dealers in and manufacturers of ice for the sum of one hundred and sixty-six thousand four hundred sixty-four and 66/100 dollars. Now, therefore, in consideration of said sale to and purchase by said second party, and in order that the said second party may be secure in the full enjoyment of the goodwill of said first parties, said first parties do severally agree that they will not, nor will either of them, for a period of ten years from the first day of April, 1905, without the consent of the said second party directly or indirectly, as principal, agent or employé, engage in the business of manufacturing or selling ice within Jefferson county, Kentucky, except in the service of said second party.

"Executed at Louisville, Kentucky, this first day of March, 1905.

"HENRY VOGT.

"ADAM VOGT.

"NATIONAL ICE AND COLD STORAGE CO.,

"By CHAS. W. INMAN,

"Pres. & Treas.

"CHAS. W. INMAN.

"JOHN ROHRMAN.

"SAM OUERBACKER.

"JOHN OUERBACKER.

"JOS. P. OUERBACKER.

"JOHN ROHRMAN.

"MERCHANTS' REFRIGERATING CO.,

"By CHAS. W. INMAN,

"Pres. & Tr."

In the contract by which the Merchants' Ice and Cold Storage Company purchased the property and assets of the Merchants' Refrigerating Company, it is stipulated that the Merchants' Refrigerating Company transfers to it, "All

its goodwill and the goodwill of others acquired by it, including all contracts pertaining to and taken in connection with the acquisition of the goodwill of others, with the right in the buyer to enforce in its behalf all such contracts to the same extent as the seller could do had it continued in business, it being understood that the said contracts are a material part of the consideration received by the buyer under its contract with the seller."

⁵³⁵ In addition to what may be termed the consolidation of the three plants mentioned, the Merchants' Refrigerating Company between the time of its absorption of the National Ice and Cold Storage Company in 1905, and the sale of its plant to the Merchants' Ice and Cold Storage Company in January, 1906, had purchased the property of all the ice plants in Louisville, engaged exclusively in the manufacture of ice, except the Inman Ice Company that had a capacity of thirty-five tons. In addition to this, it arranged to and did purchase the output of nearly all the concerns that manufactured ice in connection with their business and sold the surplus. These various plants purchased, as well as the contracts for the output, were turned over to the Merchants' Ice and Cold Storage Company, when it took over the Merchants' Refrigerating Company.

There is also some evidence that the price at which peddlers or distributors of ice sold the same was fixed by the appellant company; and they were notified that unless the prices so fixed were maintained, they would be charged a higher rate for ice than they had been paying. It does not appear, however, that any attempt was made to increase the price above its fair value, or to dictate to the independent companies the price at which ice should be sold by them. The officers of the appellant company deny that they had any intention of controlling the manufacture or price of ice in Louisville, and insist that the only purpose in buying up some plants and the product of others was to organize the business upon a satisfactory and paying basis, and cut down the expense of carrying it on.

Without stating further in detail the evidence, we may summarize as follows the facts as we gather them from the record: (1) At the time the Merchants' ⁵³⁶ Refrigerating Company commenced to purchase ice plants and the output of ice, there were in operation in the city some fifteen independent ice factories, and in addition some seven other concerns that sold a large part of their product to the public, and between these various factories there was active competition. (2) After the absorption of all the plants it could purchase or control, the Merchants' Refrigerating Company owned or controlled all the ice manufactured in Louisville for the use of the public, except five or ten per cent thereof.

(3) The absorption of these various plants was accomplished in behalf of the Merchants' Refrigerating Company by Webber and Cox, who each received for their services \$5,000 worth of stock in this company. (4) These various plants were purchased under a contract similar to the one made with Rohrman. (5) The principal stockholders in the National Ice and Cold Storage Company, the Merchants' Refrigerating Company, and the Merchants' Ice and Cold Storage Company were the same persons; and Charles W. Inman was the president and controlling spirit in each of them. (6) The Merchants' Refrigerating Company was organized to take over all the ice plants in Louisville that it could purchase or control. (7) The Merchants' Ice and Cold Storage Company was organized for the purpose of taking over the Merchants' Refrigerating Company, and all of the factories and product that it had purchased, as well as other factories engaged in the ice business, and although this last-named company was not organized until January, 1906, it is yet manifest that the purpose of its organization was to control the ice business in Louisville. (8) The purchase of the National Ice and Cold Storage Company was merely a ⁵³⁷ part of the plan and scheme conceived by Inman and his associates to obtain by purchase or otherwise control of all the plants in the city, and thereby fix and regulate the price as well as the output of ice. (9) The price of ice was not raised above its fair or reasonable value by either the Merchants' Refrigerating Company or the Merchants' Ice and Cold Storage Company; nor was it attempted to control the output of the few independent factories or the price at which they sold their product.

From these facts, our conclusion is that the contract was not only unenforceable because in violation of the statute before its amendment by the act of 1906 (*Commonwealth v. International Harvester Co. of America*, 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703), but it was void as an unreasonable restraint of trade independent of the statute. The statute, which is section 3915 of the Kentucky Statutes, reads as follows: "That if any corporation under the laws of Kentucky, or under the laws of any other state or country, for transacting or conducting any kind of business in this state, or any partnership, company, firm or individual, or other association of persons, shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding, with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind, or shall enter into, become a mem-

ber of, or party to or in any way interested in any pool, agreement, contract, understanding, combination or confederation, having for its object the fixing, or in ⁵³⁸ any way limiting the amount or quantity of any article of property, commodity, or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act."

The learned judge of the lower court, in a well-written opinion holding that the contract was in violation of this statute, said: "It was the rule of the common law that any scheme to corner the market by getting control of the available supply is illegal, and so all contracts made in promotion of such scheme are unenforceable. If the common-law rule, as thus announced, is not sufficient to dispose of the question at bar, it would seem that the Kentucky statute is violated, and renders the contract sought to be enforced by the plaintiffs void. Corporations in this county are simply aggregations of men for the purpose of conducting business, and for the convenience of those interested in the business are substituted for partnerships. There is a marked distinction between a corporation created under the laws of the state and the old corporation created by act of the legislature. Under the laws of this state any small number of men otherwise engaged in a partnership enterprise may, by proceeding under the statute, incorporate themselves. The ease and facility with which corporations are created in this age have made them a shield and a blind for many purposes, and the rule of the courts throughout the country is not to look at the form of such transaction but to the substance. Thus the motives which inspire the incorporators or the stockholders of a corporation will be inquired into, and the court will act upon the facts as found, without regard to the form of ⁵³⁹ the transaction. Where, therefore, one corporation is created for the purpose of taking over a number of other corporations, issuing stock, or even paying for the property, with a view of establishing a monopoly, trust or combination, the form of the transaction will be disregarded and the intent of the parties will be looked to. . . . Thus the Merchants' Refrigerating Company and the Merchants' Ice and Cold Storage Company were created for the purpose of taking over all other ice concerns which would sell to them, and did take over all which they could possibly buy, and pursuant to the general intent, it did arrange to take the surplus output of other concerns. It will be noted that the statute in Kentucky denounces any 'agreement' for the purpose of regulating, controlling or 'fixing the price' of any merchandise, etc. The taking over of the several corporations, the making of contracts, such as the one declared upon by plain-

tiffs, are all in the nature of agreements, and the ultimate result was the 'fixing of the price' at which the ice output was to be sold. It is not necessary that the combination shall have increased the price beyond its real value, or have depreciated the price below its value. For the vice in the contract, not as shown by the contract itself, but by all the attendant circumstances, it seems to me, the defendant, who is equally in fault with the plaintiffs, and indeed places himself beyond the sympathy of the court, cannot be enjoined from violating the contract. Applying the well-established principles of law, the court must leave the parties where it finds them, without giving either relief. The contract could not to be enforced by Rohrman, nor should it be enforced by the plaintiffs, and the fact that he has profited largely by the contract, having sold ⁵⁴⁰ interest in the National Ice and Cold Storage Company, and otherwise profited by their manipulations, cannot avail the plaintiffs."

In addition to this the contract had for its purpose an unreasonable restraint of trade, and hence the courts will not enforce it at the instance of either party. It is too well settled to need more than the mere citation of authority that a contract in reasonable restraint of trade is valid: *Pyke v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741; *Turner v. Johnson*, 7 Dana, 435; *Sutton v. Head*, 86 Ky. 156, 9 Ky. Law Rep. 453, 9 Am. St. Rep. 274, 5 S. W. 410; *Western District W. Co. v. Hobson*, 96 Ky. 550, 16 Ky. Law Rep. 869, 29 S. W. 308; *Stovall v. McCutchen*, 107 Ky. 577, 21 Ky. Law Rep. 1317, 92 Am. St. Rep. 373, 54 S. W. 969, 47 L. R. A. 287; *Louisville Board of Fire Underwriters v. Johnson*, 133 Ky. 797, 119 S. W. 153, 24 L. R. A., N. S., 153. Or, as said in *Beach on Modern Law of Contracts*, volume 2, section 1562: "It is a well-settled doctrine that any agreement in restraint of trade is void as being against public policy, unless founded upon a valuable consideration, and as regards time, space, and the extent of trade limited to what is reasonable under the circumstances of the case, for the reason that such contracts tend to deprive the public of the services of the parties in the employments and capacities in which they are most useful, and so tend to expose the public to the evils of monopoly. Many authors declare, in substance, that all restraints are presumed to be bad, but if the circumstances are set forth that presumption may be excluded, and the courts judge of these circumstances, whether the contract be valid or not." Therefore, if the contract in question was in reasonable restraint of trade, and there was no other objection, it follows that the courts would enforce ⁵⁴¹ it as a valid contract. But, in our opinion, this contract was not in reasonable restraint of trade, and we will proceed to state the reasons for this conclusion.

At the outset, it may be observed that it is difficult to draw the line between contracts in partial restraint of trade that are recognized as legitimate by all the courts, and contracts having for their purpose the control of the market for an article or commodity, and consequently the suppression of competition, which are condemned by the courts as either monopolies, trusts or conspiracies, or as being in restraint of trade. Every purchase of a competitor in any trade or business under an agreement that the seller will not for a specified time engage in the same trade or business in that territory is at least the partial suppression of competition, and gives to the purchaser a larger control of the market for the article or commodity involved in the transaction than he had before. And it is fair to assume that, in all transactions like this, one of the reasons for the purchase is to remove competition. But although this may be so, it will not of itself render the contract invalid. If this feature or fact would invalidate such contracts, then all of them would be void. To render a contract invalid, there must be some other object in view than the mere purchase of a competing business; and the natural consequence of the purchase must be to control the market or suppress competition. But, even if this should be the natural result of the purchase from a business or trade standpoint, it would not in every case or under all conditions render the contract of purchase invalid. There are and must in the necessity of the case be exceptions to the rule, and these exceptions must be dealt with ⁵⁴² as they come up. For instance, if there were only two merchants in a town, and one of them should buy the other out, it might result in a condition of affairs in that particular community that would leave only one person engaged in the mercantile business and give him control of the immediate market, and yet the circumstances and conditions surrounding the transaction might be such as to exempt it from the operation of the rule condemning contracts that have the effect of placing in the hands of one person control of an article, trade or business. In other places, and in reference to other things, the purchase by one concern of a half dozen plants or establishments might not except in a measure affect competition, and would not enable the purchaser to control the market, and this would not be the purpose in view in making the purchase. It can therefore be seen that it is easy enough to suppose or even describe conditions in which the purchase of a competing plant or business would not have the effect of creating a situation that would come within the condemnation of the law, and also that it would not be difficult to set down conditions that would make the transaction illegal without reference to the number of competitors that were purchased. The text-books on contracts are full of cases in

which this question in one form or another has come before the courts, but it would not accomplish any useful purpose to undertake to differentiate them in this opinion. In the able and elaborate opinion rendered by Judge Taft in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, as well as in the full note to *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577, 64 L. R. A. 738, a discussion of the principles underlying this question may be found.

⁵⁴³ The safe and just plan is to deal with each particular case as the facts and conditions presented seem to demand, protecting the good while punishing the bad. The question is too delicate and involves too many important rights to attempt an accurate statement of principles that might be applied to each case. On the one side, we have the inalienable right of the citizen to contract, and buy and sell, in the open market that which is the legitimate subject of barter and sale, and this privilege should not be abridged without good reason. On the other side, we have the interest of the public that must be protected, even though it cost a part of the liberty of the individual. It is not the purpose of the law to control or hinder enterprising, energetic men, with brains or capital, from developing an industry or building up a great trade or business. The largest freedom in commercial enterprise compatible with the public good should be allowed. And so there should be no interference with the right to contract or to buy or sell unless it is apparent that the main purpose and reasonable effect of the contract is to create a condition of affairs that will enable the purchaser to control the market, destroy competition, and create a condition incompatible with the public good. As well said by the supreme court of Indiana in *Knight & Jillson Co. v. Miller*, 172 Ind. 97, 87 N. E. 823: "The true test is whether the contract or combination in its apparent purpose and natural consequence places a restriction upon competition or tends to create a monopoly or is inimical to trade or commerce, and it is not necessary that a pure monopoly is effected, or that the restraint be a complete one. . . . But the control of commodities, which are necessities of life, or of material necessary or essential to building, ⁵⁴⁴ or to sanitary regulations, or of subjects of legitimate trade affecting the interests of the public or the interests of any particular class of citizens, either as producers, dealers or consumers, to the extent that it either does or tends to prevent or restrain competition, cannot be justified." To the same effect is *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 29 Am. St. Rep. 690, 19 S. W. 274, 15 L. R. A. 598.

Monopolies since the earliest times have been condemned by the courts, and contracts such as the one we are consider-

ing having for their purpose the control of the market and the suppression of competition are nothing more nor less than an effort to create a monopoly, and at the same time place an unlawful restraint upon trade. How to deal with the ever-growing problem involved in the attempt to suppress monopolies and combinations that have for their purpose the control of various lines of trade and industry that are close to the material needs and welfare of the people has become a matter of great public concern. Many attempts have been made by legislatures and courts to prevent and put down efforts to get control of a useful article or commodity, but all of them have apparently proved unavailing. These illegal combinations appear in so many forms and in so many different guises that it is a difficult task to keep them under the surveillance of the law. When driven from one place of vantage by vigilance of legislatures with the assistance of the courts, they at once seek another that seems to offer security from prosecution. As an illustration of the ingenuity in devising plans to evade the law against monopolies and combinations this case is a fair example. Here an effort is made to ⁵⁴⁵ accomplish by indirect methods what would be in another shape easily marked for condemnation. The contention being that as the appellant Merchants' Ice and Cold Storage Company was not incorporated until 1906, about a year after the contract between Rohrman and the Merchants' Refrigerating Company was entered into, and was not a party to the contract, it should not be charged with or held responsible for the vice in it. It is said it only took over the Merchants' Refrigerating Company and all the properties owned by it, and so should not be made to bear the burden of the wrongdoing of that concern. There would be more force in this argument if the Merchants' Ice and Cold Storage Company occupied the position of what we may call an innocent purchaser. But it does not hold this place of advantage. It was organized by, and is substantially owned by, the persons who owned the Merchants' Refrigerating Company. Its creation was merely the last step in the plan conceived by the Merchants' Refrigerating Company to control the ice market. As it took over the Merchants' Refrigerating Company with full knowledge of what it had done in this direction, it will not be heard to say that its hands are clean of any complicity in the scheme partially perfected by the Merchants' Refrigerating Company, and then delivered with all the vice connected with the transaction to its successors the Merchants' Ice and Cold Storage Company to put it into full execution. If this kind of subterfuge were allowed, there would be little use in trying to check monopolies or put the seal of condemnation upon contracts to control the market. It would only be necessary when any corporation or concern had obtained

control of the market to dispose of its ⁵⁴⁶ holdings to another and new corporation, thus evading the law, and making legal an obnoxious transaction. There is no merit in this contention, and we will treat the case as if the contract with Rohrman had been made with the Merchants' Ice and Cold Storage Company in place of its predecessor the Merchants' Refrigerating Company. Considered from this standpoint, let us look into this contract. As an independent transaction, distinct from the plan of which it was a part, we see no objection to it. On its face it only provides for a reasonable restraint of trade. It was merely one business concern selling out to another, and so, if this was all, the contract would be free from objection, and we would grant the relief sought. But the validity of this particular contract cannot be determined by looking at it alone. It must be considered in connection with the others of which it was and is a part, and when so considered in connection with the circumstances under which it was entered into and the conditions that gave rise to its execution, we find that it was only one of a number of like contracts secured about the same time by the Merchants' Refrigerating Company in furtherance of the purpose to obtain control of the ice market and effectually destroy substantial competition. In short, we think it is plain that the purpose in the minds of the parties to this transaction was to purchase the National Ice and Cold Storage Company and Rohrman's interest therein, as a link in the chain that would finally bind all the consumers of ice in Louisville to the wheels of a single concern, thereby creating a condition that would enable the purchaser to control the market and stifle, if not suppress, competition.

If the owners of all the ice plants in Louisville that were purchased by the Merchants' Refrigerating ⁵⁴⁷ Company had, while each was owning and operating his plant, entered into a trust agreement among themselves to control the market and fix the price, although the price might be reasonable, there would be little doubt about the invalidity of the contract. And the fact that this condition is brought about by the employment of other methods cannot exempt the purchaser from the operation of the rule of invalidity that would be applied if merely a trust agreement between these independent concerns had been entered into. In both instances the purpose would be the same—the object in the minds of the promoters identical—the only difference being in the means employed by which the same end was to be accomplished. If a contract is made that suppresses competition, and controls the market, and that contract is entered into between those who have theretofore engaged in competition in the market sought to be controlled, it is a

contract in restraint of trade. It may be more. It may amount to a trust or conspiracy or a monopoly, but it is nevertheless a contract in restraint of trade. To restrain trade is the essential feature of the contract—the reason why it was made. If trade that is in competition could not be restrained, the promoters would not go into the scheme; and when such a contract is made, whatever form it may assume, or by whatever name it may be called, and although it may be reached under the law of monopolies, trusts and conspiracies, it will be declared void as being in unreasonable restraint of trade. Said the United States supreme court in *Addyston Pipe etc. Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. Rep. 96, 44 L. ed. 136: “We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers ⁵⁴⁸ in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restraining the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded.”

Some law-writers have attempted to make nice distinctions between these different classes of illegal schemes, and insist that each class should be kept in a separate column and treated apart from the others. And so there has been some criticism of the modern tendency to bring cases like this within the doctrine governing contracts in restraint of trade upon the ground that the offense partakes of the nature of a trust, monopoly or conspiracy rather than a restraint upon trade as the law in reference to restraint is generally understood. But, in our opinion, there seems no good reason why a case should not be treated as an illegal restraint of trade when such is its effect. And so it is not important how this control of the market or suppression of competition is effected. It is the result that the law looks at and seeks to correct, and not the means by which it is accomplished. It is not worth while to make any nice distinctions in matters like this. At last and in all events, the question, in so far as it relates to restraint upon trade, comes down to the proposition ⁵⁴⁹ whether the restraint is reasonable or not. If it is, it is legal; if it is not, it is illegal.

The views we have expressed are directly at variance with the opinion of the New Jersey supreme court in *Trenton*

Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 43 Atl. 723, 46 L. R. A. 255, strongly relied on by counsel for the appellants. In that case the court upheld a contract identical, in the circumstances and conditions surrounding it, with the one involved in this case, and, in the course of the opinion, said: "A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions, if such could be imposed, upon the acquisition of such property, and its use when so acquired, courts could impose no limitations. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish, or even to exclude, competition. . . . Under our liberal corporation laws, corporate authority may be acquired by aggregation of individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase⁵⁵⁰ the plant and business of competing individuals and concerns. The legislature might have withheld such powers, or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or for a time, at least, destroy, competition. Contracts for such purchases cannot be refused enforcement. Since contracts by individuals, and by corporations having legislative authority, for the purchase of competing plants and business, may be made, and are enforceable, although, as a result thereof, competition is diminished or temporarily destroyed, it further follows that contracts reasonably required to make such purchases effective by protecting the purchaser in the use and enjoyment of the thing purchased cannot be declared by the courts to be repugnant to public policy."

And it must be admitted that this case fully sustains the contention of counsel, and if recognized as authority by us, would uphold the contract here sought to be enforced. But we cannot give our approval to the doctrine announced by the New Jersey court. It is not only entirely at variance with our public policy as often declared both by the legislative and judicial departments of the state, but is contrary to the great weight of authority. Indeed, we have not found any case that goes so far in an effort ⁵⁵¹ to promote trusts and encourage monopolies. The true and prevailing doctrine on this subject being well expressed by the Michigan supreme court in *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457, where it is said: "Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal constitution, and is not allowed to exist under express provisions in several of our state constitutions. . . . It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it." And by our court, in *Anderson v. Jett*, 89 Ky. 375, 11 Ky. Law Rep. 570, 12 S. W. 670, 6 L. R. A. 390, where it is said: "Rivalry is the life of trade; the thrift and welfare of the people depend upon it; monopoly is opposed to it all along the line; the accumulation of wealth out of the brow sweat of honest toilers by means of combinations is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift and enterprise among all the citizens of the commonwealth, and is opposed to monopolies ⁵⁵² and combinations, because unfriendly to such fair dealing, thrift, and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in, utterly void."

The argument is further made that the contract should be upheld because the purpose of the purchase was only to economize in the cost of producing and selling ice and prevent competition that was destructive to the conduct of the business, and not to fix, regulate or raise the price of the

article. And it is true there is no evidence that any attempt was made to raise the price of ice. But the mere fact that no effort was made to control or fix or raise the price has little to do with the question. It is the purpose to control the market and suppress competition that constitutes the essential vice in the contract. It would not, however, be out of place to observe that the probability of an advance in the price of an article of necessity is always imminent when there is no competition and the market is controlled by one person. It is an easy step from the point at which the control of a product is accomplished to the place at which the making of an increase in the price begins. When the unrestricted control of an article or commodity is placed in the hands of an individual or corporation, there are few who can or will resist the temptation to avail themselves of the opportunity afforded to make as much profit out of the enterprise as the business will stand. That it would be inimical to the public good to have the ice business in a city the size of Louisville in the hands of one concern is, we think, a proposition so plain as not to need argument in support of it. Ice in large cities is one of the common necessities of life. It is an article ⁵⁵³ which, on account of its perishable qualities and the loss and expense attending its shipment, affords exceptional opportunities for creating a monopoly in its manufacture and sale at the place it is used. It is easier to obtain control of the market and suppress competition in the sale of ice than almost any other article in general use. It would be almost impossible for one concern to control the dry-goods, the grocery, the boot and shoe, or the hardware or other like businesses in a large city, as goods of this character can easily be obtained at any time from other places by persons who need them, and the character of the business is such that any person with a small capital can soon set himself up in business. But the manufacture of ice requires the investment of a large sum of money to establish even a small plant. It cannot, without great deterioration, as well as expense, be imported from outside points to the place at which it is to be used. And so if it was permissible to make any discrimination between attempts to monopolize a trade or industry, it would not be amiss to single out ice as one of the articles to which the discrimination might well be applied, and the most stringent rule adopted to prevent monopoly.

The case for the appellant, tested by every rule applicable in cases of this character, falls well within the condemnation of the law, and the judgment denying it any relief must be affirmed.

Unlawful Trusts and Monopolies are discussed in the note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235. It is not safe to allow monopolies of prime necessities of life to exist for any purpose; they are contrary to the genius of a free government: *State v. Eastern Coal Co.*, 29 R. I. 254, 132 Am. St. Rep. 817. They are void as being in restraint of trade and against public policy: *Pocahontas Coke Co. v. Powhatan etc. Co.*, 60 W. Va. 508, 116 Am. St. Rep. 901.

Monopolies Embrace Any Combination the tendency of which is to prevent competition in trade in its broad and general sense, and to control prices to the detriment of the public: *Pocahontas Coke Co. v. Powhatan etc. Co.*, 60 W. Va. 508, 116 Am. St. Rep. 901. And in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages that flow from free competition: *State v. Eastern Coal Co.*, 29 R. I. 254, 132 Am. St. Rep. 817; *Dunbar v. American Telephone etc. Co.*, 224 Ill. 9, 115 Am. St. Rep. 132; *Hunt v. Riverside Co-operative Club*, 140 Mich. 538, 112 Am. St. Rep. 420.

Any Combination of Competing Corporations, the necessary consequence of which is the controlling of prices or limiting the production or suppressing competition in such a way as to create a monopoly, is contrary to public policy and void: *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936. See, also, *Hunt v. Riverside Co-operative Club*, 140 Mich. 538, 112 Am. St. Rep. 420; *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 218, 118 Am. St. Rep. 399; *Southern Electric etc. Co. v. State*, 91 Miss. 195, 124 Am. St. Rep. 638; *State v. Wilson*, 73 Kan. 343, 117 Am. St. Rep. 479; *Pocahontas Coke Co. v. Powhatan etc. Co.*, 60 W. Va. 508, 116 Am. St. Rep. 901.

Contracts in General Restraint of Trade are Void, but contracts in partial and reasonable restraint of trade are often upheld: *Harris v. Theus*, 149 Ala. 133, 123 Am. St. Rep. 17, and cases cited in the cross-reference note thereto.

PATTERSON'S ADMINISTRATOR v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

[138 Ky. 648, 128 S. W. 1068.]

CARRIER—*Passengers Riding on Top of Car.*—Passengers on a free train who, with the acquiescence of the conductor, and because the train is crowded, ride on top of the cars, take the risk of that mode of travel, and have no cause of action if thrown from the cars by a jerk which is not of such a character as to show want of care in managing the train. (p. 408.)

Leabow & De Busk and Henritze & Dawson, for the appellant.

Benjamin D. Warfield, C. W. Metcalf and J. W. Alcorn, for the appellee.

648 HOBSON, J. On April 21, 1908, a special train was run from Middlesboro to Pineville to take persons to a political convention held at Pineville on that day. No fares

were collected on the train, and, as everybody went free, there was a considerable crowd. The train consisted of three or four passenger-cars, four or ⁶⁴⁹ five cabooses, and four or five freight-cars; there being in all fourteen cars in the train. The cars were full, and a number of persons were riding on the top of the train when it pulled out from Middlesboro. Pineville is twelve miles from Middlesboro, and the persons on top of the train were riding on top of the cabooses or the freight-cars. Charles Patterson, a coal miner, twenty-two years old, was one of those on top of the cars. All went well until they reached Pineville. As the train was pulling into that station, it took up the slack, causing the rear cars of the train to jerk, and Patterson, who was riding on one of the rear cars, was by the jerk thrown therefrom and fell into Straight creek and was drowned. This action was brought to recover for his death; and at the conclusion of the evidence for the plaintiff the circuit court instructed the jury peremptorily to find for the defendant. The plaintiff appeals.

Some ten or fifteen witnesses were introduced by the plaintiff. They were on the train and felt the jerk. The sum of their testimony is that there was a considerable jerk of the train caused by the slack being taken up as it pulled up from Straight creek into the station. But, as there were fourteen cars in the train and it was practically a freight train, on account of the number of cars that were in it, such a jerk was unavoidable; and was such as was fairly incidental to the operation of such a train when the slack was taken up. While there is some proof in the record that the train was operated roughly on the journey, the proof of all the witnesses as to what occurred at the time Patterson fell off is to the effect that the jerk was due to the taking up of the slack; that the train was pulling into the station, and was running at a reduced speed. There is nothing in the record ⁶⁵⁰ to show that the jerk was greater than was incidental to the movement of such a train, or that it was due in any measure to a want of care on the part of those in charge of the train. There is nothing in the record to show that the jerk was more violent than should have been anticipated by a person of ordinary prudence riding on such a train.

The plaintiff proved by one witness that he was on the station platform at Middlesboro with a number of others; that, while they were standing around there, the conductor said to them, "Boys, crowd it, crowd the train, go to the top"; that the witness then went to the ladder and went up on top of one of the cars, and that Charles Patterson came up right behind him. It is insisted that, as Patterson went up on the cars in obedience to what the conductor said, he

was not guilty of contributory negligence in doing so, and that the company is therefore liable for his death. In support of this we are referred to the case of Indianapolis etc. R. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898. In that case a stock drover who had a right to transportation on a freight train which carried his cattle was riding in the caboose, and, when they had reached a certain point, the conductor in the night waked him up, telling him that they were going to leave the caboose there, and that he would have to ride to the next point on the top of the cars. He, at the request of the conductor, got on top of the cars, and thus rode about three-fourths of a mile, when they undertook to couple the other caboose to the train, and in making the backward movement gave the train a terrible bump which knocked the drover from the top of the car upon which he was riding. A recovery was sustained. But in that case the drover was required by the conductor to get upon the top ⁶⁵¹ of the car. He had to do this, or let his cattle go on without him. He had entered upon his journey, and was entitled to transportation as a passenger. The conductor was wrong in requiring him to leave the caboose and get on top of the car. But here the conductor required nobody to get on top of the car. His language meant that they must crowd the train or go on top. He required nobody to go on top, and the deceased and his companions evidently went on top of the train because they thought it was pleasanter riding there than in the crowded cars. It is true the conductor knew they were up there, and acquiesced in their riding there, but he did not require them to ride there, and when they voluntarily rode on the top of such a train, they took the risk of such jerking and bumping as are fairly incidental to the operation of the train run without negligence. The falling of the deceased from the train was due to the taking up of the slack when the train was not running at an unusual speed, and it does not appear that anything was omitted by those in charge of the train which they should have done. One of the plaintiff's witnesses, who was one of the companions of the decedent on the train, being asked how the men happened to be on the top of the cars, said, "Why, they just climbed up. I don't know that anybody said, 'Climb on top.' They just commenced going on top, and it seemed that all the coaches were full. Now, I couldn't say rightfully that they were obliged to go on top, but they just like to ride on top. A great many men love to ride on the top of the train." There were, according to the evidence, about one hundred men on the top of the train. Only two of them fell off. The deceased, like the others who were with him, evidently went to the top of the train because he preferred to ⁶⁵² ride there rather than in the crowded cars. In doing so he took the risk due to this

mode of travel, and there can be no recovery here in the absence of proof showing that the jerk from which he fell off was so violent as to show a want of proper care in the operation of the train. This does not appear. We therefore conclude that the death of the deceased was simply due to an accident from a risk which he had assumed in riding upon the top of the train, and that the circuit court properly instructed the jury peremptorily to find for the defendant.

Judgment affirmed.

The Liability of a Carrier to a Passenger who takes a dangerous or exposed position on the car and is there injured is considered in the recent cases of *Coburn v. Moline etc. Ry. Co.*, 243 Ill. 448, 134 Am. St. Rep. 377; *Tompkins v. Boston Elevated Ry. Co.*, 201 Mass. 114, 131 Am. St. Rep. 392. A passenger who, without excuse or necessity, leaves his seat in a passenger car attached to a freight train and takes a position upon the top of the caboose, is chargeable with negligence contributing as a proximate cause to his injury when the caboose is derailed while the passenger coach remains intact on the track. He cannot recover against the carrier. He assumes the risk of the dangerous position, and neither the suggestion of a brakeman to go there, nor the failure of the conductor to warn him while the train is standing at a station, can excuse his negligence: *McLean v. Atlantic Coast etc. R. R. Co.*, 81 S. C. 100, 128 Am. St. Rep. 892. Railroad excursionists have a right to return home on the train which took them out, and if, owing to the crowded condition of the cars, the platforms thereof are the safest place they can secure, they have a right to occupy them, and in so doing are not guilty of contributory negligence in case of accident and injury to them: *Jackson v. Natchez etc. Ry. Co.*, 114 La. 981, 108 Am. St. Rep. 366.

Where a Passenger, Riding on the Running-board of a Car when there is no room inside, is thrown to the ground, the railway company, though negligent in suddenly starting the car, is not liable if his own negligence contributed to the injury: *Oliver v. Ft. Smith Light etc. Co.*, 89 Ark. 222, 131 Am. St. Rep. 86.

McKIBBEN v. DILTZ.

[138 Ky. 684, 128 S. W. 1082.]

JUDICIAL SALE—Contract for Redemption—Statute of Frauds.—When one purchases land at a judicial sale under an agreement with the owner to allow him to redeem, the agreement is enforceable although not in writing. The purchaser holds the land in trust for the former owner, and the statute of frauds presents no obstacle to a recovery. (p. 414.)

JUDICIAL SALE—Contract for Redemption—Time Limited.—Although an agreement by a purchaser at a judicial sale with the owner to allow him to redeem limits the time for the redemption, he will be allowed to redeem after the expiration of the time. (p. 414.)

JUDICIAL SALE—Contract for Redemption—Costs and Purchase Price.—When one purchases at a judicial sale under an oral

agreement with the owners to allow them to redeem, they will be required, in enforcing the contract, to pay the purchase price with interest and the costs incurred. (p. 414.)

MORTGAGE—Transaction Considered as Security, not as Sale. Where an agreement between the heirs and the purchaser at a judicial sale of the estate of a decedent, together with the surrounding facts and circumstances, shows that he takes the land in trust for them with the privilege of redeeming, and that he only obtains a lien in the nature of a mortgage, the court will so declare, although a writing executed after the sale expressly declares the sale absolute. (pp. 414, 415.)

MORTGAGE—Form or Name of Instrument.—The Mere Form of an instrument, or the name the parties have given it, does not determine whether or not it is enforceable as a mortgage. If its purpose is security, it will be given that effect. (p. 417.)

JUDICIAL SALE—Contract for Redemption—Deed Absolute.— When a purchase is made, not from the owner, but at a judicial or execution sale under an agreement that the owner may redeem, this agreement, although not in writing, is enforceable, though the result will be to change a conveyance absolute on its face into a mortgage or deed of trust. (p. 417.)

George Doniphan and Humphrey & Humphrey, for the appellant.

Worthington & Cochran, for the appellees.

685 NUNN, J. One Watson P. Diltz died in the year 1891, a resident of Bracken county, Kentucky. He left three children, one son and two daughters, all of whom were married and had children. He owned about two hundred acres of land situated on the Ohio river adjacent to the town of Augusta. He left a will by which he gave to his children a life estate in his property with remainder in fee to the children of each, his grandchildren, who were numerous and many of them infants. He appointed his son, J. C. Diltz, and his son in law, W. P. Coons, as his executors. By the third clause of the will he directed his executors to sell and convey a certain small parcel of his land and apply the proceeds on his debts. This piece of land contained about seventeen acres, and was sold by the executors shortly after Diltz's death. The first clause of the will is as follows: "I will that my funeral expenses be paid and my debts according to contract. For the purpose of paying my debts I will that my executors, if necessary, rent the farm I own situated just above said town of Augusta, Kentucky, and same bought of 686 James Nichols and Maranda, for that purpose; but if my creditors are not willing to wait until the money to pay them can be raised in that manner, in that event I direct and endow my executors to borrow the money to pay them, by mortgaging said farm, and then to rent said farm until the debts are paid."

Pursuant to this power to borrow, and for the purpose of paying off the debts of decedent, the executors borrowed from John W. Bowman \$5,000 on August 21, 1891, and executed to him a note due August 21, 1894, bearing eight per cent interest from date until paid. The executors executed to Bowman a mortgage on the balance of the land, about one hundred and eighty-two acres, to secure the note. After the note fell due, Bowman brought an action in the circuit court to settle the estate of Diltz and to foreclose the mortgage. That suit was filed in May, 1896. The devisees of the testator were all made defendants. During the pendency of the action, Mrs. Coons, a daughter of the testator, died, and appellant, G. H. McKibben, qualified as her administrator, filed an answer as such and entered his appearance to the action. It appears that some of the devisees of the testator employed attorneys in that action for the purpose of putting in a defense of usury; that they had their answers prepared, but never filed them, having entered into an agreement, which will hereinafter be referred to, not to do so, and a judgment was rendered in the month of March, 1898, directing a sale of the farm to pay the mortgage debt and two legacies of \$200 each with interest, and a few small debts which had been proved against the estate in the action. The total amount of the debts and legacies, including interest and estimated costs to the date of the sale, July 9, 1898, amounted to \$7,059.95. The land was adjudged ⁶⁸⁷ to be indivisible without materially impairing its value, and was ordered to be sold as a whole. Appellant made the only bid at the sale that was made, and his bid was \$7,059.95, the exact amount of the debts as above set out. The property was sold to him, the sale reported to the court within a few days thereafter, which confirmed it, and ordered a deed made to appellant by the commissioner. Within a day or two, and in compliance with an agreement made previous to the purchase by McKibben, the adult devisees of Diltz and McKibben signed and executed the following writing:

“Augusta, Kentucky, July, 1898.

“This agreement made and entered into by and between G. H. McKibben of Augusta, Bracken county, Kentucky, of the first part, and Ada D. Robbins, John W. Robbins, Lounora Robbins, Ella F. Robbins, Augusta Robbins, Eva Bauer, Kneodler Robbins, Mary L. Robbins, Addie Robbins, Joseph Robbins, J. C. Diltz, Clara L. Diltz, Jennie Mitchell, Diltz Mitchell, Mary Ella Mitchell, Edward Mitchell, Ada M. Coons, Bettie J. Coons, Louisa Coons, Samuel Boude & Lidia Boude, devisees of Watson P. Diltz, deceased, late of Bracken county Kentucky, of the second part witnesseth: That whereas G. H. McKibben has pursuant to the order of

sale made and entered in equity case No. 828, Bracken circuit court, wherein John W. Bowman is plaintiff, and Watson P. Diltz's executors and others are defendants, purchased the real estate therein and hereafter described, for the sum of ———, and whereas he has had to mortgage the said premises for the full sum aforesaid, and whereas the said G. H. McKibben, while wishing fully to protect himself and to indemnify himself against all loss, damage, and expense, yet is willing to assist the said parties of the second part to repurchase said premises. Now ^{ess} he, the said G. H. McKibben proposes as follows:

“(1) It is understood and agreed that this sale and purchase are absolute, and that the offers herein shall in no manner be understood or construed to create a mortgage or trust estate.

“(2) The sale being absolute, the said G. H. McKibben takes complete and absolute charge of the said premises, and all things pertaining thereto, farms, cultivates and manages the same as his best judgment dictates.

“(3) At any time within five years he offers to resell the said real estate to the parties of the second part for an amount equal to the amount for which the aforesaid mortgage is executed with interest thereon at six per cent per annum, payable annually from the ——— day of ———, 1898, until paid, all taxes, insurance and all improvements, advancements and expenses whatever including a reasonable annual allowance to said McKibben for his time, labor, trouble and attention, all of which shall, however, be subject to credit of all the rents, issues and profits, arising out of said realty, of all of which the said McKibben agrees to keep accurate account which shall be conclusive against all parties.

“(4) Upon the acceptance and settlement on the basis set out in No. 3 the said McKibben agrees for himself, his representatives and assigns to convey the said real estate to the said parties of the second part by deed of special warranty in the proportions and manner set out in the will of the late Watson P. Diltz, probated at the July, 1891, term of the Bracken county court.”

The above is all the agreement except a description of the property and the signatures of the parties. It appears that in the spring of the year 1903, and ^{ess} prior to the expiration of the five year time limit mentioned in the agreement, the devisees, realizing that they would not be able to meet the balance of the claim—about \$6,400—at the time specified, began to look for someone who would take appellant's place, hold and conduct the farm for their benefit upon the terms stated in the aforesaid agreement, or someone who would purchase the land, pay all the claims against it, and pay

the balance of the purchase price to them. It seems that they failed on the first proposition, but did find a person who agreed to give \$9,000 in cash for the land, provided he could get a good title to it. He consulted a lawyer, who was one of the representatives of the Diltz devisees, and was advised that, as there were so many of the Diltz heirs under age, and who had not signed the agreement with McKibben, some of whom were still under age, a good title could not be obtained by purchase from the owners; that the safest and surest way to secure a good title was to have a friendly suit for the settlement of the estate and for a sale of the land by the master commissioner for the payment of the claims against it, and a division of the remaining proceeds after paying all debts among the devisees in the proportions fixed by the will. This fact was made known to appellant, and all the testimony shows that he apparently agreed to this; at least, his words and conduct were sufficient to lead all those in interest to believe that it was entirely agreeable with him, and that all he wanted was his money with interest and a reasonable compensation for his services, and this continued until October of that year, several months after this action was filed and the five years' limit mentioned in the agreement had expired. The first intimation that they had that he would undertake to ~~own~~ claim the land as his own was in the month of October, 1903, when he appeared in court by counsel and moved the court to require appellees to verify their petition and also filed a general demurrer thereto. The first positive information to appellees that appellant claimed the land because they had not repurchased it within the five years was received by them when appellant filed his answer in the month of January, 1904, wherein he asserted such a claim. In other words, he claimed that under the agreement with the heirs, he was to convey the land to them upon condition that they would repurchase the land from him within five years from the date of the agreement, and that they had failed to do so, therefore the land was his. Appellees claimed that by reason of an oral agreement, made prior to the sale under the Bowman judgment and the subsequent written agreement, appellant became their trustee to take charge of the farm and manage it for their benefit; that he was to take the proceeds, pay the expenses of running the farm, his claim for the purchase price, with interest, and himself for his services; that, at most, he only held a mortgage lien for the payment of the things named. The issues were completed, the testimony taken and case tried, which resulted in a judgment sustaining appellees' contention.

The testimony is voluminous, and we will not discuss it in detail, as it would be of benefit to no one. It is shown,

without contradiction, that there was an agreement made between appellant and J. W. Robbins, who married a daughter of the testator, and who acted for the heirs, whereby appellant was to purchase the land at the commissioner's sale made under the Bowman judgment, and this fact was made known to other persons who intended to bid ⁰⁰¹ on it at the sale, and who did not attend and bid; therefore, appellant made the only offer, and that was the exact amount of the debts, \$7,059.95, which was required to be made by the sale. Robbins and his son A. Robbins, who aided him in making the agreement, testified that the terms of the agreement were in substance as set forth in appellees' pleadings, and were after the sale reduced to writing and are contained in the agreement heretofore copied. Appellant, in his testimony in chief, denied that he had any agreement with the heirs before or at the time of the sale, and stated that there was no agreement made until after the sale, and that was contained in the writing. But on cross-examination he testified as follows:

"Q. Were not the terms included in my former question agreed upon by all parties at the time you purchased this farm? A. Not all of them.

"Q. Well, what were not, and what were? A. The time for which this contract should run and continue was not named until afterward, and that was named by Major Robbins himself.

"Q. Well, the other terms were understood at the time, were they? A. Some of them; some were not.

"Q. State what was understood. A. That they should have a right to repurchase the farm by conforming to the terms of the agreement.

"Q. Well, what was the agreement? A. It is set forth in the paper.

"Q. I mean at the time you purchased the farm? A. I don't know how to make it more satisfactory than I have got it, sir—

"Q. You say that at the time of the sale some of the terms were agreed upon and some were not, notably the time the contract should run was not agreed upon, you say; now tell me just what you had agreed to do at the time and before you purchased this property with Major Robbins. A. That ⁰⁰² they should have an opportunity to repurchase the farm."

Thus we see, according to appellant's testimony, he had an agreement with the representative of the Diltz heirs prior to the sale and at the time he took charge of the farm and ran it for the benefit of the heirs paying himself for his trouble, with the privilege on their part to purchase it without any time limit; that the time limit was inserted after-

ward in the written contract at the instance of Major Robbins. This insertion, certainly, did not bind the infant heirs. It appears that this land was worth, at least, \$11,000 at the time appellant purchased it. This court has repeatedly decided that when one purchases land at a judicial sale under an agreement with the owner to allow him to redeem, the agreement is enforceable, although not in writing. The purchaser holds the land in trust for the former owner, and therefore the statute of frauds presents no obstacle to a recovery. Although such agreement limits the time in which the owner is allowed to redeem, he will be allowed to redeem after the expiration of the time, it not being material. The original owner will, however, be required to pay the purchase price with interest and the costs which have been incurred. In the case of *Fishback v. Green*, 87 Ky. 107, 9 Ky. Law Rep. 959, 7 S. W. 881, the court said: "An agreement by A to bid in land at a sale and hold it subject to an agreement with the owner to redeem it is enforceable. It is not a sale by A, but he holds it in trust for the former owner. The statute of frauds, therefore, presents no obstacle to recovery in such a case: *Martin v. Martin*, 16 B. Mon. 8; *Miller's Heirs v. Antle*, 2 Bush, 407, 92 Am. Dec. 495; *Green v. Ball*, 4 Bush, 586." See, also, the case of *Sheffield* ⁶⁹³ *v. Day* (Ky.), 90 S. W. 545, and the authorities therein cited, which fully sustain the position that appellant took the entire title to the property under the deed from the commissioner in trust for appellees, with a lien in the nature of a mortgage to secure him in the payment of the purchase price with its interest, and for his services in managing the farm for the benefit of appellees, and the other things mentioned in the written agreement herein copied. Appellant's counsel insist that the written agreement made between appellant and appellees amounts to a conditional sale and not a mortgage; that it is stated in the face of the writing, in effect, that appellant was not to be considered as a trustee for appellees, and that the writing was not to be construed as a mortgage, and cite several cases in support of their contention. The first case is *Prince v. Bearden*, 1 A. K. Marsh. 169, which seemingly, at least in part, sustains them. In that case it appears that Prince purchased from Bearden a negro woman for the price of \$300. Prince took possession of the woman. In the contract between them it was recited that if Bearden repaid that sum on or before the 1st of September, then ensuing, the sale should be void. It was also stated that the writing should be considered as a conditional sale and not a mortgage. As stated, Prince took possession of the woman and kept her for three years, when Bearden brought an action to have the contract declared a mortgage and to recover the

woman with her children. The court declared it a conditional sale and defeated Bearden. That case is unlike this in many material particulars. Prince was not required under the contract to pay taxes on the woman as property or to clothe and feed her; nor was he to receive anything for his trouble in keeping her; nor ⁶⁹⁴ was he required to account to Bearden for the value of her services or to keep an account and report anything to Bearden. It is unlike the case at bar, as in the third section of the agreement in this case appellant was to take possession of the farm and keep it until he was repaid the purchase price with its interest, and pay all "taxes, insurance and for all improvements, advancements and expenses whatever, including a reasonable allowance to said McKibben for his time, labor, trouble and attention, all of which shall however, be subject to credit of all the rents, issues and profits arising out of said realty, of all of which the said McKibben agrees to keep an accurate account, which shall be conclusive against all parties." The next case—Kenny v. Marsh, 2 A. K. Marsh. 46—is unlike the case at bar. In that case the agreement between the parties was made after the purchase by Marsh at the execution sale. It does not appear that there was any understanding or agreement between them with reference thereto before Marsh became the purchaser. He purchased it in his own right, and not with any agreement that he was doing so for the owner. The case of Honore v. Hutchings, 8 Bush, 687, was where the parties purchased real estate in partnership. Hutchings furnished the whole of the purchase price. The writing between them stated that upon a sale of the property, Hutchings was to receive the money he paid with its interest, and the balance was to be divided equally between them, provided the land was sold within eighteen months, and if it was not sold within that time, under the agreement, Honore was to have no further interest in it. This court in that case held that notwithstanding the terms of the writing, Honore was entitled to his one-half interest after the purchase money ⁶⁹⁵ and its interest had been returned to Hutchings, although the sale of the land was not made until about eight years after the contract was executed. In the next case—Tygret v. Potter & Co., 97 Ky. 54, 16 Ky. Law Rep. 809, 29 S. W. 976—Tygret was indebted to Potter & Co. in a sum over \$4,000. He executed to them his note payable in twelve months from date, and secured it by a mortgage on land. After the note matured, Tygret not being able to pay it, Potter & Co. purchased the land and surrendered the note, and Tygret executed an absolute deed to them, acknowledging the payment of the purchase money. Potter & Co. at the same time executed to Tygret a writing, in which

they agreed to give Tygret twelve months from that date in which he was to have the privilege of paying them "the amount we this day paid him for certain lands this day deeded to us." Tygret failed to pay them within the time stipulated, and the court held that Tygret was not entitled to recover the land. The court refused to declare this last paper a mortgage. Potter & Co. held a mortgage in the first place, and there could have been no reason for substituting one mortgage for another. It does not appear in that case that the purchase was made by Potter & Co. at an inadequate price. It seems that the transaction was open and fair. The last case cited—Tucker v. Witherbee, 130 Ky. 270, 113 S. W. 123—was where Tucker purchased a horse from Witherbee for \$110, to secure the payment of which he executed to Witherbee a deed conveying to him a small piece of land. The deed is in the usual form with a clause of general warranty. The deed closes as follows: "It is further agreed by the parties hereto that said Tucker is to pay taxes due on said land for 1892, 1893, 1894, and recording fee of this deed. The ~~case~~ said Witherbee hereby agrees to hold said land for one year and a half and to sell same to Tucker at the end thereof, provided he shall then pay him cash \$118.60, being purchase price hereof and necessary recording fee." Witherbee claimed in that case that the language expressed a conditional sale, and as Tucker did not pay the amount named within a year, he lost all right to the land. This court determined the question against Witherbee, and declared that the transaction amounted to a mortgage only. This case supports the contention of appellee rather than militates against it. But appellant says that the writing in the case at bar executed between the parties after the sale, expressly provides that the purchase by appellant was to be regarded absolute, and that the provisions contained in the writing should not in any manner be understood or construed as a mortgage or a deed of trust. In our opinion, this language should have but little weight in construing the contract. If the agreement made by appellant with appellees prior to the sale made him a holder of the property in trust for the owners, and if the whole of the writing made after his purchase, connected with the surrounding facts and circumstances, show that he took it in trust when he made the purchase, and that he only had a lien in the nature of a mortgage on the property, the court should so declare it, regardless of the fact that it is said in the writing that it should not be so construed. In the case of Edrington v. Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145, and Sheffield v. Day (Ky.), 90 S. W. 545, this court said that whenever it—i. e., a deed—can be ascertained to be only a security for money, it is

only a mortgage, and will be so considered, however artfully it may be disguised. In the cross-reference note to *Plummer v. Isle*, 111 Am. St. Rep. 1003, it is ⁶⁹⁷ said: "The mere form of an instrument cuts very little figure in respect to whether it is enforceable as a mortgage or not, upon its character being questioned in either a legal or equitable action. If its purpose is security, . . . the instrument is treated as a mortgage and nothing else."

In the case of *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003, the court said: "In determining the real character of a contract, courts will always look to its purpose, rather than to the name given it by the parties."

In the case of *Stockton Saving Society v. Purvis*, 112 Cal. 239, 53 Am. St. Rep. 212, 44 Pac. 562, the court said: "There is nothing in the name given an instrument which will be in any way binding or controlling upon the court. Calling a contract a lease or a sale will not make it a lease or sale. The agreement, whatever it may be, when coming before a court, will be named according to its provisions, and any technical christening of it by the parties cannot control its true interpretation."

In the note to *Fleet v. Hertz*, 94 Am. St. Rep. 234, it is said: "It should first of all be remarked that the name parties have seen fit to give the transaction is of little or no importance in determining its true effect."

In the recent case of *Hobbs v. Rowland*, 136 Ky. 197, 123 S. W. 1185, this court, after a full review of the authorities, decided that parol testimony might be introduced to show that a deed, absolute in its terms, was executed to secure a debt and therefore a mortgage, and overruled the case of *Munford v. Green's Admr.*, 103 Ky. 140, 19 Ky. Law Rep. 1791, 44 S. W. 419.

There has been some conflict of opinions in Kentucky on this point, but there has never been any conflict ⁶⁹⁸ on the question that when a purchase is made, not from the owner, but at a judicial or execution sale under an agreement that the owner might redeem, this agreement, although not in writing, is valid and enforceable, although the result would be to change a conveyance absolute on its face into a mortgage or deed of trust.

In 20 American and English Encyclopedia of Law, 944, the following circumstances, amongst others, are mentioned as important, indicating that a transaction is a mortgage and not a conditional sale: First, "the transaction originated in an application for a loan of money." The importance of this circumstance has been recognized by this court in *Skinner v. Miller*, 5 Litt. 84, and *Perkins v. Drye*, 3 Dana, 170. That circumstance exists in the present case. It appears from the testimony that appellees commenced nego-

tiations with appellant by requesting him to advance the money to pay off the debts, and then to manage the farm for them, and reimburse himself out of the income therefrom. Second, "the grantor was in embarrassed circumstances." That circumstance fits the present case. The land of appellees was about to be sold to pay the debts on it by a decree of the court, and appellees were unable to pay them. Third, "the price paid is inadequate"; i. e., less than the market value of the land. That circumstance exists in the case at bar. The land was worth \$11,000 and the legal debts against it, including costs and interest and everything, was only about \$7,000. Fourth, "the fact that after making the deed there is an accounting between the parties as if the vendor still had an interest in the property." In the case at bar accounts showing the receipts and disbursements of the farm were regularly rendered by appellant to appellees from the ⁶⁹⁹ beginning until after this action was instituted. Fifth, "the fact that a defeasance is executed simultaneously with, or as a part of, the same transaction, is extremely indicative of a mortgage." Another circumstance existing in the present case which indicates that the transaction was a mortgage and not a conditional sale, i. e., the reconveyance was to be made for the identical same sum, with interest, that the seller paid for the property: Jones on Mortgages, sec. 278. Another is that the defeasance contract expressly provides that appellant should take possession of the property. If a sale was in the minds of the parties, why should mention be made that the purchaser should take possession? See Bright v. Wagle, 3 Dana, 252, in which the court said: "If the minds of the parties were not running upon a loan, and a mortgage, pledge or lien upon the slave to secure it, why the introduction of this stipulation? If it were a sale, and so intended by the parties, no reasonable man could doubt but that the property and immediate possession thereof would pass to the vendee, without special stipulation to that effect."

Another circumstance indicating that the transaction was to secure the payment of money and not a conditional sale, is that by the terms of the writing the entire net proceeds of the farm for five years were to be credited on the price that appellees were to pay for it. When a man owns a farm and gives another an option to buy it at any time within five years for the same price he paid for it, it would seem strange that he should further agree that the entire income made by his own management should be applied to the payment of the purchase money.

For these reasons, the judgment of the lower court is affirmed.

The Statute of Frauds cannot be Invoked to prevent the enforcement of an agreement made by a purchaser at a judicial sale to permit the debtor to redeem: See the note to McCoy v. McCoy, 102 Am. St. Rep. 244.

A Conveyance Absolute upon Its Face may be shown by parol to have been intended as security, and when so shown is a mortgage: McElroy v. Allfree, 131 Iowa, 112, 117 Am. St. Rep. 412. The mere form of an instrument is of unimportance in respect to whether it is enforceable as a mortgage or not, upon its character being questioned in either a legal or an equitable action. If its purpose is security, and this is established in any action involving the subject, the instrument is treated as a mortgage and nothing else: Smith v. Pfluger, 126 Wis. 253, 110 Am. St. Rep. 911. If a person acquires the legal title by purchase at a sheriff's sale of land under execution, in pursuance of a parol agreement with the judgment debtor to hold the title thus obtained as a security for a loan of money paid to relieve the land from the judgment lien, and that he will reconvey when the money is refunded, the case is not distinguishable from any other where the deed, though absolute in terms, is designed simply as security for a loan, and parol evidence is admissible to show the nature of the transaction: Dickson v. Stewart, 71 Neb. 424, 115 Am. St. Rep. 596. An agreement by a grantee in a sheriff's deed, made at the time the certificate is outstanding, to purchase the latter and hold the title to the land as security for the money paid and other debts of the owner, may be shown by parol evidence: McElroy v. Allfree, 131 Iowa, 112, 117 Am. St. Rep. 412.

An Agreement Given by the Grantees of a Deed received from their mortgagor that if the property is sold for more than enough to pay certain claims and expenses, all sums over and above this shall be paid to such grantor, amounts to more than a simple promise, and creates a trust under which the title is held for the purposes stated in the agreement: Weltner v. Thurmond, 17 Wyo. 268, 129 Am. St. Rep. 1113.

The Creation of Trusts in Land by Parol is the subject of a note to Insurance Co. of Tennessee v. Waller, 115 Am. St. Rep. 774.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

LORD v. SHERER DRY-GOODS COMPANY.

[205 Mass. 1, 90 N. E. 1153.]

MERCHANT'S LIABILITY for Injury to Person in Rush at Bargain Counter.—Where a merchant attracts a large crowd to his store by advertising, and then announces bargains at a particular counter near a stairway, and the people, rushing in that direction, cause a girl on the stairs to fall, he is not liable for her injuries. (p. 421.)

Tort for injuries received by the plaintiff, a girl five or six years old, by being pushed down a stairway by a crowd in the department store of the defendant. At the close of the evidence the judge ordered a verdict for the defendant. The plaintiff alleged exceptions.

C. A. MacDonald, for the plaintiff.

D. F. Slade, for the defendant.

■ **HAMMOND, J.** There was nothing in the shape, construction or condition of the stairway which was unusual or which would ■ warrant a finding of negligence in leaving it as it was. In this respect the case differs from cases like *Hendricken v. Meadows*, 154 Mass. 599, 28 N. E. 1054, and *Toland v. Paine Furniture Co.*, 175 Mass. 476, 56 N. E. 608, 179 Mass. 501, 61 N. E. 52, which are cited by the plaintiff. And even if the stairs were not well lighted, it is manifest that the accident was in no way due to that fact.

Upon the question whether there was any evidence of negligence of the defendant in attracting a crowd of customers to his store and in failing to take measures to protect them from each other, the case presents more difficulty. It has been often adjudged that a common carrier is held to the exercise of proper care to protect his passengers from injury by reason of the jostling, pushing or other rough act of a

crowd which he allows to collect in his cars or upon his platforms, especially elevated platforms: *Treat v. Boston etc. R. R.*, 131 Mass. 371; *Kuhlen v. Boston etc. Ry.*, 193 Mass. 341, 118 Am. St. Rep. 516, 79 N. E. 815, 7 L. R. A., N. S., 729, and cases cited. It is contended by the plaintiff that on the day in question a crowd of customers had been drawn to the defendant's store by advertisements issued for that purpose; that while the store was thus crowded an announcement was made by one of the defendant's servants calling particular attention to a certain jewelry counter as a place where articles were for sale at a very low price; that this counter was situated near the stairway and that this announcement was calculated to cause, and did cause, a rush to that counter; that such a rush might be dangerous to people on the stairs, especially to children of the age of the plaintiff, and that this danger might and ought to have been foreseen and provided against by the defendant.

It cannot be said, however, that a merchant is negligent simply because he has his store crowded with customers, or because while the store is crowded he directs their attention to some part where they can get good bargains. That is what the store is for.

And while it is not difficult to conceive of a case where the path to the place to which the customers are called may be so dangerous or the place itself may be so dangerous as to make it the duty of the merchant to warn the customers (*Hendricken v. Meadows*, 154 Mass. 599, 28 N. E. 1054), we do not think that under the circumstances of this case there was any such duty resting on the ⁴ defendant. The stairs were of ordinary construction, and the defendant had the right to assume that under the circumstances there was no reason to anticipate any danger to those upon them.

Exceptions overruled.

He Who Maintains a Store for the Sale of Goods Impliedly Solicits patronage, and one who accepts the invitation to enter is not a trespasser nor a mere licensee, but is rightfully on the premises by invitation, and there arises in his favor a legal duty which demands reasonably safe arrangements for his protection: Shobert v. May, 40 Or. 68, 91 Am. St. Rep. 453. As to the liability of a storekeeper to a customer in case a basket used upon the storekeeper's carrier system to convey goods falls from the track and strikes the customer, see *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 126 Am. St. Rep. 870. And as to the obligation of a shopkeeper to keep the sidewalk in front of his shop safe for customers by removing ice therefrom, see *McGrath v. Misch*, 29 R. I. 49, 132 Am. St. Rep. 798. A child of tender years who enters a shop, though for the purpose of buying candy which is there for sale, has no implied invitation to go into another part thereof where a coffee grinder is in operation, and the owner is under no obligation to look out for the child and to see that it does not injure itself by placing its hand in the grinder, from which it suffers personal harm: *Holbrook v. Aldrich*, 168 Mass. 15, 60 Am. St. Rep. 364.

MAGUIRE v. PAN-AMERICAN AMUSEMENT COMPANY.

[205 Mass. 64, 91 N. E. 135.]

REPLEVIN BOND—Recovery of Costs and Counsel Fees.—In an action on a replevin bond, wherein the condition is that the principal obligor shall pay such damages and costs as the defendant in replevin shall recover against it, and also return the property if such is the final judgment, there can be no recovery for expenses, including counsel fees, incurred in defending the replevin suit and in prosecuting the action on the bond, since the bond includes no provision for such payment, and the taxable costs in each case are in contemplation of the law a full indemnity for all expenses incurred in defense or prosecution. (p. 423.)

REPLEVIN BOND—Interest on Value of Property Detained.—In an action on a replevin bond the plaintiff can have interest on the damages and costs recovered and on the value of the property only from the date of the judgment in the replevin suit. (p. 424.)

REPLEVIN BOND—Damages—Interest on Value of Property. The damages for the taking and retention of property in replevin, to the time of judgment in the replevin suit, including interest upon the value of the property if that is taken to be the damages for its detention, can be recovered only in the replevin suit. This applies to the interest allowed by statute in case the goods replevied were under attachment and service of execution was delayed by the replevin. (pp. 424, 425.)

REPLEVIN BOND—Conclusiveness of Recital of Value.—The sum named in a replevin bond as the value of the property is competent, but not conclusive, evidence of that value against the obligors in an action on the bond. (p. 425.)

REPLEVIN—Return of Property in Good Order.—Upon the rendition of a judgment in replevin for a return, it is the duty of the plaintiff to see that the property is restored to the defendant in like good order and condition as when taken. (p. 427.)

REPLEVIN BOND—Damages When Property not Returned.—In an action on a replevin bond, when there has been judgment in the replevin suit for the return of the property, but there has been a failure to make such return, the plaintiff is entitled to the market value of the property in as good order and condition as it was on the date of the final judgment in the replevin suit. (p. 427.)

Action upon a replevin bond. The plaintiff, Robert E. Maguire, a deputy sheriff, attached personal property by virtue of a writ in an action of Charles Messenger against the Pan-American Amusement Company. Two days later the property was taken from Maguire by virtue of a replevin writ issued from the circuit court of the United States in which the Pan-American Amusement Company was plaintiff and Maguire defendant. The Pan-American Amusement Company gave the bond to Maguire which is the basis of the present action. In the action of Messenger v. Lederer Amusement Company the plaintiff recovered judgment for \$6,188.46, debt or damage, and \$59.56 costs. In the replevin suit a final judgment was entered in the

circuit court against the Pan-American Amusement Company for the return of all the property, for \$1.05 as damages, and for \$180.20 as costs of suit. The execution having been in no part satisfied, this action was brought on the bond. At the close of the evidence the presiding judge ordered a verdict for the penal sum of the bond, namely, \$10,000, and that damages be assessed in the sum of \$6,461.50, made up as follows: \$5,000 for the value of the goods, \$1,279.25 interest, \$182.25, the amount of damages and costs for which execution issued in the original replevin suit. Both the plaintiff and the defendant alleged exceptions.

T. J. Barry and A. E. Burr, for the defendants.

J. P. Russell and F. M. Whitman, for the plaintiff.

⁶⁷ *SHELDON, J.* 1. The plaintiff's first exception is to the refusal of the judge to allow him to show what expenses he had been obliged to incur in the defense of the replevin suit, including counsel fees, and also in the present action on the bond. ⁶⁸ His contention is that he is entitled to these sums as a part of the expenditures which he has been obliged to make in order to get back his property or its value: *Stern v. Knowlton*, 184 Mass. 29, 67 N. E. 869; *Berry v. Ingalls*, 199 Mass. 77, 85 N. E. 91. But to this contention there are two sufficient answers.

In the first place, the condition of the bond which constitutes the agreement upon which the plaintiff must rely was simply that the principal defendant should pay whatever damages and costs this plaintiff should recover against it, and return the property replevied if such should be the final judgment. That is the limit of the defendant's obligation: *Swift v. Barnes*, 16 Pick. 194; *Leighton v. Brown*, 98 Mass. 515. In the second place, the taxable costs which the prevailing party recovers in each case are in the contemplation of the law a full indemnity for all the expenses incurred in his defense or prosecution: *McIntire v. Mower*, 204 Mass. 233, 90 N. E. 567, and cases cited; *Barnard v. Poor*, 21 Pick. 378; *Henry v. Davis*, 123 Mass. 345. We have never followed the Illinois cases in which, under the prescribed form of replevin bonds, reasonable counsel fees have been allowed to a successful defendant in replevin: *Gilbert v. Sprague*, 196 Ill. 444, 63 N. E. 993; *Harts v. Wendell*, 26 Ill. App. 274; *Dalby v. Campbell*, 26 Ill. App. 502. This case does not resemble *Berry v. Ingalls*, 199 Mass. 77, 85 N. E. 191, and the defendants were under no obligation, by contract or otherwise, to indemnify the plaintiff for whatever expense was caused to him, as in *Pond v. Harris*, 113 Mass. 114; *New Haven & Northampton Co. v. Hayden*, 117 Mass. 433; *Westfield v. Mayo*, 122 Mass. 100, 23

Am. Rep. 292; Faneuil Hall Ins. Co. v. Liverpool & London & Globe Ins. Co., 153 Mass. 63, 26 N. E. 244, 10 L. R. A. 423; Boston & Albany R. R. v. Charlton, 161 Mass. 32, 32 N. E. 688; Wheeler v. Hanson, 161 Mass. 370, 42 Am. St. Rep. 408, 37 N. E. 382, and Consolidated Hand-Method Lasting Machine Co. v. Bradley, 171 Mass. 127, 68 Am. St. Rep. 409, 50 N. E. 464.

This exception cannot be sustained.

2. The plaintiff claimed interest on the value of the property from the time that it was taken on the replevin writ; but the judge ruled that he could recover interest only from the date of the verdict in the replevin suit. This ruling was too favorable to the plaintiff and so he cannot complain of it. The damages for the taking and detention of the property to the time of the judgment in the replevin suit should be assessed in that suit; ⁶⁹ and this principle includes interest upon the value of the property, if that is taken to be the damages for its detention. If and so far as these damages are not recovered in the replevin suit, then in our practice they cannot be recovered at all: *Stevens v. Tuite*, 104 Mass. 328. As was said in that case (page 336), if the principal defendant had immediately upon the entry of final judgment in the replevin suit paid the amount of the damages and costs for which that judgment was rendered, and restored all the replevied property in the same condition as when taken, there would have been no breach of the bond. It is for the failure to do this that the plaintiff is entitled to recover; and it follows that he can have interest alike on the damages and costs recovered and on the value of the property only from the date of that judgment: *Swift v. Barnes*, 16 Pick. 194; *Leighton v. Brown*, 98 Mass. 515. This corresponds to the measure of damages in a suit on a bail bond: *Heustis v. Rivers*, 103 Mass. 398. We never have allowed a defendant in replevin to elect between having these damages assessed in the original suit and having them all finally determined in a suit on the replevin bond, as seems to have been done in Maine: *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Thomas v. Spofford*, 46 Me. 408.

But the property replevied was under attachment, and was held by the present plaintiff as an attaching officer. The statute provides that "if the goods when replevied had been taken on execution, or if they had been attached and judgment is afterward rendered for the attaching creditor, and if in either case the service of the execution is delayed by reason of the replevin, the damages to be assessed for the defendant upon a judgment for a return shall be at the rate of not less than twelve per cent a year on the value of the goods for the time during which the service of the

execution was so delayed": Rev. Laws, c. 190, sec. 11. The attaching creditor here recovered judgment pending the action of replevin; the service of the execution was delayed by the replevin, and it has remained wholly unsatisfied. The plaintiff claims that he is entitled to interest at this higher rate from the date of the execution in the attachment suit to the date of the verdict in this action, and has excepted to the ruling of the judge allowing him interest at the rate only of six per cent per year. But this increased rate of interest is allowed only by way of damages ⁷⁰ for the detention of the property whereon the execution might have been levied, and the allowance by the very language of the statute is to be made upon the "judgment for a return." It follows that recovery for this item of damages can be had only in the action of replevin itself: *Stevens v. Tuite*, 104 Mass. 328; *Parker v. Simonds*, 8 Met. 205. So far as *Huggeford v. Ford*, 11 Pick. 223, lays down a different rule, it cannot be followed.

Both of the plaintiff's exceptions must be overruled.

3. The trial judge ruled that the defendants could not be allowed to show that the value of the property replevied was less than \$5,000. They made several offers of proof to show what they claimed to be the value of the property, all of which were excluded. The defendants have excepted to these rulings.

It was said in some of our earlier cases that the plaintiff's averment in a writ of replevin of the value of the property which he seeks to replevy, or the recital of such value in the replevin bond, is conclusive upon him and upon his sureties in that bond, and that they cannot, when sued upon the bond after a breach of its condition, diminish the amount of their liability by proof that the property was in fact of a smaller value: *Huggeford v. Ford*, 11 Pick. 223; *Swift v. Barnes*, 16 Pick. 194; *Parker v. Simonds*, 8 Met. 205; *Leighton v. Brown*, 98 Mass. 515. But the rule was not uniformly applied. In *Pomeroy v. Trimper*, 8 Allen, 398, 85 Am. Dec. 714, the court, after pointing out that a plaintiff in replevin need not make any averment of the value of the property (*Blake v. Darling*, 116 Mass. 300), said that such an averment, if made, was admissible against him on the question of value, but was not conclusive against him nor in any way binding on the defendant. In *Barnes v. Bartlett*, 15 Pick. 71, it was said that such an averment was *prima facie* evidence against a plaintiff in replevin. But it does not settle the jurisdiction of the court over the action: *King v. Dewey*, 11 Cush. 218. In *Gordon v. Jenney*, 16 Mass. 465, in which the court refused to allow damages for depreciation in value of the property to a plaintiff who has kept it to abide the final judgment, this was put on

the ground that he could have sold the property in such a manner as to ascertain its value, and that he would be answerable on his bond only for that real value.

But we are of opinion that the rule has been finally settled ⁷¹ in this commonwealth by the decision in *Wright v. Quirk*, 105 Mass. 44. It was held in that case that the sum named in a replevin bond as the value of the property is competent but not conclusive evidence of that value against the obligors in an action on the bond. Either party has a right to have the value determined by a jury, and the testimony of any witness of competent knowledge is admissible as evidence of such value; and because the judge at the trial had excluded such testimony and refused to leave the question of the value to the jury, but had ruled that the defendants, the obligors of the bond, were bound by the recital of value therein contained, a new trial was ordered. That case is decisive of this question. So it was said in *Litchman v. Potter*, 116 Mass. 371: "It is not necessary in a replevin writ to allege the value of the goods to be replevied: *Pomeroy v. Trimper*, 8 Allen, 398, 85 Am. Dec. 714; *Blake v. Darling*, 116 Mass. 300. If alleged, it may, under some circumstances, be admissible against the plaintiff as evidence of value (*Clap v. Guild*, 8 Mass. 153; *Barnes v. Bartlett*, 15 Pick. 71); but it is not conclusive evidence even on the question of jurisdiction."

We are of opinion that the judge erred in ruling that the plaintiff was entitled as matter of law against the defendants to have the property valued at \$5,000, and that he should have ruled that the language of the bond afforded no more than *prima facie* evidence that the property was of that value.

We have been referred by the industry of counsel to a great many decisions upon this question in other states. As we find the rule to have been settled in this commonwealth, we do not deem it necessary to advert to those decisions, although we have examined them all. They are not in accord, and it would be difficult to say which of the two rules contended for before us is supported outside of this commonwealth by the greater weight of authority. But we are of the opinion that as a matter of sound reason the better doctrine is that to which we adhere. If a plaintiff in replevin chooses to make a statement of the value of the property in his writ or in his bond, undoubtedly it should be regarded as an admission by him, and should afford evidence of that value against him and those who, like his sureties, are in privity with him. But it is against all the analogies of the law to treat the mere admission of a party, not essential, as we have ⁷² seen that this is not essential, to the institution or the prosecution of his proceedings, and not acted upon or intended to be in any

way acted upon by the opposite party, as an estoppel: *Athol Savings Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632. The averment may have been made without seeing the property or knowing anything of the condition into which it has been put by the defendant in replevin. It is customary in our practice to prepare the bond in advance of the service of the writ and before an appraisal of the property has been made under Revised Laws, chapter 190, sections 3 and 9. If this is done, the plaintiff will naturally make the penalty of the bond large enough to cover whatever appraisal may in the future be made. Under such circumstances, the fact that the bond is required to be in double value of the property scarcely justifies the inference that the plaintiff and his sureties are estopped to deny that the value of the property is at least half of the penalty of the bond, especially since we have decided that no harm is done to any party by making that penalty needlessly large: *Clap v. Guild*, 8 Mass. 153. But in the case at bar the writ contained no allegation of the value of the property; the bond contains no such recital; the appraisal amounted only to \$4,000; and the statement in the return of the officer that he took and returned a bond in double the value of the property replevied could not constitute a solemn averment such as to bind and estop the obligors of the bond, even under the most rigid of the decisions which have held those obligors bound by an averment of that value. Even if the plaintiff in replevin had made in his writ such an express averment, we think that, in the language of Smith, J., in *Briggs v. Wiswell*, 56 N. H. 319, "it would be unreasonable to hold that he should be precluded from laying any evidence before the jury upon the question of value, because he may have been led, for reasons that turn out not to be well grounded, to set the value in his writ higher than it actually is." A fortiori is this so, where, as here, no such express averment is made, but it is a matter of inference to be drawn by coupling the language of the bond with that of the officer in his return, although the obligors had absolutely no control over the language to be used by the officer.

Accordingly, the defendant's exceptions to this ruling must be sustained. It is not necessary to deal with their offers of proof ⁷³ in detail. But it was their duty, upon the rendition of the judgment for a return, to see that the property was restored to the plaintiff in like good order and condition as when taken: *Citizens' Nat. Bank v. Oldham*, 136 Mass. 515. The plaintiff is entitled to the fair market value of the property in that order and condition as of the time when it should have been delivered to him—that is, on the date of the final judgment in the replevin suit: *Swift v. Barnes*, 16 Pick. 194; *Leighton v. Brown*, 98 Mass. 515; *Stevens v. Tuite*,

104 Mass. 328. The damages should be assessed upon this basis.

4. The defendants have waived their exception to the refusal of the judge to rule that the plaintiff could not maintain this action, or could at any rate recover no more than nominal damages, by reason of the removal of the attachment suit to the United States court. We do not see how that exception could have been sustained: *Barney v. Globe Bank*, 5 Blatchf. 107, Fed. Cas. No. 1031; *Dennistoun v. Draper*, 5 Blatchf. 336, Fed. Cas. No. 3804; *Schott v. Youree*, 41 Ill. App. 476, 142 Ill. 233, 31 N. E. 591; *Petrie v. Fisher*, 43 Ill. 442; *Tedrick v. Wells*, 59 Ill. App. 657.

The plaintiff's exceptions must be overruled, and the defendants' exceptions must be sustained; and it is so ordered.

The Proper Measure of Damages in a Suit on a Replevy Bond is the value of the property with interest thereon: *Ward v. Hood*, 124 Ala. 570, 82 Am. St. Rep. 205, and see cases cited in the cross-reference note thereto.

Replevin Against Public Officers is the subject of a note to *Carpenter v. Innes*, 25 Am. St. Rep. 256.

As to When Replevin can be Maintained, see the note to *Sinnott v. Feiock*, 80 Am. St. Rep. 741.

ANDREWS v. MINES CORPORATION, LIMITED.

[205 Mass. 121, 91 N. E. 122.]

CORPORATION—Examination of Books of Foreign Company. The right of a stockholder to examine the books of his company will be enforced against a foreign corporation, when its usual place of business, and its books and the officer having their custody, are in this state. (p. 430.)

CORPORATION — Examination of Books. — Mandamus is a Proper Remedy to enforce the right of a stockholder to examine the books of his corporation. (p. 430.)

S. Lewenberg, for the petitioner.

J. S. Allen, Jr., and W. N. Buffum, for the respondents.

¹²¹ KNOWLTON, C. J. This is a petition for a writ of mandamus upon which a justice of this court, after a hearing, entered an order that the writ should issue, and then, at the request of the respondents, reported the case to this court. As the proceeding is at law, such a report brings before us only questions of law, and the decision of the single justice must be given effect unless some error of law appears.

The petitioner is a stockholder in the respondent corporation, and his petition is that the corporation and the other respondent, ¹²² who is a director and the treasurer of the corporation, having custody of its books and records, be directed to give him an opportunity to examine these books. The petitioner is a citizen of this commonwealth, and the respondent corporation, which is organized under the laws of the state of Delaware, has a usual place of business in Boston and holds its meetings there. Its books and records are there in the hands of Davison, the other respondent. The president of the corporation also resides in this commonwealth.

The right of a stockholder in a corporation to inspect its books and records for good reasons, and under proper conditions, was considered at length in *Varney v. Baker*, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989. The principal question in the present case is whether this right will be enforced in this commonwealth against a foreign corporation and its officers, when its books and the officer having the custody of them are here, and when it has a usual place of business in Massachusetts. The circumstances of the present case call for the exercise of this jurisdiction, if it ever can properly be exercised.

It has often been decided that this court will not take jurisdiction, in ordinary cases, to regulate the internal affairs of a foreign corporation which ought to be managed under the laws and by the direction of the courts of the state or country where it is organized: *Smith v. Mutual Life Ins. Co.*, 14 Allen, 336; *Williston v. Michigan Southern & Northern Indiana R. R.*, 13 Allen, 400; *Kansas & Eastern R. R. Construction Co. v. Topeka etc. R. R.*, 135 Mass. 34, 46 Am. Rep. 439; *Kimball v. St. Louis etc. Ry.*, 157 Mass. 7, 34 Am. St. Rep. 250, 31 N. E. 697; *Wason v. Buzzell*, 181 Mass. 338, 63 N. E. 909; *Electric Welding Co. v. Prince*, 195 Mass. 242, 81 N. E. 306. But the right which is sought to be enforced here is one of general, if not universal, recognition from early times. It is referred to in different cases as a right existing at common law. In order to enforce it, the court is not called upon to investigate the internal affairs of the corporation, or to make any order that affects it in the management of its business, or in the relations of stockholders to one another. By virtue of the laws which permit the corporation to do business in this commonwealth and subject it to the jurisdiction of our courts, any proper jurisdiction may be exercised which concerns its dealings with third parties here whereby their rights are affected. ¹²³ Rights of third parties, whether they happen to be stockholders or not, if the rights are such as are recognized by our laws, may be enforced by our courts, unless they relate to such internal affairs of the corporation as ought to be regulated only by the courts of the state or county to

which it owes its existence. Where all that is desired is an examination of books, and the corporation has a usual place of business in this commonwealth, and the books and their custodian are here, there is every reason of policy and convenience why our courts should enforce a stockholder's right to examine them. This conclusion has been reached in carefully considered opinions of courts in other states: *Richardson v. Swift*, 7 Houst. (Del.) 137, 30 Atl. 781; *State v. North American Land & Timber Co.*, 106 La. Ann. 621, 87 Am. St. Rep. 309, 31 South. 172; *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780. That there was jurisdiction in such a case was assumed, both by counsel and the court, in *Schondelmeyer v. Columbia Fireproofing Co.*, 219 Pa. 610, 69 Atl. 49, although the writ of mandamus was refused on the ground that the facts did not show a need of relief. The only case to the contrary that has come to our attention is *In re Rappleye*, 43 App. Div. 84, 59 N. Y. Supp. 338. That was decided in New York, where there are statutory provisions for the keeping of certain books in that state by foreign corporations doing business there, to which stockholders shall have access. This case did not come within the statutes, and the existence of such statutes may have been a reason for the decision, although the judges did not say so. We see no good reason why this jurisdiction should not be exercised in this commonwealth in a proper case.

The findings of fact by the presiding justice bring the application within the principles stated in *Varney v. Baker*, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989, and the findings seem to be well supported by the other facts and the evidence reported.

It cannot be said as a matter of law that the petitioner did not make a sufficient effort to obtain the books for examination before bringing the suit. He inquired of the president, and of Davison, the treasurer and custodian of the books, besides one or two other stockholders. The books and records were taken from his possession by force on one occasion, after he had begun to examine them. The decision in *Dunphy v. Traveler Newspaper Assn.*, 146 Mass. 495, 16 N. E. 426, is not applicable.

¹²⁴ There is no ground for a contention that the relief to the petitioner should be in equity. The case of *Post v. Toledo etc. R. R.*, 144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540, shows the importance of sometimes taking jurisdiction in aid of or against a foreign corporation; but the remedy there given in equity was of a different kind from that sought in the present case, and could not have been obtained upon a writ of mandamus. On the other hand, a writ of mandamus is a proper remedy in a case like the present.

Peremptory writ of mandamus to issue.

As to the Right of a Stockholder to Inspect the Books of his corporation and the remedies for its enforcement, see the note to *Harkness v. Guthrie*, 107 Am. St. Rep. 674. This question is discussed with reference to foreign corporations on pages 685, 686 of this note. The New York statute gives a stockholder the absolute right to inspect the books of the corporation during business hours, and imposes on the corporation and the custodian of the books the absolute duty to permit such inspection, without any disclosure by the stockholder of his purpose: *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302, 134 Am. St. Rep. 835.

YANCEY v. BOSTON ELEVATED RAILWAY.

[205 Mass. 162, 91 N. E. 202.]

STREET RAILWAY—Passenger Boarding Car on Wrong Side.

Where a woman attempts to board a car on the wrong side where the door is closed, and the conductor sees her standing on the steps and knows her purpose, the railway company owes her the duty of exercising reasonable care until at least an opportunity is given in which she may safely step down. (p. 433.)

STREET RAILWAY—Passenger Boarding Car on Wrong Side.

Where a conductor starts a car, knowing that a woman is standing on the steps trying to gain entrance on the wrong side where the door is closed, and she is thrown to the ground, it is a question for the jury whether the conductor is so negligent as to make the railway company liable. (p. 433.)

STREET RAILWAY—Passenger Boarding Car on Wrong Side.

A woman, not accustomed to traveling on street-cars is not careless as a matter of law in trying to gain entrance to a car on the wrong side where the door is closed, and the car stationary. (p. 433.)

STREET RAILWAY—Passenger Boarding Car on Wrong Side.

For a conductor deliberately and without warning to start a car at a speed which may compel a crippled woman, who is standing on the steps and trying to gain entrance to the wrong side of the car where the door is closed, to fall to the ground, may be found by the jury to be such a disregard of the consequences which reasonably should be anticipated as to amount to willful misconduct. (pp. 433, 434.)

NEGLIGENCE.—A General Verdict for the Plaintiff in an action against a street railway company for injuries to one attempting to board a car will not be sustained, if there are two counts, both good, in the declaration, one charging simple and the other gross negligence, and the court, notwithstanding its attention was called to the matter, failed to point out the proof required to sustain the allegations of the latter count. (p. 435.)

Tort for personal injuries received by the plaintiff in being thrown from the steps of an electric car of the defendant. The defendant requested the judge, at the close of the evidence, to make the following rulings, which the judge refused to do:

“1. On all the evidence the plaintiff is not entitled to recover.

"2. The plaintiff cannot recover upon the first count in her declaration.

"3. The plaintiff cannot recover upon the second count in her declaration.

"4. Upon all the evidence the plaintiff was not in the exercise of due care.

"5. The plaintiff was not a passenger upon the defendant's car at the time of the accident.

"6. The plaintiff was a trespasser upon the defendant's car at the time of the accident.

"7. The defendant did not owe to the plaintiff that high degree of care it was bound to exercise toward a passenger.

"8. The defendant is not liable for any acts which do not amount to willful and wanton recklessness toward the plaintiff.

"9. To establish the degree of negligence on the part of a defendant necessary for the plaintiff to recover, the plaintiff must show intentional, willful wrong. The conduct of the defendant's agent must be criminal or quasi criminal. If it results in the death of the injured person, he is guilty of manslaughter.

"10. The evidence does not show willful and wanton disregard of the plaintiff's rights by the defendant, its agent or servants."

"12. Even if the conductor did start the car after the plaintiff boarded it there was no such probability that injury would result to her as to make his act reckless or wanton.

"13. The defendant is not liable for a mere error of judgment on the part of the conductor."

The jury returned a general verdict for the plaintiff, and the defendant alleged exceptions.

F. H. Chase, for the defendant.

W. H. Sullivan, for the plaintiff.

169 BRALEY, J. The plaintiff, although a young woman, suffered from permanent lameness, owing to a dislocation of the hip. In walking, to lessen the weight upon this hip, where an abscess had formed, she had been provided with crutches at the hospital from which she was returning to her home at the time of the accident. The car she had intended to take had stopped, and remained standing at a cross-walk, with the right-hand rear door of the vestibule open on the side next to the street, through which passengers were entering, while the conductor stood on the platform. But the vestibule door next to the double track was closed. If the evidence of the witnesses as to the conduct of the plaintiff and the conductor cannot be reconciled, the jury could find from the plaintiff's testimony that she crossed the street in her line of travel with the intention of taking passage, and, approaching the car

from that side, stood upon the step, with both hands on the grab-irons, holding her crutches, and rapped upon the closed door, and asked for admission, but, although she was seen by the conductor, he shook his head and did not open the door. A further finding would have been warranted that, even if she was seeking to get on from the farther side of the platform, he must have understood she was attempting to board the car for the purpose of becoming a passenger. But while from his uncontradicted evidence it appeared that under a rule of the defendant the left-hand rear door in the direction in which the car moves is always kept closed and locked, and only the door on the right is used for the entrance and exit of passengers, a momentary mistake as to the method of entrance, of which the jury could find she was ignorant, did not make her presence on the car wrongful, in the sense that her act up to the time of refusal was an intentional invasion of the defendant's possession and control: *Severy v. Nickerson*, 120 Mass. 306; *Plummer v. Dill*, 156 Mass. 426. See *Hogner v. Boston Elevated Ry.*, 198 Mass. 260, 270. The fact that the plaintiff technically was a trespasser did not absolutely relieve the defendant from the duty to observe proper care toward ¹⁷⁰ her or in exercising its own rights so to act as not to injure her unnecessarily: *Lovett v. Salem & South Danvers R. R.*, 9 Allen, 557. The car had been stopped for the reception of passengers, and if it were found that the defendant's servant knew not only of the plaintiff's presence, but of her evident purpose, the defendant owed the plaintiff the duty of exercising reasonable care until at least an opportunity had been given in which she might safely step down: *Aiken v. Holyoke Street Ry.*, 184 Mass. 269, 68 N. E. 238; *Robertson v. Boston & Northern Street Ry.*, 190 Mass. 108, 112 Am. St. Rep. 314, 76 N. E. 513, 3 L. R. A., N. S., 588; *Hogner v. Boston Elevated Ry.*, 198 Mass. 260, 84 N. E. 464, 15 L. R. A., N. S., 960; *Donovan v. Hartford Street Ry.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; *Dale v. Brooklyn City etc. R. R.*, 1 Hun, 146, 60 N. Y. 638; *Kelly v. Consolidated Traction Co.*, 62 N. J. L. 514, 41 Atl. 686.

In the description of what followed, if the jury believed the plaintiff, the conductor simultaneously with shaking his head started the car, causing her to be carried a short distance when, being unable to retain her footing, she fell off into the street. It was properly left to the jury to decide whether the conductor was so negligent as to make the defendant liable. Nor could it have been rightly ruled as matter of law that the plaintiff was careless. It could not have been reasonably anticipated that under such conditions the car would be instantly set in motion. Upon discovery that she had made a mistake when the door was not opened, it could be found

that she might assume that the conductor, knowing her perilous position, would not immediately give the signal to start, but would allow her time to step off.

The defendant's requests for rulings, with the exception of the second and third, make no reference to the different counts. The first count does not allege that the plaintiff was a passenger, but charges the defendant with negligence in the management of the car, and, the evidence being applicable to that count, no error appears in the refusal to give the defendant's first, second, fourth and twelfth requests; but the sixth request should have been given. Nor should the thirteenth request have been granted. It was not asserted by the plaintiff that an error of judgment had been made in starting the car, but that it was knowingly started with a disregard to her safety, and the defendant's ¹⁷¹ evidence was simply a denial of the plaintiff's statement as to the place and cause of the accident. Besides, the jury were plainly told that, if it happened elsewhere and under entirely different conditions, as the defendant contended, the plaintiff could not recover.

The fifth and seventh requests, while correctly stating the law, were fully and accurately covered by the instructions: *Graham v. Middleby*, 185 Mass. 349, 70 N. E. 416.

The second count alleged gross negligence of the defendant in starting the car recklessly and wantonly with gross disregard of the plaintiff's safety, and the defendant excepted to the refusal to give the third, eighth, ninth, tenth and twelfth requests. We have said that there was evidence for the jury of the defendant's negligence, and a further inference of fact could have been drawn by the jury that the conductor, with full knowledge of the situation of the plaintiff, although he might not have fully appreciated her bodily infirmities, gave her no opportunity to alight. The use of unreasonable force, where under the circumstances life and limb may be endangered, can be found to be willful or reckless and wanton. A trespasser even cannot be willfully molested and dealt with to his harm and injury: *Planz v. Boston & Albany R. R.*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835. The conductor, as the defendant's servant, was in charge of the car, and the defendant was responsible for his acts: *Holmes v. Wakefield*, 12 Allen, 580, 90 Am. Dec. 171; *Young v. South Boston Ice Co.*, 150 Mass. 527, 23 N. E. 526. Deliberately and without warning to start the car at a speed which the jury might find would compel the plaintiff, in her crippled condition, to fall into the street while it was in motion, resulting, perhaps, in loss of life itself, the jury could say constituted such a disregard of consequences, which reasonably should have been anticipated, as to amount to willful misconduct: *Gordon v. West End Street Ry.*, 175 Mass. 181,

55 N. E. 990; Aiken v. Holyoke Street Ry., 184 Mass. 269; Banks v. Braman, 188 Mass. 367, 74 N. E. 594; Black v. New York etc. R. R., 193 Mass. 448, 79 N. E. 797, 7 L. R. A., N. S., 148, 9 Ann. Cas. 485. See Spooner v. Old Colony Street Ry., 190 Mass. 132, 76 N. E. 660. The denial of the third, tenth and twelfth requests afforded no ground of exception.

By the eighth and ninth requests the attention of the court was directed to the nature of proof required to sustain the allegations ¹⁷² of the second count. If not called upon to instruct in the language requested, appropriate instructions as to the liability of the defendant under this count were necessary to a correct understanding by the jury of the issue. In the charge no reference whatever is found to the distinction under our decisions between negligence as ordinarily defined and the willful misconduct which the plaintiff alleged: Black v. New York etc. R. R., 193 Mass. 448, 79 N. E. 797, 7 L. R. A., N. S., 148, 9 Ann. Cas. 485. The counts are not defective, as each states a good cause of action, and, the verdict being general, there is no means of knowing on which one the jury found the defendant liable and assessed damages: James v. Boston Elevated Ry., 201 Mass. 263, 87 N. E. 474. The jury, to the defendant's prejudice, having been improperly left to infer that the plaintiff, even if she was not in the exercise of due care or was a trespasser, could recover if the conductor was shown to have been merely negligent, the exceptions to the refusal to give these requests must be sustained: Bride v. Clark, 161 Mass. 130, 36 N. E. 745.

We do not find it necessary to consider the exceptions to the instructions dealing with portions of the testimony, or to the refusal to give certain instructions asked for at the close of the charge. The questions presented may not arise at the second trial, or, if raised, may assume an entirely different aspect.

Exceptions sustained.

That It is Negligence for a Street Railway Company to Start a Car while a passenger is attempting to board or alight from it, see Jirachek v. Milwaukee etc. Light Co., 139 Wis. 505, 131 Am. St. Rep. 1070; Burger v. Omaha etc. Street Ry. Co., 139 Iowa, 645, 130 Am. St. Rep. 343; Clark v. Durham Traction Co., 138 N. C. 77, 107 Am. St. Rep. 526; Sharp v. New Orleans City R. R. Co., 111 La. 395, 100 Am. St. Rep. 488. And a street railway company is negligent if, having slackened or stopped a car for passengers to get on and off, it starts the car with such a sudden jerk as to cause passengers, who are riding upon the running-board when there is no room for them inside the car, to surge back and forth and crowd or throw one of them to the ground: Oliver v. Ft. Smith Light etc. Co., 89 Ark. 222, 131 Am. St. Rep. 86.

A Railroad Company Owes the Duty of Ordinary Care to any person of any age who enters upon one of its trains as a trespasser. This is especially true of children of tender years: Enright v. Pittsburg Junction R. R. Co., 198 Pa. 166, 82 Am. St. Rep. 795.

HATHAWAY v. CITY OF EVERETT.

[205 Mass. 246, 91 N. E. 296.]

MUNICIPAL CORPORATION—Liability for Act of Police Officer.—A city is not liable to a person assaulted and robbed by its police officers. (p. 436.)

MUNICIPAL CORPORATION—Liability for Acts of Assessor. A city is not liable in tort to a person compelled to pay excessive taxes fraudulently assessed by its assessors. (p. 436.)

MUNICIPAL CORPORATION—Liability for Injury from Riot. If, in an action of tort against a city for injury to property by persons riotously assembled, the declaration contains no count under Revised Laws, chapter 211, section 8, a verdict will be ordered for the defendant. (p. 437.)

Tort against the city of Everett for injuries to the person and property of the plaintiff alleged to have been caused by the servants and agents of the defendant. The plaintiff offered to show that on a certain day a riot took place in the city, that there were some police officers engaged in it, and that those engaged in the riot laid hands on the plaintiff and committed robbery of his person. He also offered to prove that the assessors of the city committed robbery and conspiracy against him by making a false and fraudulent assessment of his land and collecting taxes accordingly. The judge ruled that if the plaintiff should prove the facts as offered, the defendant would not thereby become liable in this action. The plaintiff alleged exceptions.

A. S. Hathaway, pro se.

N. P. Brown, for the defendant, was not called upon.

247 **BRALEY, J.** If the plaintiff could have proved the allegations of his declaration, that his premises had been invaded and he had been assaulted and robbed by police officers of the defendant, and that his real estate, through a conspiracy of its board of assessors, had been excessively overvalued and he had been compelled to pay taxes fraudulently assessed, he would not have established a cause of action against the defendant. Policemen and assessors, when guilty of such willful wrongdoing, do not act as servants of the city, although they may have been appointed or elected by it, but as public officers, for whose tortious acts the municipality, upon the facts stated in the opening, would not be responsible: *Thayer v. Boston*, 19 Pick. 511; *Buttrick v. Lowell*, 1 Allen, 172, 79 Am. Dec. 721; *Johnson v. Somerville*, 195 Mass. 370, 81 N. E. 268, 10 L. R. A., N. S., 715; *Smith v. Gloucester*, 201 Mass. 329, 87 N. E. 626; *Alger v. Easton*, 119 Mass. 77.

The plaintiff also contended that the defendant was liable in an action of tort for injury to his property caused by per-

sons riotously assembled. But as the declaration contained no count under Revised Laws, chapter 211, section 8, the verdict for the defendant was rightly ordered.

Exceptions overruled.

The Liability of Cities for the Acts of Their Agents is the subject of a note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 376. Generally, a municipal corporation is liable for the negligence of employes in performing its private or corporate duties, but not for their negligence in performing its governmental duties: *City and County of Denver v. Maurer*, 47 Colo. 209, 135 Am. St. Rep. 210, and cases cited in the cross-reference note thereto.

As to the Liability of a City for the Acts of Police Officers, see the note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 402; *New Orleans v. Kerr*, 50 La. Ann. 413, 69 Am. St. Rep. 442; *Whitfield v. City of Paris*, 84 Tex. 431, 31 Am. St. Rep. 69; *Moffitt v. City of Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810.

Assessors are Quasi-judicial Officers, and Therefore, are not Liable to a person injured by an excessive valuation of his property for the purposes of taxation, and the assessment not being impeachable in a collateral proceeding, an assessor cannot be held liable on the ground that he acted maliciously, and conspired and colluded with his assistants with intent to injure the plaintiff: *Stewart v. Case*, 53 Minn. 62, 39 Am. St. Rep. 575.

NEW ENGLAND TRUST COMPANY v. ABBOTT.

[205 Mass. 279, 91 N. E. 379.]

INHERITANCE TAX—Transfer to Take Effect After Death.—

Where a person places money with a trust company under agreement that the income is to be paid to a beneficiary as often as dividends should become payable, that at the end of five years the settler may withdraw the whole fund by giving the trustee six months' notice and the trustee may pay off the trust fund by giving like notice to the settler, that if no such notices are given, the fund is to remain for another period of five years, and the right of withdrawing or paying off may be exercised at intervals of five years from the date of the agreement, and that in case of the death of the settler before the termination of the trust or any agreed extension thereof the principal and unpaid income are to be paid to the beneficiary in sixty days after the expiration of the five year period, the gift is "made or intended to take effect in possession or enjoyment after the death of the grantor," and on his death the property is subject to the inheritance tax, to be assessed as of a time thirty days after the expiration of the period of five years referred to in the agreement. (p. 439.)

Bill filed by a trustee for instructions as to whether an inheritance tax should be paid upon a fund in its possession. Information filed the same day by the attorney general, at the relation of the treasurer and receiver general, seeking to have the trustee ordered to pay the tax.

D. Malone, attorney general, and F. T. Field, assistant attorney general, for the plaintiff, in the second case.

C. H. Tyler, O. D. Young and I. H. Ellis, for Harriet E. Abbott and the New England Trust Company.

²⁸⁰ KNOWLTON, C. J. These two cases present but a single question. On or about December 23, 1893, and on each of three days thereafter, one James C. Marshall, who died in January, 1907, domiciled in Boston, deposited with the New England Trust Company the sum of one thousand dollars, making four thousand dollars in all, upon conditions set forth in certain agreements of trust. Under these agreements, which were all alike in their substantive provisions, the trust company was to pay the income as often as dividends thereon should become payable, to Harriet E. Abbott or her ²⁸¹ order. At the expiration of five years from the date of the agreement, Marshall could withdraw the whole trust fund by giving the company written notice of his intention so to do six months before that time, and the company could pay off the trust fund if it chose, by giving him a like notice of its intention so to do. If no such notice was given by either party, the trust fund was to remain during another term of five years, and the right of withdrawing or paying off the principal sum might be exercised at intervals of five years from the date of the agreement. In case of the death of Marshall before the termination of the trust, or of any agreed extension thereof, the trust fund and any unpaid income was to become payable to Harriet E. Abbott in sixty days after the expiration of the period of five years, or any agreed extension thereof. The fund has remained in the possession of the trust company, Marshall has deceased, and the question is whether the trust company, before paying the principal to Miss Abbott, is to deduct from it any sum for a collateral inheritance tax under the provisions of the Revised Laws, chapter 15, section 1, as amended by the Statutes of 1905, chapter 470, and 1906, chapter 436, and if so, what sum.

The only part of the property which was finally disposed of in a known and definitely stated way was the income for the period of five years. The disposition of the principal was left subject to contingencies, any one of three of which might terminate the trust and give direction to the payment of the principal. The creator of the trust, six months before the expiration of the five years, could give notice of his intention to withdraw the principal, or the trust company could give notice of its intention to pay it off, in either of which cases the money would be returned to Marshall; or if Marshall survived and no notice was given, another period of five years would begin under the same arrangement; or

if Marshall died before the expiration of the first period and no notice had been given, the trust would be terminated and the principal paid off to Miss Abbott at the end of sixty days from the expiration of the period.

She had a vested interest in the income until the termination of the trust. The arrangement in regard to the principal was very different. Her only interest in that was contingent, and she was not to enter into the possession and enjoyment of it, in ²⁸²any event, until after the death of Marshall, and then only if the trust had not been terminated by either party by giving notice in his lifetime.

The question under the statute is whether this gift of the property was "made or intended to take effect in possession or enjoyment after the death of the grantor." We think it plain that it was. Miss Abbott could have no possession or enjoyment of the principal until after his death. The fact that she had the possession and enjoyment of the income in his lifetime makes no difference. In that respect the case is the same as if this income had been given to another person, with the disposition of the principal that appears in the agreement. The income and principal stood each by itself, with a separate provision for the disposition of each, and they were as independent of each other as if the income had been given to a third person. The cases are within the principle on which *Crocker v. Shaw*, 174 Mass. 266, 54 N. E. 549, was decided, and similar decisions under similar statutes have been made in other states: *People v. Kelley*, 218 Ill. 509, 75 N. E. 1038; *Matter of Green*, 153 N. Y. 223, 47 N. E. 292; *Matter of Bostwick*, 160 N. Y. 489, 55 N. E. 208; *Matter of Brandreth*, 169 N. Y. 437, 62 N. E. 563, 58 L. R. A. 148; *Wrights' Appeal*, 38 Pa. 507; *Reish v. Commonwealth*, 106 Pa. 521; *Seibert's Appeal*, 110 Pa. 329, 1 Atl. 346; *Dubois' Appeal*, 121 Pa. 368, 15 Atl. 641; *Lines' Estate*, 155 Pa. 378, 26 Atl. 728.

The property is subject to a collateral inheritance tax, to be assessed as of a time thirty days after the expiration of the period of five years referred to in the agreement, and interest is to be paid upon the tax from that time. In the bill of the New England Trust Company the plaintiff is to be instructed accordingly. In the information by the attorney general the defendant is to be ordered to make payment of the tax and interest to the treasurer and receiver general.

So ordered.

Inheritance Taxes.—For Authorities Bearing upon the Principal Case, see the note to *English v. Crenshaw*, 127 Am. St. Rep. 1083.

HILL v. BAKER.

[205 Mass. 303, 91 N. E. 380.]

MUTUAL INSURANCE COMPANY—Insolvency—Policy-holders.—When a mutual insurance company becomes insolvent and a receiver is appointed, outstanding policies are canceled as to future losses, but the premiums that have been paid, for future as well as past protection, and premium notes, remain a fund for the payment of all liabilities of the company, including losses that have been incurred. (pp. 440, 441.)

MUTUAL MARINE INSURANCE—Insolvency—Policy-holders. When a mutual marine insurance company becomes insolvent and a receiver is appointed, policy-holders are liable to him on their promissory notes for their premiums, although the terms of the policies have not expired and the total amounts of the premiums have not been earned. (pp. 441, 443.)

MUTUAL MARINE INSURANCE — Insolvency — Cancellation of Policies.—Where the president of a mutual marine insurance company writes a policy-holder on the 16th of the month that his policy has been canceled as requested, and on the 19th a receiver is appointed, the policy will be treated as canceled on the 16th, there being no intimation that this was not done in good faith on both sides in ignorance of the insolvency, and the policy-holder is entitled to a reduction on his premium note for the period after March 16th. The case is otherwise with a policy-holder who does not request cancellation until after the appointment of the receiver. (p. 444.)

MUTUAL MARINE INSURANCE.—When a Mutual Marine Insurance company becomes insolvent, and a receiver is appointed and one of its policies provides that the premiums shall be returned for months not entered upon, with a warranty of twelve per cent, and the term of insurance has been entered upon and would run until stopped by written request, and there has been no request, the case is not like that of an ordinary open policy in which the insurer is held only for such risks as are subsequently assumed and indorsed on the policy. (p. 444.)

Five actions of contract by the receiver of the China Mutual Insurance Company, brought upon five promissory notes given for marine insurance premiums by policy-holders of that corporation, and one action by a policy-holder against the receiver for a part of a premium paid by him and alleged to have been unearned when his policy was canceled by a decree of court enjoining the company from further proceeding with its business.

A. D. Hill, F. H. Nesmith and A. G. Gill, for the receiver of the China Mutual Insurance Company.

C. W. Clifford, for the defendants in the first five cases and for the plaintiff in the sixth case.

³⁰⁶ **SHELDON, J.** When a mutual fire insurance company has become insolvent and a receiver has been appointed to settle its affairs under Statutes of 1907, chapter 576, section 8, its outstanding policies cease to afford any protection to their holders, being canceled as to any future losses, but

the premiums which have been paid, for future as well as past protection, and the contingent liability to assessment upon premium notes which have been given by the policyholders remain as a fund for the payment of all the debts and liabilities of the company, including losses that have been incurred: *Commonwealth v. Massachusetts Mutual Fire Ins. Co.*, 119 Mass. 45, 112 Mass. 116. As was said by Wells, J., in the case last cited: "Each member is, at the same time, insurer and insured. In one aspect he is a mere holder of a policy, containing a contract of indemnity against loss by fire, with a specific and limited fund out of which that indemnity is to be made good. . . . In another aspect he is a member of the corporation, made so by the very nature of the contract, and so declared by law. . . . In this relation he is an insurer, and is affected by another and very different class of obligations." The deprivation of the right to recover for a future loss does not of itself terminate his membership in the company and his consequent liability to contribute, to the extent of his note, to the payment of losses: *Cumings v. Sawyer*, 117 Mass. 30. The fundamental question in this case is whether the same rule is to be applied to the mutual marine insurance company of which the plaintiff in the first five of these actions is the receiver; whether policyholders in ³⁰⁷ that company are liable to the receivers upon their promissory notes given for insurance premiums, although the terms of the policies have not expired, and the total amounts of the premiums have not been earned, or, in other words, although they have not enjoyed the full benefit of the insurance for which their notes were given. This question is to be determined upon the several contracts of insurance and the statutes under which these contracts were made: *Pendergast v. Commercial Mutual Marine Ins. Co.*, 15 Gray, 257.

In each of these cases the company has made a contract of insurance against definite risks for a fixed period and in consideration of a stipulated premium. In each case except the last the premium was paid, in whole or in part, by a note given by the insured to the company. Each policy describes the insured as a member of the company. By the charter of the company, Statutes of 1853, chapter 262, it was to make "insurance against maritime losses on the mutual principle, with all the powers and privileges, and subject to all the duties, liabilities and restrictions set forth in the thirty-seventh and forty-fourth chapters of the Revised Statutes, and all subsequent laws in force relating to mutual insurance companies so far as applicable to" this company. The by-laws of the company provide that all persons who have property insured with it shall be members of the company during the period of such insurance and shall have votes accordingly. And see Public

Statutes, chapter 119, section 121, continued in force by Revised Laws, chapter 118, section 53, and Statutes of 1907, chapter 576, section 54. The by-laws also provide for the division of profits among policy-holders upon terminated risks.

It seems clear to us that the effect of the policies under this provision of statute is that the policy-holders must be treated as having taken their insurance strictly upon the mutual principle, unless there shall be found to be something in subsequent legislation to alter this. But the decisions already cited did not rest upon principles applicable only to mutual fire insurance companies. They went upon broad rules which were to be applied to all cases of mutual insurance, although modified by our statutes as to the manner of enforcing the contingent liability upon premium notes given as additional security to the company and its policy-holders. Those general principles ³⁰⁸ have been applied and enforced in other states under statutes more or less similar to our own, without distinction as to the general doctrine between mutual companies, whether they issued insurance upon lives, against loss by fire, or upon marine risks. The cases as to fire insurance companies are, of course, more numerous: *Mygatt v. New York Protection Ins. Co.*, 21 N. Y. 52; *Lawrence v. Nelson*, 21 N. Y. 158; *Doane v. Millville Mutual Ins. Co.*, 43 N. J. Eq. 522, 11 Atl. 739; *Hillier v. Allegheny County Mutual Ins. Co.*, 3 Pa. 470, 45 Am. Dec. 656; *Dewey v. Davis*, 82 Wis. 500, 52 N. W. 774; *Taylor v. North Star Ins. Co.*, 46 Minn. 198, 48 N. W. 772. But we find also decisions put upon the same grounds as to life insurance and marine insurance companies: *Hone v. Boyd*, 1 Sand. 481; *Vanatta v. New Jersey Mutual Life Ins. Co.*, 31 N. J. Eq. 15; *Mayer v. Attorney General*, 32 N. J. Eq. 815. The cases go on the general rule that there is no liability on the part of the insurance company for failing to continue the performance of its agreement when that performance has been made impossible by the action of the state under existing laws: *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174; *Baylies v. Fettyplace*, 7 Mass. 325; *Wade v. Mason*, 12 Gray, 335, 74 Am. Dec. 597; *Woodward v. Cowing*, 13 Mass. 216. The fact that the insurance company has become insolvent, instead of being a reason against the full collection of outstanding premiums, furnishes a reason why they should be collected: *Fogg v. Pew*, 10 Gray, 409, 71 Am. Dec. 662; *Alliance Mutual Ins. Co. v. Swift*, 10 Cush. 433; *Lester v. Webb*, 5 Allen, 569. All these cases that have been referred to go upon the principle that the premiums paid or absolutely agreed to be paid by the members for their policies constitute a fund for the payment of losses; and the principle is the same whether the payment is in cash or by note, so long as the policy is issued upon the mutual principle to one who by accepting the in-

insurance becomes a member of the insurance company: *State v. Manufacturers' Mutual Fire Ins. Co.*, 91 Mo. 311, 3 S. W. 383; *Ohio Mutual Ins. Co. v. Marietta Woolen Factory*, 3 Ohio St. 348; *Hart v. Achilles*, 28 Barb. 576; *White v. Havens*, 20 How. Pr. 177.

We find nothing to alter the general principle in the legislation which followed the charter of this company. The definition of the "net assets" of a mutual marine insurance company in Revised Laws, chapter 118, section 1, Statutes of 1907, chapter 576, section 1, can have no such effect. We have been referred to no statute giving the right ³⁰⁰ to the return of any part of a premium or to an allowance of any part of a note given for a premium in a case like this; and we find no such statute. No such right is created by the stipulations of the policies or the by-laws of the company. The notes were given in payment of premiums absolutely due; they were to be paid in full, either in money or by the application of anticipated profits; each policy-holder was a member of the company. The members were not, to be sure, to be assessed like policy-holders in a mutual fire insurance company, for the very reason that it was expected that ultimately, in the one way or the other, their notes would be paid. And each policy upon which a note was taken provides that when a loss occurs, the amount of any unpaid premium note without discount is to be deducted from what the insured is entitled to receive. This shows the understanding of both parties that the premium note was absolutely payable. The language of Public Statutes, chapter 119, section 128, still in force as we have already seen, points in the same direction.

We cannot accede to the contention made for the policy-holders that this company was not a mutual company.

It follows that in the action of Lothrop judgment must be entered for the defendant. In the cases against Baker and Donnell respectively, the plaintiff is entitled to judgment.

In the action against the River Plate Shipping Company, the policy was sent to the company on March 14, 1908, for cancellation, and on March 16th the president of the company wrote in reply that the policy was canceled as requested. The plaintiff was appointed temporary receiver of the company on March 19th; and permanent receiver on March 27th, of the same year. We have not the date of the filing of the bill on which this was done, and must take the date of the appointment as fixing the rights of the parties: *Merrill v. Commonwealth Fire Ins. Co.*, 171 Mass. 81, 50 N. E. 519; *Attorney General v. Massachusetts Benefit Life Assn.*, 171 Mass. 193, 50 N. E. 520. We are of opinion that we must treat the policy as canceled on the day when the president wrote his letter saying that it was canceled. There is no intimation that this was not done in good faith on both sides in

ignorance of the insolvency, and such ignorance was possible, even in the president of the company: *Furber v. Dane*, 204 ⁸¹⁰ Mass. 412, 90 N. E. 859. The case differs in this respect from *Doane v. Millville Mutual Ins. Co.*, 43 N. J. Eq. 522, 11 Atl. 739. Accordingly, the defendant is entitled to have a proper deduction made from the amount of its note for the period after March 16, 1908, when its policy was surrendered: *Fayette Mutual Fire Ins. Co. v. Fuller*, 8 Allen, 27. In this case there must be a new trial.

In the case against Hodsdon, the insured requested on March 29, 1908, that the policy be canceled. This was after the appointment of the receiver, who answered that the matter would have his attention. But the rights of the parties had already been fixed. The plaintiff is entitled to judgment.

In Wing's case the premium was agreed to be sixteen per cent for two years. But the policy provided that the premium should be returned for months not entered upon, with a warranty of twelve per cent. This is not like the case of an ordinary open policy, in which the insurer is held only for such risks as are subsequently assumed and indorsed upon the policy. If that were so, the company and the receiver in its right would be entitled in an action like this to recover the amount only of the premiums upon such risks as had been so assumed: *Maine Ins. Co. v. Stockwell*, 67 Me. 382; *Elwell v. Crocker*, 4 Bosw. 22. But under this policy the term of insurance had been entered upon, and it would continue to run until stopped by a written request from the insured. As it does not appear that any such request was made, in this case also there must be judgment for the plaintiff upon his declaration.

Ordered accordingly.

The Interests of Policy-holders in a Mutual Insurance Company are twofold. They are both insurers and insured. In respect to the former, they are bound to share in the losses and entitled to share in the profits of the business on the basis of a partnership, except so far as the charter or policy contract provides otherwise: *Huber v. Martin*, 127 Wis. 412, 115 Am. St. Rep. 1023. See, also, *Condon v. Mut. Reserve Assn.*, 89 Md. 99, 73 Am. St. Rep. 169; *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 Am. St. Rep. 545; *In re Assignment Mut. etc. Ins. Co.*, 107 Iowa, 143, 70 Am. St. Rep. 149. When members of a mutual fire insurance association have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion thereof: *Perry v. Farmers' Mut. Fire Ins. Assn.*, 139 N. C. 374, 111 Am. St. Rep. 791.

Where an Insolvency Occurs While Policies are Outstanding in a Mutual Fire Insurance Company, the action of the court in adjudging such insolvency, granting an injunction, and appointing a receiver operates to cancel all existing policies in such company: *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 96 Am. St. Rep. 948.

FEELEY v. CITY OF MELROSE.

[205 Mass. 329, 91 N. E. 306.]

AUTOMOBILE—Defective Highway—Negligent Driver.—Persons injured on a defective highway while driving in an automobile, when the chauffeur is not exercising due care, have no action against the city, since the defect in the way is not the sole cause of the injury. (p. 446.)

AUTOMOBILE—Defective Highway—Unregistered Machine.—Persons riding in an automobile which is not registered as required by law, though they are ignorant of that fact, have no action against the city for injuries received through defects in the highway. (p. 447.)

AUTOMOBILE—Registration of Machine—Evidence.—It cannot be said as a matter of law that evidence that an automobile has been duly registered, that this registration has expired, and that it still bears the number of the old registration, does not tend to prove that the machine is not duly registered and numbered. (p. 447.)

Actions for tort for injuries sustained by an automobile and the passengers therein by running into an open trench in a public highway of the defendant city. The following are the rulings requested of the judge by the defendant and referred to in the opinion:

“1. Upon all the evidence the plaintiffs are not entitled to recover.

“2. There was no evidence which would warrant the jury in finding that the way was defective. . .

“5. If the jury find that the driver Brooks was not in the exercise of due care, the plaintiffs are not entitled to recover.

“6. If the jury find that the plaintiffs Stevens and Feeley trusted to Brooks the sole care and operation of the automobile in which they were riding, and relied wholly upon the care and vigilance of Brooks, and he was negligent, the said plaintiffs are not entitled to recover.

“7. If the jury find that the plaintiffs Stevens and Feeley continued to ride a considerable distance with Brooks after he had operated the automobile at a speed so great as to cause them to scream with fright, they cannot recover.

“8. If the jury find that the plaintiffs Stevens and Feeley accepted an invitation to ride in an automobile late at night with a person whom they did not know and of whose care and skill they had no knowledge, and his negligence contributed to the injury, the said plaintiffs are not entitled to recover.

“9. If the jury find that the automobile in which the plaintiffs were riding was not registered according to the requirements of law, the plaintiffs are not entitled to recover.

“10. If the jury find that the ownership of the automobile registered under the number which was upon the automobile

in suit had changed before July 5, 1907, and the number had not been reissued, the plaintiffs cannot recover.

"11. If the jury find that the brake upon the automobile was defective or failed to work properly, and this contributed to the cause of the accident, the plaintiffs are not entitled to recover. . . .

"13. If the plaintiffs Stevens and Feeley saw the lanterns in the street sixty or more feet away, and did not watch them or call Brooks' attention to them, they were guilty of contributory negligence and cannot recover.

"14. If the jury find that the number upon the machine was not the dealer's number, 0408, issued to W. L. Shepard Company, the plaintiffs cannot recover."

The jury returned a verdict for the plaintiff in each case. The defendant alleged exceptions.

W. J. Corcoran and M. F. Cunningham, for the plaintiffs.

C. L. Allen, for the defendant.

³³³ SHELDON, J. In our opinion the fifth and sixth requests should have been given in each one of the cases. If the injury to the individual plaintiffs was due in part to the negligence of Brooks in driving the automobile, then it could not be said that the defect in the highway was the sole cause of their injury within the meaning of our decisions: *Kidder v. Dunstable*, 7 Gray, 104; *Shepherd v. Chelsea*, 4 Allen, 113; *Pratt v. Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691, 17 N. E. 538; *Block v. Worcester*, 186 Mass. 526, 72 N. E. 77. This would not be a case where the concurring cause of the injury was the merely innocent act of a third party, as in *Hayes v. Hyde Park*, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249, and *Clinton v. Revere*, 195 Mass. 151, 80 N. E. 813. It is not because the negligence of Brooks is to be imputed to these plaintiffs that they fail of recovery (*Shultz v. Old Colony Street Ry.*, 193 Mass. 309, 118 Am. St. Rep. 502, 8 L. R. A., N. S., 597, 9 Ann. Cas. 402), but because by reason of that negligence, although they are not responsible for it, it could not be found that the defect in the way was the sole cause of the injury.

But as the case has turned, the defendant has not been harmed by this error. The fifth ruling asked for was given in the case of the Shepard Company, and the finding of the jury in favor of the plaintiff in that case establishes the fact that Brooks was not negligent. This exception cannot be sustained. And what we have said applies also to the eleventh request.

If the automobile in which the female plaintiffs were riding was not registered according to the requirements of law, it was unlawfully upon the way; those who were using it were not

travelers, but trespassers; and it would follow that they could ³³⁴ not maintain this action: *Doherty v. Ayer*, 197 Mass. 241, 125 Am. St. Rep. 355, 83 N. E. 677, 14 L. R. A., N. S., 817; *Dudley v. Northampton Street Ry.*, 202 Mass. 443, 89 N. E. 25, 23 L. R. A., N. S., 561. Each one of the plaintiffs must fail of recovery in that event. It would not help the individual plaintiffs that they may not have known that the automobile was not duly registered; they did not know that it was, and it was at their own peril, as to the city and as to third persons, that they undertook to use a vehicle the use of which was prohibited by law. It follows that the ninth and tenth requests for instructions should have been given, if there was evidence on which the jury could have found the facts therein stated. And we are of opinion that the jury could so have found.

There was evidence that the number upon this machine was 13,627, and that the only automobile which had been registered under that number was a machine like this which had been registered in the name of one Eames, but which he had ceased to own on March 20, 1907. The accident happened on July 5, 1907. The statute in force on March 20th was Statutes of 1903, chapter 473, section 1, as amended by Statutes of 1905, chapter 311, section 2, and Statutes of 1906, chapter 412, section 8. It was further amended before the date of the accident by Statutes of 1907, chapter 580, section 1; but this amendment contained nothing which bears upon the question before us, and may be disregarded. The statute provided that "upon the transfer of ownership of any automobile or motorcycle its registration shall expire." Accordingly, it could have been found that the registration of this machine had expired on March 20th, and yet that it still bore the number of that former registration. And the plaintiffs, although their attention was thus called to the matter, offered no evidence of any new registration or to show that a new official number had been assigned to the machine. Brooks in rebuttal testified that it was running "by Mr. Shepard's number," but that he could not tell what that number was or what number was on the machine.

Undoubtedly, it was for the defendant to show that the machine was not duly registered and numbered: *Doherty v. Ayer*, 197 Mass. 241, 125 Am. St. Rep. 355, 83 N. E. 677, 14 L. R. A., N. S., 817. But we cannot say as matter of law that evidence that it had been duly registered, that this registration had expired about three months before the accident, and that the machine still bore the number of the old registration did not ³³⁵ tend to prove this fact, especially when the plaintiffs, one of whom was the owner of the machine, put in no other evidence upon the question than the testimony of Brooks,

which we have referred to. Accordingly, we are of opinion that the ninth and tenth requests should have been given.

The first request was rightly refused. The questions in the case were for the jury. Nor do we find any error in the rulings excepted to other than what has been stated: *Woods v. Boston*, 121 Mass. 337; *Flynn v. Watertown*, 173 Mass. 108, 53 N. E. 147; *Leonard v. Boston*, 183 Mass. 68, 66 N. E. 596.

Exceptions sustained.

The Contributory Negligence of the Driver of a Private Automobile Bars an action by an occupant of the car against the municipality for injuries occasioned through a defect in the highway: Lauson v. Fond Du Lac, 141 Wis. 57, 135 Am. St. Rep. 30.

One Who Travels on the Public Streets Without Proper Registration of the Vehicle and without a license to operate it is without remedy for injury caused by defects in the way: *Doherty v. Inhabitants of Ayer*, 197 Mass. 241, 125 Am. St. Rep. 355.

HEWITT v. HAYES.

[205 Mass. 356, 91 N. E. 332.]

TRUST FUND—Right of Beneficiary to Follow.—When a trustee deposits in a bank in one fund, without any earmark, money of his own and money which he holds in trust, the beneficiary, though wholly unable to identify his money in the bank, may yet at his election follow the mixed fund thus created and enforce a charge thereon for his indemnity. (p. 451.)

TRUST FUND—Right of Beneficiary to Follow.—Where a trustee deposits in a bank in one fund, without any earmark, money of his own and money which he holds in trust, it will be presumed, for the protection of the beneficiaries, that withdrawals made by the trustee by check from the mixed fund were made from his own part of the fund, and not from that part consisting of the trust money, so long as there remains in the fund available for use any part of his own money. (p. 452.)

TRUST FUND—Right of Beneficiary to Follow.—Where a trustee mingles trust funds in bank with his own, the beneficiary is not allowed a charge upon the entire fund, regardless of deposits and withdrawals made after the deposit of his own money, but only upon what is left in the fund after the proper application of whatever withdrawals have been made by the trustee. (p. 452.)

TRUST FUND—Right of Beneficiary to Follow.—Where a trustee mingles trust funds in a bank with his own, the beneficiary is not given a charge upon the general estate of the trustee, on the ground that that estate has been enriched at his expense, but is merely allowed to hold a charge upon the specific account or fund into which his money has gone and in which equity can presume that it still remains. (p. 452.)

TRUST FUND—Remedies Against Bankrupt Trustee.—Where a trustee mingles trust funds in bank with his own and is then adjudged bankrupt, the beneficiaries may by suit in equity charge the

specific fund into which they can trace their money, or they may prove their claims in bankruptcy as creditors. But these remedies are inconsistent, and an election to pursue one is a bar to the other. (p. 454.)

TRUST FUND—Right of Beneficiary to Follow.—Where a trustee, who deposits in a bank in one fund trust funds with his own, overdraws the fund, the amount for which any of the beneficiaries is entitled to a charge is determined by taking the deposit first thereafter made of his money and adding thereto the amount of any such later deposits. But this will be reduced by withdrawals made by the trustee. And when such withdrawals cannot be treated as made from his part of the fund, they must, as among those claimants entitled to a charge upon the fund, be charged against the deposits in the order of their respective dates, the doctrine that the first withdrawal will be applied to the first deposit being followed among the claimants, though not followed between them and the trustee. And when the amount subject to a charge in favor of a claimant has been diminished by the application against it of such withdrawals, it is never increased by any subsequent deposit by the trustee not shown to have been the money of that particular claimant. If the total amount that can be held by all the claimants who are entitled to a charge upon the fund thus determined exceeds the amount of the fund, then that amount is to be divided among them in proportion to the amounts of their respective charges. If the total amount of their charges is less than the amount of this fund, then they are to receive the amount of their respective charges in full. (p. 455.)

Bill in equity by the trustee in bankruptcy of the estate of Edward A. Bangs against the executors of the will of S. Gannett Wells, and by later amendment against defendants Hayes and Wing, individually, to compel the defendants to turn over to the plaintiff certain bank deposits standing in the names of the defendants as executors and another deposit standing in their names individually.

F. L. Hewitt, trustee in bankruptcy of the estate of Edward A. Bangs, pro se.

H. Williams, Jr., and C. A. Williams, for Francis L. Hayes and others, executors of the will of S. Gannett Wells, and for Francis L. Hayes and another, individually.

L. C. Southard and G. L. Ellsworth, for William E. Boardman and others.

R. H. Gardiner, Jr., for David H. Hodgkinson and others, intervening claimants.

³⁵⁸ SHELTON, J. It has been decided that the plaintiff is entitled to require the original defendants, the executors of the will of ³⁵⁹ Samuel G. Wells, who was a partner in the late firm of Bangs and Wells, to turn over to the plaintiff all the property and assets of that firm which have come into the hands of the defendants: *Hewitt v. Hayes*, 204 Mass. 586, 90 N. E. 985, 27 L. R. A., N. S., 154. This bill is brought to compel them to turn over and deliver to the plaintiff certain

specific funds in the possession of the defendants. The main question raised as to each of these funds is whether they should be regarded as assets of the late firm that ought to be applied in payment of its debts, or whether they are made up of trust moneys, which the intervening claimants or any of them have a right to hold, or at least to subject to an equitable lien or charge in behalf of the claimants.

One of these funds, which has been called in argument the "for whom it may concern" fund, was created and is held by the defendants Hayes and Wing individually. They were acting under the power of attorney given to them by Bangs after the death of Wells. This fund was made up of the cash found in the cash drawer of the firm which belonged to the firm itself and of other sums which also belonged to the firm, either as the proceeds of its property or as commissions due to it or otherwise. This fund is now deposited in the Shawmut National Bank in the names of the defendants Hayes and Wing "for the benefit of whom it may concern." It now amounts to more than ten thousand dollars. In our opinion this fund, which has been derived entirely from the property of the late firm, should be paid by Hayes and Wing to the plaintiff as prayed for in the bill; and the decree will so order.

The "S. G. W. fund," it has been found, belongs as between the late firm and the individual estate of Wells entirely to the former. This finding was excepted to by the executors of Wells; but it seems to us that it is not inconsistent with any of the subsidiary findings upon which it was based, and the evidence is not reported. It follows that this exception to the master's supplementary report must be overruled.

Certain of the intervening claimants have excepted to the master's finding that the S. G. W. fund was one entire bank account, in no way separated or divided into parts so that any separate or distinct parts thereof were or could be established as trust property belonging to any of the claimants, and also to the ³⁶⁰ ruling of the master made upon the tabulations submitted by these claimants and their contention that thereby certain distinct shares or proportions of this fund could be established or identified as trust property belonging to them. And some of the intervening claimants contend that in equity they are at least entitled severally to a charge or lien upon this fund for their satisfaction. Others of the claimants agree with the contention made by the plaintiff. These contentions raise the questions which are now to be passed upon.

It is not disputed, and we do not doubt, that the relations between the late firm of Bangs and Wells and each of its members on the one side and the respective parties for whom they acted, including these claimants, on the other side, were strictly fiduciary. Either the firm or one of its members had been appointed and was acting as trustee for some of them,

either by virtue of an appointment by the probate court or under some agreement between the parties. In other cases the firm was acting as the representative or agent of other trustees or in the management of property which had been committed to its care by the owners thereof. Their relations were strictly confidential and fiduciary, and they were under the ordinary obligations of trustees: *Campbell v. Cook*, 193 Mass. 251, 79 N. E. 261; *Matter of Le Blanc*, 14 Hun, 8; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. Rep. 118, 34 L. ed. 724; *Gibert v. Gonard*, 54 L. J. Ch., N. S., 439.

This fund, which had been deposited in the name of Wells in the City Trust Company, was really a continuation of the general bank account of the firm. Both money belonging to the firm itself and money collected by it or by Wells for it, but belonging to different principals or cestuis que trust for whom it had been collected, were deposited in this account. The latter amounts, however, made up the larger part of the deposits. Wells also drew checks against this fund or account, partly for the private uses of the firm or its partners, but mainly for proper payments to or for some or others of the parties to whom it equitably, in part at least, belonged. But all the amounts, including what belonged to the firm or to either of the partners therein and the different amounts that should have been paid to the respective principals or beneficiaries for whom it was held, ³⁶¹ were mingled in the bank in one common fund, so that, after the various deposits and the various withdrawals that were made, it would be difficult, if not impossible, upon any practicable method of identification or computation, to ascertain or distinguish any separate parts thereof as trust property belonging in equity to any of the intervening claimants. This is especially true when we consider that the amount of this fund is only about one-half of the total amount due to the claimants; and no apportionment of the fund could be made among them on the basis of an identification of their property without such inequality as might practically be a denial of justice to some of them. We are of opinion that the exceptions taken by some of the intervening claimants to the master's supplementary report should be overruled.

But these considerations do not dispose of all the questions raised in the case. We regard it as settled, to go no further than the facts in the case at bar, that when a trustee deposits in a bank in one fund without any earmark money of his own and money which he holds in trust for another, the beneficiary, though wholly unable to identify his money in the bank, may yet at his election follow the mixed fund which has been thus created by the trustee, and enforce a claim or charge thereon for his indemnity. And for the protection of the beneficiary it will be presumed that withdrawals made by the

trustee by check from this mixed fund were made from the trustee's own part of the fund and not from that part which consisted of the trust money, so long as there remains in the fund available for use any part of the trustee's own money: *Central National Bank v. Connecticut M. L. Ins. Co.*, 104 U. S. 54, 26 L. ed. 693, citing and stating the cases of *Pennell v. Deffel*, 4 De Gex, M. & G. 372; *Frith v. Cartland*, 2 Hem. & M. 417; *In re West of England & South Wales District Bank*, 11 Ch. D. 772; *In re Hallett's Estate*, 13 Ch. D. 696; *Taylor v. Plumer*, 3 Maule & S. 562; *Farmers' & Mechanics' National Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Van Alen v. American Nat. Bank*, 52 N. Y. 1. The rule in *Clayton's Case*, 1 Mer. 572, that checks are to be applied against deposits in the order of their respective dates, has been modified to this extent, as is shown by the cases above cited. And see further as to the general principle stated, *Houghton v. Davenport*, 74 Me. 590; *Cushman* ³⁶² *v. Goodwin*, 95 Me. 353, 50 Atl. 50; *Importers & Traders' Nat. Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319; *Ellicott v. Kuhl*, 60 N. J. Eq. 333, 46 Atl. 945; *Fire & Water Commrs. v. Wilkinson*, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; *Elizalde v. Elizalde*, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861; *Richardson v. New Orleans Debenture Redemption Co.*, 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67; *Hancock v. Smith*, 41 Ch. D. 456; *Ex parte Cooke*, 4 Ch. D. 123. The converse of this doctrine was maintained in *Re Oatway* (1903), 2 Ch. 356.

The beneficiary is not allowed a charge upon the entire fund, regardless of deposits and withdrawals made after the deposit of his own money, but only upon what is left in the fund after the application in the mode we have stated of whatever withdrawals have been made by the trustee: *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. Rep. 354, 33 L. ed. 696; *In re Mulligan*, 116 Fed. 715, 9 Am. Bank. Rep. 8, 11; *Boone County National Bank v. Latimer*, 67 Fed. 27; *Ober & Sons Co. v. Cochran*, 118 Ga. 396, 98 Am. St. Rep. 118, 45 S. E. 382; *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96. He is not given a charge upon the general estate of the trustee, on the ground that that estate has been enriched at his expense, but is merely allowed to hold a charge upon the specific account or fund into which his money has gone, and in which equity can presume that it still remains. See the discussion of this question in the note to *Board of County Commrs. v. Strawn*, 15 L. R. A., N. S., 1100.

But it is said that our own recent decisions are at variance with this doctrine. We do not so consider. *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570, turned on the fact that the trust fund there in question could neither

be identified nor traced into any specific fund; and the court said that it was not enough that it had gone into the general estate of the defaulting trustee. But it was expressly stated in the opinion, as indeed is manifest, that there was nothing in that decision contrary to *Central Nat. Bank v. Connecticut M. L. Ins. Co.*, 104 U. S. 54, 26 L. ed. 693, or *In re Hallett's Estate*, 13 Ch. D. 696. The same thing is true of *Lowe v. Jones*, 192 Mass. 94, 116 Am. St. Rep. 225, 78 N. E. 402, 6 L. R. A., N. S., 487, 7 Ann. Cas. 551. It was really sought in that case to establish a trust in the general assets of an insolvent estate upon the ground that the proceeds of trust property wrongfully disposed of had gone into those general assets, and thus increased the amount of the estate. There is some authority for that contention (see the cases collected ³⁶³ by Professor Ames in 19 Harvard Law Review, 519 et seq., note), but this court has never adopted it, and we are not now disposed to do so. In *O'Brien v. New England Trust Co.*, 183 Mass. 186, 66 N. E. 794, no one but the executrix of the deceased sheriff made any claim to the deposit. And see further, *Le Breton v. Peirce*, 2 Allen, 8; *Andrews v. Bank of Cape Ann*, 3 Allen, 313; *White v. Chapin*, 134 Mass. 230; *Howard v. Fay*, 138 Mass. 104; *Attorney General v. Brigham*, 142 Mass. 248, 7 N. E. 851.

It would be easy to apply the principle which we have stated and to enforce an equitable charge upon this fund for the protection of a cestui que trust whose money has gone into it and has remained a part of it, if we had to do with only one claim of this kind. But here there are several claimants. And they fall naturally into two classes, by reason of the fact that some of them have proved their claims in the bankruptcy proceedings against Bangs. It must be determined whether that act deprives them of the right to the equitable remedy which they now seek.

Beneficiaries who do not receive from their trustee or agent what he ought to pay them may either bring an action, with or without an attachment of property, taking the position of an ordinary creditor, or they may seek to enforce their rights by such equitable remedies as are available to them. And while the defaulter remains solvent, so that he can be compelled to meet all his obligations, legal or equitable, there may be no difficulty in allowing them to proceed simultaneously in both ways. But upon the bankruptcy of their debtor or defaulter, the case becomes different. If they appropriate to themselves a fund which they can reach upon the equitable doctrine that we have stated, they thereby assume a different position from that of ordinary creditors of a common debtor; they assert rights superior to those of ordinary creditors; and by the enforcement of those rights they diminish the fund to which those creditors must look for a dividend. If, on the other

hand, they choose to prove their claims as creditors, they can then look, not merely to the specific fund into which they might have traced some part of their money, but to all the assets, and share in those assets *pari passu* with the other creditors. Obviously in some cases the one course, and in some cases the other, will be for their advantage. And these ³⁶⁴ are wholly inconsistent remedies. In one case, they rank themselves as creditors; in the other, they claim to be entitled to a charge upon some specific fund or property. Under these circumstances, it is the right of the general creditors and of the trustee in bankruptcy as their representative to require those who have the choice of these inconsistent remedies to elect between them. And their final adoption of one course, their completed election to avail themselves of one remedy, if made without mistake and with full knowledge of all the circumstances, is a bar to their pursuit of the other remedy: *Washburn v. Great Western Ins. Co.*, 114 Mass. 175; *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 126 Am. St. Rep. 409, 84 N. E. 133; *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775, 23 L. R. A., N. S., 144; *Russell v. Owen*, 61 Mo. 185; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; *Stewart v. Isidor*, 5 Abb. Pr., N. S., 68; *Brown v. Farmers' Bank of Kentucky*, 6 Bush, 198; *In re Granger*, 8 Nat. Bank. Reg. 30, 37. There is no suggestion that any of those proofs was made under a mistake, as in *Morse v. Lowell*, 7 Met. 152; *Importers & Traders' National Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319, and *Richardson v. Olivier*, 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113. No steps have been taken to amend or withdraw any proof, as in *Watson v. Phoenix Bank*, 8 Met. 217, 41 Am. Dec. 500; *Bemis v. Smith*, 10 Met. 194; *Nichols v. Smith*, 143 Mass. 455, 9 N. E. 810; and *In re Wilder*, 101 Fed. 104. There was no erroneous choice of a remedy that did not actually exist, as in *Snow v. Alley*, 156 Mass. 193, 30 N. E. 691, and *Doucette v. Baldwin*, 194 Mass. 131, 80 N. E. 441. *Franklin County Nat. Bank v. First Nat. Bank of Greenfield*, 138 Mass. 515, was decided upon its peculiar circumstances, and has no bearing here. The decision in *Boston v. Turner*, 201 Mass. 190, 87 N. E. 634, turned upon the proposition that the remedies given to a tax collector to enforce the payment of taxes are cumulative, and that he is under no duty to elect between them. It was assumed that otherwise his proof in bankruptcy would have been a waiver of his equitable remedy.

Accordingly, we are of opinion that those of the claimants who have proved their demands against the estate of Bangs in bankruptcy have thereby waived any right to a charge upon this fund. The question whether this was a final election, or whether those claimants can now, upon expunging their proofs in bankruptcy, reassert their equitable rights, as

was done in some of the cases above cited, has not been argued, and is not decided.

³⁸⁵ It has been found that on January 2, 1907, this fund was overdrawn by more than two thousand dollars. It follows that no one of the claimants can have a charge upon the fund for any deposit made before that date. The amount for which any of them is entitled to a charge after that time must be determined by taking the deposit first thereafter made of his money and adding thereto the amount of any such later deposits. But that amount must be diminished by the amount of any diminution of the fund made by withdrawals by Wells from that part of the fund which was subject to the charge. Withdrawals made by Wells for his own use or that of his firm must be treated as made from that part of the fund which belonged to him or them so far as that is practicable. But when this cannot be done, such withdrawals must, as among those claimants who are entitled to a charge upon the fund, be charged against the deposits in the order of their respective dates, the doctrine that the first withdrawals will be applied to the first deposits being followed among the claimants though not followed between them and their trustee. And when the amount subject to a charge in favor of a claimant has been diminished to any extent by the application against it of such withdrawals, it is not, nor is it ever, to be increased by any subsequent deposit by Wells or the firm of other money, not shown to have been the money of that particular claimant: *Board of County Commrs. v. Strawn*, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A., N. S., 1100. And see *In re Mulligan*, 116 Fed. 715. The fund must be treated as having so far been dissipated once for all, with the result that there is no longer any equitable charge for its repayment. The fact that the firm was insolvent is of itself enough to bring about this result, and prevent the application of the rule stated in *United National Bank v. Weatherby*, 70 App. Div. (N. Y.) 279. And no claimant is to be allowed a charge or lien by reason of any part of the fund which, under the rules stated, was subject to a charge in favor of a claimant who was prior to him in time.

If the total amount that can be held by all the claimants who are entitled to a charge upon the fund thus determined exceeds the amount of the fund, then that amount is to be divided among them in proportion to the amounts of their respective charges: *McBride v. Potter-Lovell Co.*, 169 Mass. 7, 61 Am. St. Rep. 265, 47 N. E. 242.

³⁸⁶ If the total amount of their charges is less than the amount of this fund, then they are to receive the amount of their respective charges in full (*Hancock v. Smith*, 41 Ch. D. 456; *Baker v. New York National Exchange Bank*, 100 N. Y. 31, 53 Am. Rep. 150, 2 N. E. 452), and the residue of the

fund will be paid to the plaintiff. The case must be remitted to the master to find and state these amounts and the total amount of the fund, as this may have increased by the addition of interest.

A decree will be entered in accordance with the opinion.

So ordered.

The Right to Follow Trust Funds after they have been misapplied by the trustee is discussed in the notes to *Ferchen v. Arndt*, 46 Am. St. Rep. 608; *Union Nat. Bank of Chicago v. Goetz*, 32 Am. St. Rep. 125. Trust funds may be followed into the trustee's estate, although no particular property or asset can be identified as having been purchased or acquired by the particular funds, where it appears that the trust fund was mixed and commingled with the general funds and property of the trustee's estate and went into the general assets either in the purchase of paper and securities or in the payment of the debts of the trustee, and in such case the lien of the cestui que trust will attach against the entire assets of the trustee's estate for the payment of such claim: *State v. Bruce*, 17 Idaho, 1, 134 Am. St. Rep. 245, and see cases cited in the cross-reference note thereto.

COMMONWEALTH v. WHEELER.

[205 Mass. 384, 91 N. E. 415.]

MILK REGULATIONS—Constitutional Law.—A statute making it a crime to sell milk which is not of good standard quality, and providing that milk which "is shown to contain less than twelve and fifteen hundredths per cent of milk solids or less than three and thirty-five hundredths per cent of fat, shall not be considered of good standard quality," is constitutional. (pp. 457, 458.)

MILK REGULATIONS.—In a Prosecution for Selling Milk containing less than the percentage of milk solids prescribed by statute, evidence that the defendant did not know and had no reason to know that the milk contained less than the prescribed quantity is immaterial. (p. 458.)

MILK REGULATIONS.—In a Prosecution for Selling Milk containing less than the percentage of milk solids prescribed by statute, evidence is immaterial that the milk was not deleterious or injurious to health and that it was nutritious and beneficial as an article of food. (p. 458.)

MILK REGULATIONS.—In a Prosecution for Selling Milk containing a less percentage of milk solids than that prescribed by statute, evidence is immaterial that the milk was without adulteration and just as it came from properly fed cows in sound health. (p. 459.)

H. Parker, for the defendants.

J. J. Higgins, district attorney, for the commonwealth.

³⁸⁵ KNOWLTON, C. J. These are prosecutions under Revised Laws, chapter 56, sections 56, 57, as amended by the

Statutes of 1908, chapter 643. The last of these sections makes punishable selling, exchanging or delivering, or having in custody or possession with intent to sell, exchange or deliver, milk which is not of good standard quality. The amendment provides that, in prosecutions under these and certain other sections, "milk which, upon analysis, is shown to contain less than twelve and fifteen hundredths per cent of milk solids or less than three and thirty-five hundredths per cent of fat, shall not be considered of good standard quality." Each of the defendants admitted that, at the time alleged in the complaint, he had in his possession, with intent to sell it, certain milk which contained eleven and sixty-five hundredths per cent of milk solids and no more. The jury found each of the defendants guilty, and the cases were reported to this court upon questions of law raised at the trial. These questions all relate to the constitutionality of the statute. They are in the form of different requests to rule that the statute is unconstitutional, and of offers of evidence which were intended to show the unconstitutionality of the law.

The sections referred to are a part of an elaborate system of legislation regulating the sale of milk, particularly directed to the prevention of the sale of adulterated or unwholesome milk. In considering these statutes we must take into account matters of common knowledge, and facts and opinions which fairly may be presumed to have influenced the action of the legislature.

Milk is a very important article of food, which enters largely into the sustenance and development of children. It is the natural food of infants for a considerable time after their birth, and the milk of the cow is often used to supply the deficiency of milk from the mother. Probably there is no other article of diet the purity and good quality of which are so important to the life and ^{and} health of the people, and especially to the life and health of young children, as are the purity and good quality of milk. It is also very easy to adulterate it, and it may be adulterated, especially by the addition of water, in such a way that nothing but a chemical analysis will detect the adulteration. The legislature, in the interest of the public health, has enacted laws intended to enable the people to obtain milk of good quality, that is free from adulteration. No one can question the propriety of legislation upon this subject. If statutes are directed to this end, the methods adopted for accomplishing the object desired, so long as they have some manifest relation to the object, must be left to legislative determination. Not only in Massachusetts, but in several other states the establishment of a standard founded on the quantity of milk solids and of fat contained in the milk has been adopted as the best way of preventing adulteration, and of securing for purchasers milk

whose quality can be relied upon: *Commonwealth v. Keenan*, 139 Mass. 193, 29 N. E. 477; *Commonwealth v. Evans*, 132 Mass. 11; *Commonwealth v. Vieth*, 155 Mass. 442, 29 N. E. 577; *People v. Cipperly*, 37 Hun, 319, 101 N. Y. 634, 4 N. E. 107; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *State v. Crescent Creamery Co.*, 83 Minn. 284, 85 Am. St. Rep. 464, 86 N. W. 107, 54 L. R. A. 466; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585. In each of the cases from other courts cited above, the constitutionality of such legislation has been affirmed. It is a familiar exercise of the police power for the prevention of fraud and the promotion of the public health: See, also, *Shivers v. Newton*, 45 N. J. L. 469; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, 32 L. ed. 253; and *State v. Addington*, 77 Mo. 110.

The defendants offered to prove that they did not know, and had no reason to know, that the milk contained less than the prescribed quantity of milk solids. This was immaterial. It has often been decided that, in the public interest, the burden of ascertaining at his peril whether an article that he sells is within the prohibition of a criminal statute may be put upon the seller: *Commonwealth v. Farren*, 9 Allen, 489; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795.

They also offered evidence that the milk in their possession was not deleterious or injurious to health, and that it was nutritious and beneficial as an article of food. This, if proved, would not have shown that the law was invalid. The fact that a certain ³⁸⁷ kind of milk is not injurious to health, and that it is somewhat nutritious and beneficial, as an article of food, if used discreetly, with full knowledge of its qualities and deficiencies, is not enough to deprive the legislature of its power to forbid the sale of it, if it would be likely to be used to commit frauds upon purchasers who might buy and use it, relying upon its supposed possession of a larger proportion of nutritious qualities, and if such use of it would be likely greatly to injure the public health, and particularly the health of young children. The legislature might believe that the authorized sale of such milk would open so wide a door to the commission of frauds upon the community, and would be so injurious in its consequences, that such sales should be prohibited. And this, too, notwithstanding that such milk might be used without detriment by one who knew all about it, and might be nutritious, and under certain circumstances beneficial as an article of food.

The offer to prove that the milk was without adulteration, and just as it came from properly fed cows in sound health, is governed by the same considerations. As was said in the opinion in *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585: "The statute tends to discourage the breed-

ing of a certain class of cattle for the supply of the milk market. The difficulty of guarding against the adulteration of milk may have influenced the legislature in fixing a standard of richness. Practically, it makes no difference whether milk is diluted after it is drawn from the cow, or whether it is made watery by giving her such food as will produce milk of an inferior quality, or whether the dilution, regarded by the legislature as excessive, arises from the nature of a particular animal or a particular breed of cattle. The sale of such milk to unsuspecting consumers for a price in excess of its value is a fraud which the statute was designed to suppress. It is a valid exercise by the legislature of the police power for the prevention of fraud and the protection of the public health, and as such is constitutional." Similar principles have been applied to the sale of oleomargarine and other articles, which in themselves, if sold with a true representation of their character, are not objectionable, and are valuable: *Commonwealth v. Huntley*, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, 32 L. ed. 253.

None of the evidence offered and excluded goes far enough to ~~388~~ meet all the considerations upon which the legislature may have acted. It cannot be contended that the statute was not aimed at the protection of the public in a field over which the state has supervision. Nor can it be contended that the legislation has not a manifest and direct relation to the objects intended to be accomplished. It follows that the statute is constitutional.

Verdicts to stand.

The Constitutionality of Milk Regulations similar to those upheld by the Massachusetts court in the principal case is recognized in *Re Hoffman*, 155 Cal. 114, 132 Am. St. Rep. 75; *State v. Crescent Creamery Co.*, 83 Minn. 284, 85 Am. St. Rep. 464; *St. Louis v. Liessing*, 190 Mo. 464, 109 Am. St. Rep. 774; *State v. Dupaquier*, 46 La. Ann. 577, 49 Am. St. Rep. 334. As to the constitutionality of ordinances providing for the inspection of milk and requiring venders to take out a license, see *State v. Milwaukee*, 140 Wis. 38, 133 Am. St. Rep. 1060; *People v. Vandecarr*, 175 N. Y. 440, 108 Am. St. Rep. 781; *City of Norfolk v. Flynn*, 101 Va. 473, 99 Am. St. Rep. 918.

As to Whether the Fact That a Vender of Articles of Food is ignorant that they do not comply with the statute is any defense to him in a prosecution for making sales, see *Meshbesh v. Channellene etc. Mfg. Co.*, 107 Minn. 104, 131 Am. St. Rep. 441; *People v. Snowberger*, 113 Mich. 86, 67 Am. St. Rep. 449. A person cannot escape, when prosecuted under a statute fixing a standard of milk, by proving that the milk as given by his cows falls below such standard, though they were fed on the proper food: *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419.

HUSSEY v. FRANEY.

[205 Mass. 413, 91 N. E. 391.]

MASTER AND SERVANT.—Where a Stable-keeper Lets a Hack with the horse and driver for an afternoon to another stable-keeper, and the latter sends the hack and driver to an undertaker in charge of a funeral procession, who exercises no control over the driver beyond indicating to him his place in the procession, the first stable-keeper is liable for injuries suffered by a third person in consequence of the driver's negligence. The driver is not the servant either of the second stable-keeper or the undertaker. (pp. 460, 461.)

Tort for personal injuries sustained by the plaintiff through the negligence of one Duggan, while driving a hack in a funeral procession. The hack and horse belonged to the defendant, a stable-keeper. He had let the hack with the driver for the afternoon to one Conklin, also a stable-keeper, and Conklin sent the hack and driver to one Hogue, an undertaker, who directed the funeral procession. Through negligence Duggan drove into a buggy belonging to one Bakeman in which Bakeman was driving the plaintiff as his guest.

M. O. Garner, for the defendant.

A. T. Johnson, for the plaintiff.

415 MORTON, J. The principal question in this case is whether Duggan, the driver of the hack, was at the time of the accident the servant of the defendant, or of Conklin, to whom the defendant had let the hack with the horses and driver, or of Hogue, the director of the funeral procession of which the hack formed a part.

There was nothing to show, or at least it cannot be said that it could not have been found, that the hack with the driver and horses was not let in the usual manner, with the implied understanding that the driver remained the servant of the defendant, and as such had the management of the horses and exercised care and oversight over them and the hack, but was to obey such directions as to the use to be made of the hack as might be given to him by the person to whom the hack, driver and horses were let. Under such circumstances it is clear that the defendant ⁴¹⁶ would be liable for injuries suffered by a third person in consequence of the driver's negligence: *Shepard v. Jacobs*, 204 Mass. 110, 134 Am. St. Rep. 648, 90 N. E. 392, 26 L. R. A., N. S., 442, and cases cited; *Driscoll v. Towle*, 181 Mass. 416; *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. Rep. 252, 53 L. ed. 480; *Dewar v. Tasker & Sons*, 23 T. L. R. 259.

There is no just ground for the contention that the driver was the servant of either Conklin or Hogue. Conklin simply

sent the hack and driver to Hogue, and Hogue, beyond riding on the hearse with the driver and thus setting the pace for the procession and beyond indicating to Duggan his place in the procession, exercised no control whatever over him.

It is plain that there was evidence of negligence on the part of Duggan. No contention is made that the plaintiff was not in the exercise of due care.

There was no evidence to warrant a finding that Bakeman willfully interrupted or otherwise disturbed the funeral procession in violation of Revised Laws, chapter 212, section 34, even if we assume in the defendant's favor without deciding that, if he had done so, it would have operated to prevent the plaintiff from recovering.

Exceptions overruled.

As to the Liability of a Master for the Acts of His Servant whom he lends or hires to another, see *Delory v. Blodgett*, 185 Mass. 126, 102 Am. St. Rep. 328; *Shepard v. Jacobs*, 204 Mass. 110, 134 Am. St. Rep. 648.

If the Owner of a Horse and Vehicle Furnishes Them, Together With a Driver, to one who hires them, such owner is liable for injuries to third persons caused by the negligence of the driver: *Sacker v. Waddell*, 98 Md. 43, 103 Am. St. Rep. 374. And where the owner of an automobile lends it, with a licensed chauffeur in charge, under an agreement for a specified amount for the use of the car with the driver for two days, the chauffeur to be under the directions of the hirer, the owner is liable for an injury to a third person caused by the negligence of the chauffeur in operating the car: *Shepard v. Jacobs*, 204 Mass. 110, 134 Am. St. Rep. 648.

Where a Livery-stable Keeper Lets a Conveyance for a Particular Journey, and exercises reasonable prudence in selecting the team, vehicle, and driver, he is not answerable for injuries sustained by a person riding in the vehicle, occasioned by negligent driving: *McGregor v. Gill*, 114 Tenn. 524, 108 Am. St. Rep. 919.

NEWHALL v. ENTERPRISE MINING COMPANY.

[205 Mass. 585, 91 N. E. 905.]

RES JUDICATA.—The Rule That as Between the Same Parties a judgment on the merits in an earlier suit is a bar to a later suit as to every issue that in fact was, or in law might have been, litigated, is limited to a suit for the same cause of action. (pp. 463, 464.)

RES JUDICATA.—It Does not Follow That Causes of Action in two cases are the same because they originated in the same series of transactions, and in the conversations and communications which took place between the parties concerning them. Nor does it follow that they are not the same because there is a difference in the form of stating them, or an omission in the statement of one to include one or more of the matters that are merely incidental or in aggravation of damages. The question is whether the substantive causes of

action relied on are essentially the same, not whether they grew out of transactions which occurred at the same time and had a close relation to one another. (p. 464.)

RES JUDICATA.—A Judgment for the Defendant in a suit in equity by the purchaser of stock to rescind on the ground of false and fraudulent representations is not a bar to his subsequent action at law against the corporation to recover what he paid for the stock, on the ground that he purchased treasury stock but the agent of the corporation delivered his own stock instead. (p. 464.)

CORPORATION.—One Who Purchases Treasury Stock from the agent of the corporation cannot be compelled to receive and retain instead thereof stock that belongs to the agent. (p. 465.)

P. H. Kelley, for the plaintiff.

S. H. Tyng, for the defendant.

⁵⁸⁶ **KNOWLTON, C. J.** One Woodin was the promoter, the treasurer and a director of the defendant mining corporation, whose capital stock was ten thousand shares, of a par value of one hundred dollars each. Of these shares nine thousand three hundred and ninety-one had been issued to Woodin in payment for his interest in certain mines, nine shares had been issued to other corporators, and six hundred shares were not issued nor subscribed for. Woodin conveyed one thousand of his shares to one Prince as a trustee for the corporation, under a stipulation, agreed to by the board of directors, that he, Woodin, should be appointed the fiscal agent for the sale of them or of any portion of them, with authority to take a commission of not more than thirty-three and one-third per cent from the selling price, this selling price to be such as the board should determine, and the proceeds of the sales to be placed in the treasury of the corporation, to be expended in the discretion of the directors, with a proviso that the balance due upon the bond given for the purchase price of the mining property should be paid in accordance with its terms. Woodin, as agent for the defendant, contracted to sell to the plaintiff and the plaintiff's wife stock belonging to the company at three different times, amounting to one hundred and thirty-four shares in all, for thirty-three and one-third dollars per share. The plaintiff's wife has deceased and the plaintiff has succeeded to her rights. The plaintiff brought a bill in equity against the defendant, alleging that these sales were made upon false representations by Woodin of matters of fact, which, if true, would have shown that the stock was very valuable, and that the purchases were made by the plaintiff and his wife in reliance upon these false and fraudulent representations. He attempted to rescind the contracts on account of these alleged frauds, and to obtain a decree for a return of the money paid to Woodin for the defendant. Upon a hearing in the superior ⁵⁸⁷ court this bill was dismissed on the ground that the alleged frauds were not suffi-

ciently supported by evidence, and that, if they were, the plaintiff had delayed too long before attempting to rescind the contracts.

Subsequently the plaintiff brought this action at law on the ground that all the sales, according to their terms, were of a part of the one thousand shares of stock belonging to the defendant and held by the trustee, called in the plaintiff's declaration treasury stock, and that the plaintiff and his wife paid Woodin for this stock, and that Woodin, in executing the contract, failed to deliver the defendant's stock, except to the amount of forty-five shares, and delivered his own stock instead. For this reason, as the property was not that which the plaintiff had bought, he elected to rescind the contract and reclaim the money paid to the defendant's agent, which this agent had never paid over to his principal, but had kept as his own. The defendant's answer was a general denial, and a plea of *res judicata* founded on the decree dismissing the bill in equity. At the hearing the judge made the following finding: "In the above action, the court finds for the defendant. I find the defendant's agent did not represent that he was selling any of the original treasury stock of six hundred shares, but he agreed to sell the syndicate stock referred to in the bill in equity held in trust by James P. Prince, and that the plaintiff agreed to buy such stock; that for relief for any misrepresentations by Woodin in such sale the plaintiff could have obtained a remedy in the bill in equity referred to in the answer, and should have sought it by the proper allegations in the bill." This so-called syndicate stock was the one thousand shares above referred to. The plaintiff made many requests for rulings, and the case comes before us on his exceptions to the refusal of the judge to grant them.

The finding indicates a decision by the judge that the dismissal of the bill in equity was a bar to this suit. The argument of the defendant's counsel upon the exceptions before us was upon this ground only. It therefore becomes necessary to compare the two suits and determine whether they are for the same cause of action.

⁵⁸⁸ It is not contended that the principal issue presented in the present case was decided in favor of the defendant in the suit in equity. Indeed, the matter relied upon by plaintiff as his cause of action in this case was not averred or put in issue in the former suit. The plaintiff testified, and the other evidence tends to corroborate him, that he did not know the facts upon which he now relies until he discovered them during the former trial.

The defendant relies upon the principle that, as between the same parties, a judgment on the merits in an earlier suit is a bar to a later suit for the same cause of action as to every

issue that in fact was, or in law might have been, litigated: *Foye v. Patch*, 132 Mass. 105; *Newburyport Institution for Savings v. Puffer*, 21 Mass. 41, 87 N. E. 562. It is to be noted that the proposition is limited to a suit for the same cause of action. As was said in *Norton v. Huxley*, 13 Gray, 285, and in *Harlow v. Bartlett*, 170 Mass. 584, 49 N. E. 1014, it does not follow that the causes of action in two cases are the same because they "both originated in the same series of transactions, and in the conversations and communications which took place between the parties concerning them." On the other hand, it does not follow that they were not the same because there is a difference in the form of stating them, or an omission in the statement of one to include one or more of the matters that are merely incidental or in aggravation of damages. The question is whether the substantive causes of action relied on are essentially the same, not whether they grow out of transactions which occurred at the same time and had a close relation to one another.

The plaintiff's claim in his bill in equity was founded entirely on the defendant's alleged fraudulent representations made as inducements to contracts of purchase. The claim in the present case is for a failure to perform a contract according to its terms, and for a performance which was so far a departure from the contract as to justify the plaintiff in rescinding it altogether. The cause of action in the first suit, while cognizable at law, was one proper for jurisdiction in equity. The right which the plaintiff seeks to enforce in this action is strictly legal, and cannot be made the subject of a suit in equity. The evidence required to support the cause of action in the present suit is very ⁵⁸⁹ different from that required to maintain a suit in equity. Although the different causes of action relate to the same transaction, they are founded upon different features of it, which have no necessary relation to each other and which are very different in their nature. The present suit depends entirely upon a contractual right, and the liability of the defendant rests solely upon a breach of contract. The case is like *Allen v. Storer*, 132 Mass. 372, in that it could not have been made the foundation of a suit in equity. It is like *Norton v. Huxley*, 13 Gray, 285, *Harlow v. Bartlett*, 170 Mass. 584, 49 N. E. 1014, and *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41, 87 N. E. 562, in that the decision in the previous bill in equity is not a bar to the maintenance of the plaintiff's present claim. The principal ruling requested by the plaintiff on this branch of the case should have been given.

We do not deem it necessary to consider the plaintiff's requests for rulings in detail. It is plain that the plaintiff, who bought the stock of the defendant, which it had in its treasury, could not be compelled, without his knowledge or against his

will, to receive and retain stock that belonged to another party, thus leaving himself and the corporation without the benefit of the money, for corporate use, which the defendant would have received from him if its agent Woodin had done his duty.

While the evidence strongly indicates that the plaintiff is entitled to recover, we do not think the case is exactly within the plaintiff's request that a judgment be directed in his favor under the Statutes of 1909, chapter 236, section 2.

Exceptions sustained.

The Rules of Res Judicata are stated in the recent cases of Vincent v. Blanton, 134 Ky. 590, 135 Am. St. Rep. 424; Morgan v. Kendrick, 91 Ark. 394, 134 Am. St. Rep. 78; Hilton v. Stewart, 15 Idaho, 150, 128 Am. St. Rep. 48; Alerding v. Allison, 170 Ind. 252, 127 Am. St. Rep. 363.

Am. St. Rep., Vol. 137—80

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

PEOPLE v. BURNS.
[161 Mich. 169, 125 N. W. 740.]

CHATTEL MORTGAGE—Recording or Change of Possession.—Under the Michigan statute nothing short of a change of possession or a filing for record as prescribed by statute can save a chattel mortgage, as against creditors of the mortgagor. As to them his good faith, in the absence of a compliance with the statutes, is immaterial. (p. 469.)

CHATTEL MORTGAGE—Affidavit Required by Statute.—Under a statute requiring that a chattel mortgage, in the absence of change of possession, must be filed, and that, before filing, an affidavit must be annexed to it setting forth that the mortgage is given in good faith and for adequate consideration, a mortgage is not entitled to record, and if recorded is not notice, if the notary does not fill out or sign the blank jurat, although the mortgagor may have sworn to and signed the affidavit. (p. 469.)

CHATTEL MORTGAGE—Recording—Creditors Affected.—A statute providing that a chattel mortgage is invalid as against creditors, if not put on file when the goods remain in the mortgagor's possession, applies to persons who become creditors during the interval while the mortgage is not on file, and not merely to those who have obtained judgment or levied attachment before the filing. (p. 469.)

CHATTEL MORTGAGE—Actual Notice to Creditors.—As to subsequent purchasers and mortgagees notice of a chattel mortgage is equivalent to filing, but to a creditor actual notice of the existence of a mortgage does not appear to be sufficient. (p. 470.)

RECORDING LAWS—Defective Registration.—One who seeks to benefit from the recording laws incurs all risks of the failure to put his papers duly upon record, whether the fault is his own or that of an officer. (p. 470.)

RECORDING LAWS—Paper not Entitled to Record.—An instrument which conforms to the recording laws is, when recorded, notice to everyone, but an instrument which does not comply with the statutes on which it is based is notice to no one, even if recorded. (p. 470.)

AN AFFIDAVIT is a Sworn Statement reduced to writing, and evidenced by the fact that it has been subscribed and sworn to before some officer having authority to administer oaths. (p. 471.)

H. M. & D. B. Duffield, for the appellants.

Charles Engelhard, for the appellee.

170 STONE, J. This is an action of debt on bond brought in the circuit court for the county of Wayne against James D. Burns, sheriff of said county, and the bonding company which furnished his general official bond, because of the seizure and sale of certain goods.

The facts in the case are as follows: On January 25, 1907, Twitchell Bros. Manufacturing Company, a corporation of Detroit, being indebted to the Independent Steel and Wire Company, an Illinois corporation, upon its promissory note which was past due, the latter company commenced suit in the Wayne circuit court against said Twitchell Bros. Manufacturing Company to recover for said indebtedness. On May 27, 1908, a judgment by consent and on withdrawal of plea was entered in favor of the plaintiff therein, and against the said Twitchell Bros. Manufacturing Company, for the sum due upon said promissory note, with interest and costs, the amount of which does not appear in this record. As soon as judgment was obtained, an execution was issued thereon and placed in the hands of said sheriff. With a view to the levying of an execution upon the personal property of said Twitchell Bros. Manufacturing Company, the attorneys for the Independent Steel and Wire Company examined the record in the office of the city clerk. There was found on file a chattel mortgage dated April 9, 1907, purporting to have been executed by Twitchell Bros. Manufacturing Company to Michael Esper & Sons in the sum of \$875.

171 To this mortgage was attached the printed form of an affidavit which was signed by the president of the Twitchell Bros. Manufacturing Company, and there it stopped. There was no jurat attached. There was nothing about it to indicate that it had been sworn to. The law governing the recording of chattel mortgages (see Act No. 258, Pub. Acts 1905) is as follows:

“Sec. 10. Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known

as city clerk, where the goods or chattels are located, and also where the mortgagor resides, except when the mortgagor is a nonresident of the state, when the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of the cities having no officer known as city clerk, where the property is; and unless the mortgagor named in such mortgage, or conveyance intended to operate as a mortgage, or some person for him, having knowledge of the facts, shall, before the filing of the same, make and annex thereto an affidavit setting forth that the consideration of said instrument was actual and adequate, and that the same was given in good faith for the purposes in such instrument set forth, no officer shall receive such instrument or file the same in his office until such affidavit is made and annexed thereto. Every person who shall knowingly make any false statement in any such affidavit, upon conviction thereof shall be deemed guilty of the crime of perjury."

It will be observed that the date of the chattel mortgage is prior to the judgment of the Independent Steel and Wire Company, but it is subsequent to the debt incurred to the steel company, and subsequent to the commencement of suit by said company. There was nothing in the ¹⁷² appearance of the chattel mortgage to indicate that the affidavit form had been sworn to. When the sheriff levied upon the goods of the Twitchell Bros. Manufacturing Company, which goods were in possession of said company, he was notified by Edward Esper that there was a chattel mortgage upon the goods. The blank jurat was filled in and signed by John W. Eisman, notary public, and the date, April 16, 1907 (the date of the filing of the chattel mortgage), was written in after the levy of the execution. There was a renewal affidavit attached to the chattel mortgage showing that the same had been sworn to March 30, 1908, by Edward Esper before a notary public. The levy was made by the sheriff on execution May 29, 1908, and sale followed. This suit was begun August 20, 1908. It appeared upon the trial of the case that James E. Twitchell, at the time he filed the chattel mortgage, signed and swore to the affidavit, but that the notary public, who was also the chief clerk in the office of the city clerk, failed to fill out or sign the jurat. The circuit judge upon the trial of the case directed a verdict and judgment in favor of the plaintiffs, and against the defendants, for the value of the goods seized and sold by the sheriff, amounting to seven hundred and ninety dollars and thirty-one cents.

The defendants have sued out a writ of error, and assign error upon the charge; and the single question is presented whether or not the chattel mortgage was entitled to be filed under the circumstances as above stated, and whether such

filing was notice. It seems to us that the only question of law to be decided is whether the instrument placed on file in the office of the city clerk complied with the statute. The statute declares that such mortgage shall be absolutely void as against the creditors of the mortgagor, and nothing short of a change of possession or filing as the section requires can save it: *Cooper v. Brock*, 41 Mich. 488, 2 N. W. 660. Under this section of the statute, as to the creditor of the mortgagor, the questions of good faith and intention are immaterial: ¹⁷³ *Buhl Iron Works v. Teuton*, 67 Mich. 623, 35 N. W. 804.

In the absence of a change of possession—and none is claimed here—the statute requires that the mortgage or a copy thereof shall be filed in order to be effective. The statute above cited provides that, unless the mortgagor named in such mortgage or some person for him having knowledge of the facts shall, before the filing of the same, make and annex thereto an affidavit setting forth that the consideration of such instrument was actual and adequate, and that the same was given in good faith for the purposes in such instrument set forth, no officer shall receive such instrument, or file the same in his office, until such affidavit is made and annexed thereto. Nothing could be more explicit than this statutory provision, the object and purpose of which is apparent. Here, while the mortgagor may have taken the oath, the mortgagee did not have an affidavit annexed to the chattel mortgage when filed as the statute required. It must be held that a chattel mortgage filed in violation of the statute is not a compliance with the statute.

An affidavit has been defined to be a declaration on oath, in writing, sworn to by a party before and attested by some person who has authority to administer oaths: *Bacon's Abridgment*, p. 146. This paper had only a blank jurat, and it did not show on its face, as it should, who administered the oath, nor that any oath was ever administered. Such a paper must be held to be a nullity: *Knapp v. Duclo*, 1 Mich. N. P. 189. It must be held, therefore, that the mortgage was not entitled to record, and that the record of an instrument not entitled to record is notice to no one: *Dutton v. Ives*, 5 Mich. 515.

The statute as affecting creditors has been discussed in this court in many cases: *Montgomery v. Wight*, 8 Mich. 143. A chattel mortgage is invalid as against creditors if not put on file when the goods remain in the mortgagor's possession, and this applies to those who become creditors during the interval while the mortgage is ¹⁷⁴ not on file, and not merely to those who have obtained judgment or levied attachment before filing: *Fearey v. Cummings*, 41 Mich. 376, 1 N. W. 946. A chattel mortgage not filed is void as against creditors of the mortgagor by the express terms of the statute: *Putnam v.*

Reynolds, 44 Mich. 113, 6 N. W. 198. A chattel mortgage, where possession is not given, is void as against the mortgagor's creditors, if not put on file in the proper office, even though recorded elsewhere by mistake: Talcott v. Crippen, 52 Mich. 633, 18 N. W. 392; Crippen v. Fletcher, 56 Mich. 386, 23 N. W. 56; Haynes v. Leppig, 40 Mich. 602; Root & Co. v. Harl, 62 Mich. 420, 29 N. W. 29; Johnson v. Stellwagen, 67 Mich. 10, 34 N. W. 252; Corbett v. Littlefield, 84 Mich. 30, 22 Am. St. Rep. 681, 47 N. W. 581, 11 L. R. A. 95; Cutler v. Steele, 85 Mich. 627, 48 N. W. 631; Dempsey v. Pforzheimer, 86 Mich. 652, 49 N. W. 465, 13 L. R. A. 388; Ramsdell v. Citizens' E. L. & Power Co., 103 Mich. 89, 61 N. W. 275; Campbell v. Remaly, 112 Mich. 214, 67 Am. St. Rep. 393, 70 N. W. 432; Vining v. Millar, 116 Mich. 144, 74 N. W. 459.

But as to subsequent purchasers and mortgagees notice is equivalent to filing: American Cigar Co. v. Foster, 36 Mich. 368; Read v. Horner, 90 Mich. 152, 51 N. W. 207. It is well that we keep this distinction in mind in considering this statute, for actual notice to the creditor of the existence of the mortgage does not appear to be sufficient. One who seeks to benefit from the recording laws must incur all risks of the failure to put his papers duly upon record, whether the fault shall be his own or that of an officer: Barnard v. Campau, 29 Mich. 162; Grand Rapids Nat. Bank v. Ford, 143 Mich. 402, 114 Am. St. Rep. 668, 107 N. W. 76, 8 Ann. Cas. 102.

We have not overlooked the case of People v. Bristol, 35 Mich. 28. In that case the mortgage when made was at once duly filed with the town clerk, who in this instance was the mortgagor himself. The clerk received and properly indorsed it. He omitted, however, to make ¹⁷⁵ the entries which he should have done, and did not put the documents in the files of mortgages where it was customary to place such instruments, but left it in another pigeon-hole. It was held by this court that the filing was all that was required to be done by the party, and that the mortgagee, having done all that the statute requires of him, cannot be prejudiced by the failure of the officer to do his duty. We think that this case is easily distinguished from People v. Bristol, 35 Mich. 28. In this case the statute prohibited the filing of the chattel mortgage until the proper affidavit was annexed thereto. The language of the amendment of 1905 is very significant. The affidavit must not only be made by the proper person, but must be annexed before the instrument is entitled to be filed. An instrument which conforms to the recording laws, and which is recorded, is notice to everyone, but an instrument which does not comply with the statute is notice to no one, even if recorded. Whatever view may be taken as to whether an affidavit was made in this case, it is very clear that it was not annexed to the instrument in a complete form before filing.

An affidavit is a sworn statement reduced to writing, and evidenced by the fact that it has been subscribed and sworn to before some officer having authority to administer oaths. Any other definition would make the requirement concerning annexation idle. It was clearly the duty of the mortgagee, if he wished to take advantage of the statute, to see that all its requirements had been complied with, and, if the mortgagee is content, as in this case, to take chances in that regard, and to leave it to the mortgagor, and the mortgagor does not comply with the statutory requirements, then the mortgagee should suffer the consequences, and not the creditor who seeks to collect his judgment.

For the error pointed out and discussed, the judgment is reversed, and a new trial ordered.

Montgomery, C. J., and Ostrander, Hooker and Blair, JJ., concurred.

CHATTEL MORTGAGES—THE EFFECT OF THE FAILURE TO EXECUTE AND RECORD AS PRESCRIBED BY STATUTE.

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I. The Rationale of Technicalities.

In the general outcry for the abolition of technicalities, both in legal procedure and legal documents, there is, to a qualified extent only, sound reason. To the rest of the extent the clamor is but the voices which swell the chorus. A litigant is defeated on any technicality, a business man sustains a loss for want of business provision, a criminal goes unwhipt of justice by reason of a flaw in the

people's proceedings, or, as has recently occurred, loses an opportunity of appeal in consequence of an involuntary dereliction of power in a court, and thereupon all join in a sustained whine at the absurdity of legal network woven by lawyers and legislators, forgetting the old Arabian parable that though the dog bayed at the moon, the moon continued to shine, and legal technicalities are not the "moonshine" they are apt to be thoughtlessly styled. We have been, and hope to continue to be, among the first to deprecate the use of a bundle of red tape when an elastic band will serve the purpose, and in the consideration of rights inter partes, he who seeks to take advantage of some trifling departure from legal order should be properly viewed with a just suspicion of the merits of his cause. A different light, however, is cast upon these so-called technicalities, when the rights of others are involved, and chattel mortgages, nowadays the creatures of statute, are surrounded with certain and by no means improper formalities, the neglect of which serves as a veritable pitfall for the unwary and careless mortgagee. So many vital considerations turn upon the mortgaging of chattels left in the possession of the mortgagor that legislation for the distinguishing marks of a valid mortgage is as necessary as that particular form of negotiation is convenient. The mortgagor may seek to defraud his immediate mortgagee; he may fraudulently or otherwise again mortgage his chattels, and seeing that a man whom necessity compels to give a chattel mortgage is almost invariably one who needs or seeks money, it may be taken for granted he has unsecured creditors both previous and subsequent to his giving his lender a chattel mortgage. Such dealings are correctly subjected to legislative supervision, and the courts are called upon to adjust the rights of the parties. To render their duty as little onerous as can be possible, to give both mortgagor and mortgagee their greatest rights and powers under the instrument, to afford creditors the fullest measure of protection against careless or criminal debtors the law has provided that when a chattel mortgage is given, it must be bona fide, it must be substantially in a set form, executed in a designated mode, verified in a particular method, and, above all, filed in the proper office as of record, that those in whose business transactions the ownership of the chattels creates a factor shall know the relative positions of the persons they are dealing with, and thus possibly save ultimate litigation over a matter that common prudence and ordinary regard for the requirements of the law should never have been allowed to be brought into court.

We purpose considering the result of the failure of a mortgagee of chattels to comply with the statutory requirements as to execution of the mortgage. We have in a note to *Beebe v. Morrell*, 15 Am. St. Rep. 288, a case of the same state as the principal case, ante, p. 466, and to *Brown v. James H. Campbell Co.*, 21 Am. St. Rep. 274, dealt with some parts of the subject, but set them out for further reference if so desired.

II. Definitions.

As it is not necessary for the purposes of this note, which deals only with the malexecution of mortgages of chattels, we refrain from giving the many varying definitions of the principal term. Seeing, however, that we have to do with the miscarriage of such an instrument, it is essential to keep before us some authorized definitions of a chattel mortgage, the execution and completion of which is surrounded by, in

our opinion, most necessary and stringent formalities. In *Parshall v. Eggart*, 52 Barb. 367, there is a wholesome definition which will supply all the demands necessary for our purpose. In that case a chattel mortgage is described as an instrument of sale conveying the title of the property to the mortgagee, with terms of defeasance, and if the terms of redemption are not complied with, then at law the title becomes absolute in the mortgagee. The nature of the agreement must be such that by the mere nonperformance of the condition by the mortgagor, the title will be transferred to the mortgagee by the force of the agreement. This test is decisive and the definition is founded on *Story on Bailments*, sections 287, 288, *Huntington v. Mather*, 2 Barb. 538, *Brown v. Bement*, 8 Johns. 96, *Langdon v. Buel*, 9 Wend. 80, *Brownell v. Hawkins*, 4 Barb. 491, and is to be found with but slight variation in *People v. Remington*, 59 Hun, 282, 12 N. Y. Supp. 824, 14 N. Y. Supp. 98. This, then, is the instrument with the execution and filing of which we are now concerned.

III. The Mode Prescribed by Statute.

It will be necessary to consider what the requirements of the statutes are, the failure to comply with which may prejudice the mortgagee's security; and, inasmuch as the modern laws as to such requirements have been in force practically in every state for a considerable time, reference to those exceptional cases of transactions whose signing and recording were intermixed with the dates of passing and coming into operation of the statutes are omitted. The statutory requirements are to all intents and purposes the same in the greater number of the states, and provide as a rule a form of the mortgage of personal property which may be substantially adopted. It is generally followed by an enactment that such a mortgage is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers, unless it is accompanied by the affidavit of all the parties thereto that it is made in good faith and without design to hinder, delay or defraud creditors, and unless the mortgage itself is acknowledged or proved, certified and recorded in like manner as grants of real property. As to ships, the mortgage must be recorded in the office of the collector of customs where the ship is registered or enrolled. As to personal property generally, the mortgage must be recorded in the office of the county recorder of the county in which the mortgagor resides, if the mortgagor is a resident of the state, and it must also be recorded in the county in which the mortgaged property is situated or to which it may be removed. Property in transit is usually provided for, during a time reasonable for transportation purposes to the county where the mortgagor resides, or to a location for temporary use, as situated in the latter case where it is intended to be used, and in the former in the county where the mortgagor resides. The mortgage is valid only as to the chattels in respect to which it is duly recorded, that is to say, that a single mortgage embracing things of such a character or so situated that separate mortgages would be required to be recorded in different places, is good only in that part which can be classified as properly recorded. Separate records are kept of real and of personal mortgages. When it becomes necessary to record in another county a mortgage already duly recorded, the operation is effected by recording a certified copy of the original mortgage. These are the usual statutory provisions

and we have extracted them from the Civil Code of California, sections 2955-2965, taking the provisions of that code as substantially typical of the law in most of the other states. Every effort is made to keep them as much in harmony as possible. In *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, 44 Pac. 867, an error in the punctuation of 1 Hill's Code, section 1648, which read: "A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchasers, and encumbrancers of the property for value and in good faith" unless duly recorded, was corrected by transposing the comma after the word purchasers to after the word mortgagor, so that the section should be the same as that in nine other states named. The opinion points out that the three classes of persons whose rights are defined by the section are: 1. The creditors of the mortgagor, as to whom the unrecorded mortgage is absolutely void; 2. Subsequent purchasers; and 3. Parties in whose favor subsequent encumbrances of the property are made; and as to these two classes it is also void when they deal with the mortgaged property for value and in good faith.

While statutory provisions are intended for notice and consequent protection to creditors and purchasers, they are equally intended, at all events, as to the recording of the security in proper form, to show the transaction to have been actual and genuine, and to prevent secrecy and imposition, and to remove the presumption otherwise arising against good faith. Such provisions enable mortgages to be given by men in business without requiring them to suspend their business, or give up possession of their stock in trade, on which they rely to raise the amount of their debts: *People v. Bristol*, 35 Mich. 28.

We shall now endeavor to trace the result of failure to apply these statutory regulations to the execution and filing of such mortgages.

IV. Execution of the Mortgage.

a. *Signature.*—The execution of a chattel mortgage differs in no material feature from the ordinary mortgage of realty, and the requirements of the statute as to such mortgages are that they shall be subscribed by the grantor. Whatever, therefore, is a sufficient signature of a mortgage of realty will be sufficient for a chattel mortgage. We repeat from the monographic note to *Hamilton v. State*, 53 Am. Rep. 491, on the sufficiency of signatures that "the word 'subscribed,' when used in reference to the authentication of a writing or document, ordinarily implies that the name of the party who subscribes is set by him or by his authority at the bottom or end of the writing or document": *Wild Cat Branch Bank v. Ball*, 45 Ind. 213, which was the case of a bond; *Stone v. Marvell*, 45 N. H. 481, which was the case of an affidavit; and *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376, which was the case of a memorandum under the statute of frauds.

In most, if not all, the states, a mark is the substitute for a signature; but such mark itself must be attested by a witness. If the witness cannot write, it will not be a good attestation for him to make his mark by way of witnessing the execution of the mortgage. It would be a case of the blind leading the blind. The purpose of those statutes which require that the making of a mark by the mortgagor should be attested by a witness who is able to write his own name was to protect the mortgagor, prevent injustice or fraud being com-

mitted, and also as a security against clandestine conveyances: *Houston v. State*, 114 Ala. 15, 21 South. 813. In that case, the prohibition of such an attestation is thus put: "It would be a violation of the words, and go far to defeat the policy and emasculate the requirements of this statute, if it should be construed as sanctioning an attestation of a witness who makes his mark only, when the party executing the instrument subscribes only by a mark." The case of *Jones v. Hough*, 77 Ala. 437, was precisely similar, but was decided before the code of 1886, section 1731. In that case, evidence was permitted of a third person who saw the mortgagor make his mark to the instrument. *Houston v. State*, 114 Ala. 15, 21 South. 813, was followed in *Morris v. Bank of Attalla*, 153 Ala. 352, 45 South. 219.

b. Seal.—A chattel mortgage need not be under seal, no matter what its form is, and though it purports to be a document under seal: *Cook v. Harrison*, 19 Ill. App. 402; *Burkamp v. Healey*, 24 Ky. Law Rep. 1926, 72 S. W. 759; *Gerrey v. White*, 47 Me. 504; *Sherman v. Fitch*, 98 Mass. 59; *Sweetzer v. Mead*, 5 Mich. 107; *Odom v. Clark*, 146 N. C. 544, 60 S. E. 513; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Woodruff v. King*, 47 Wis. 261, 2 N. W. 452; and in *Fowler v. Bell* (Tex. Civ. App.), 35 S. W. 822, it was held that a chattel mortgage signed and acknowledged by the president, secretary and treasurer of a corporation was not invalid because the corporate seal was not attached to the instrument.

c. Attestation.—It is hardly necessary to devote space to the consideration of the attestation of chattel mortgages, as the code provisions, now almost uniformly adopted, do not call for specific method of attestation of the mortgagor's signature in the ordinary acceptance of the term as indicating the subscribing of his own name by the one who saw the mortgagor sign the document. The cases show that so long as the signature could be proved, the courts were averse to holding the document invalid for irregularities in the attestation: *Geibold v. Rogers*, 110 Ala. 438, 18 South. 312; *Morris v. Bank of Attalla*, 142 Ala. 638, 38 South. 804; *Jones v. Howard*, 99 Ga. 451, 59 Am. St. Rep. 231, 27 S. E. 765; *First Nat. Bank v. Northwestern Elevator Co.*, 4 S. D. 409, 57 N. W. 77.

Some code provisions, however, provide the alternative mode of acknowledgment or signature in the presence of a given number of witnesses, and in such cases, the provisions have been strictly construed throughout. In *Donovan v. St. Anthony & D. Elevator Co.*, 8 N. D. 585, 73 Am. St. Rep. 779, 80 N. W. 772, 46 L. R. A. 721, two witnesses being required to the mortgage, it was held invalid by reason of one of them being the mortgagee, and therefore disqualified, and the filing of the document gave it no additional and curative strength. In *Fisher v. Porter*, 11 S. D. 311, 77 N. W. 112, the mortgage was held good, although the mortgagee was one of the attesting witnesses, but that was in consequence of Compiled Laws, sections 4384 and 5260, which latter section provides that interest shall not affect the competency of a witness.

In *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okl. 353, 60 Pac. 249, a chattel mortgage unsigned by two witnesses as required by Statutes of 1893, section 3275, was held to give the mortgagee no further rights than he would have had if it had not been filed. In *Moore's Exr. v. Auditor*, 3 Hen. & M. (Va.) 232, a mortgage proved by only two witnesses and recorded was void as to creditors where

the law required such deeds to be either acknowledged or proved by three witnesses.

In *Morris v. Bank of Attalla*, 153 Ala. 352, 45 South. 219, the fact that one of the subscribing witnesses was a stockholder in the mortgage corporation did not affect the validity of the mortgage.

A mortgage covering neat cattle is not affected by the fact that it is not witnessed by two residents of the county as provided in Compiled Laws, section 75, as that section applies to sales and not to mortgages: *Kitchen v. Schuster*, 14 N. M. 164, 89 Pac. 261.

As between the parties themselves, these requirements of the various statutes are not operative, and the mortgage is valid, irrespective of the observance of the formalities: *Smith v. Camp*, 84 Ga. 117, 10 S. E. 539; *Strahorn-Hutton-Evans Commission Co. v. Florer*, 7 Okl. 499, 54 Pac. 710; *Walter A. Wood Mowing & Reaping Mach. Co. v. Lee*, 4 S. D. 495, 57 N. W. 238.

V. Acknowledgment.

The same rule as to the validity of irregularly attested documents between the parties applies to unacknowledged mortgages being good inter partes: *Main v. Alexander*, 9 Ark. 112, 47 Am. Dec. 732; *Crane v. Chandler*, 5 Colo. 21; *Forest v. Tinkham*, 29 Ill. 141; *Springer v. Lipsis*, 209 Ill. 261, 70 N. E. 641; *Waterhouse v. Black*, 87 Iowa, 317, 54 N. W. 342; *Benson Bank v. Hove*, 45 Minn. 40, 47 N. W. 449; *McFarlan Carriage Co. v. Wells*, 99 Mo. App. 641, 74 S. W. 878; *Brown v. Koenig*, 99 Mo. App. 653, 74 S. W. 407; *Kitchen v. Schuster*, 14 N. M. 164, 89 Pac. 261. And the converse, that they are invalid as against third persons has been directly held in *Crane v. Chandler*, 5 Colo. 21; *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. 966; *Edinger v. Grace*, 8 Colo. App. 21, 44 Pac. 855; *Forest v. Tinkham*, 29 Ill. 141; *Farson v. Gilbert*, 114 Ill. App. 17; *Sanders v. Pepoon*, 4 Fla. 465; *St. Paul Title Ins. & Trust Co. v. Berkey*, 52 Minn. 497, 55 N. W. 60. In Alabama no acknowledgment at all is necessary and the registration is deemed notice: *Bickley v. Keenan*, 60 Ala. 293. In California the case of *Talcott v. Hurbert*, 143 Cal. 4, 76 Pac. 647, was decided on the common sense lines of the security being good between the parties and their privies. In that case the mortgage, properly verified and recorded, but without acknowledgment, while void as to creditors, was held not void between the parties, nor as to a purchaser with notice, nor as to any parties not included in those named in section 2957 of the Civil Code. The court held that the words of the statute could not be extended by implication to other classes of persons than those named. In Colorado and Nebraska it has been held that an unacknowledged chattel mortgage cannot be received in evidence: *Machette v. Wanless*, 1 Colo. 225; *Hooker v. Hammill*, 7 Neb. 231. In Illinois while it has been held that the statute as to the acknowledgment of such mortgages must be strictly construed as being in derogation of the common law (*Porter v. Dement*, 35 Ill. 478), the necessity for acknowledgment has been declared, notwithstanding the recording of the mortgage: *Koplin v. Anderson*, 88 Ill. 120; and the case of *People v. Hamilton*, 17 Ill. App. 599, goes the length of saying that actual notice will not supply the place of acknowledgment or record as against subsequent purchasers and encumbrancers. In Iowa, the mortgage unacknowledged is valid against those having notice of it: *Waterhouse v. Black*, 87 Iowa, 317,

54 N. W. 342. In Texas prior to the act of March 23, 1891, chapter 35, acknowledgment was unnecessary when the original was filed: *Hicks v. Ross*, 71 Tex. 358, 9 S. W. 315; *Chator v. Brunswick-Balke-Collender Co.*, 71 Tex. 588, 10 S. W. 1050. Since that act was passed, however, a copy can be filed only when the original has been witnessed by two subscribing witnesses or acknowledged or proven for record and certified as required in case of other instruments for the purpose of being recorded. Instruments not so acknowledged or not being proved as at common law, cannot be admitted in evidence: *Baxter v. Howell*, 7 Tex. Civ. App. 198, 26 S. W. 453. In Washington, where 1 Hill's Code, section 1648, made a chattel mortgage void as to creditors and subsequent purchasers for value and in good faith, unless acknowledged and recorded and accompanied by the statutory affidavit, the court in *Mendenhall v. Kratz*, 14 Wash. 453, 44 Pac. 872, held that the mere fact that a chattel mortgage was not verified or recorded, would not render it invalid as to a purchaser, unless for value and in good faith; and that no one can so become a purchaser or an encumbrancer of property in good faith if he has notice of a pre-existing mortgage, although such mortgage may not be recorded or verified in accordance with the statute. *Roy & Co. v. Scott, Hartley & Co.*, 11 Wash. 399, 39 Pac. 679, was the case followed in that opinion, and it, in turn, was followed by *Hicks v. National S. Co.*, 50 Wash. 16, 126 Am. St. Rep. 883, 96 Pac. 515. This latter case brings the decisions almost up to date in deciding that a bill of sale must be acknowledged under section 4558, Ballinger's Annotated Codes, or it will be void as against creditors of the vendor or subsequent purchasers and encumbrancers for value and in good faith; and that a chattel mortgage or bill of sale is good as between the parties, though not acknowledged or accompanied by the affidavit of good faith as required by the section referred to, and it further draws marked attention to the broad distinction which the statute creates between creditors and subsequent purchasers or encumbrancers. In *Scruggs v. Burruss*, 25 W. Va. 670, in the case of a deed of trust on personal property to secure debts, partaking of the nature of a chattel mortgage, where the interests of creditors and subsequent purchasers for valuable consideration without notice (the only classes mentioned in section 5, chapter 74 of the code) were not involved, and the deed was imperfectly acknowledged, the court held that it was immaterial whether it was recorded or not, as the failure to do so would only render it void as to the class of persons shown to be nonexistent—there being no creditors to suffer by the deed or the upholding of its imperfect execution. In *Kitchen v. Schuster*, 14 N. M. 164, 89 Pac. 261, the court gave a clear sheet as to all imperfections being harmless between the parties: "We think, therefore, that the failure to record was not fatal to the instrument. Nor was the absence of an acknowledgment. The absence of an acknowledgment does not, as between the parties or those with actual notice, affect the validity of deeds, nor bills of sale, nor chattel mortgages. Neither is the instrument invalid because not witnessed by two residents of the county, as required in Compiled Laws, section 75. This latter does not apply to chattel mortgages, but to absolute sales. This being so, the lack of witnesses is immaterial. We find nothing in *Gale v. Salas*, 11 N. M. 211, 66 Pac. 520, or *Territory v. Claypool*, 11 N. M. 568, 71 Pac. 463, contrary to these views."

VI. Affixing Revenue Stamps.

Except the omission to stamp the mortgage was fraudulent and for the purpose of evading revenue, the courts properly looked with a forgiving eye on the failure to comply with the statutory requirements in that behalf. When the failure to stamp arose from the fact that all the parties—mortgagor, mortgagee and the scrivener employed—believed it was not necessary to affix a revenue stamp thereto in view of the fact that each of the twelve notes secured by the mortgage was stamped, and the court found that there was no intention on the part of either to defraud the revenue, or in any manner violate the revenue law of the United States, the court, on the authority of *Craig v. Dimock*, 47 Ill. 308, *United States Express Co. v. Haines*, 48 Ill. 248, *Bunker v. Green*, 48 Ill. 243, *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339, *Knox v. Rossi*, 25 Nev. 96, 83 Am. St. Rep. 566, 57 Pac. 179, 48 L. R. A. 305, *McGovern v. Hoesback*, 53 Pa. 176, *Campbell v. Wilcox*, 10 Wall. 421, 19 L. ed. 973, *Dowell v. Applegate*, 7 Saw. 232, 239, 7 Fed. 81, 8 Fed. 698, came to the conclusion that the mortgage was valid and binding upon the parties in the state courts, notwithstanding the omission to stamp it. Practically that was the decision arrived at in the old case of *Brown v. Thompson*, 59 Me. 372, wherein it was held that unless it affirmatively appeared that the omission of the stamp was the result of an attempt to evade the statute the mortgage would not be declared "invalid and of no effect."

VII. Affidavit Verifying Mortgage.

It will have been observed that the case of *People v. Burns*, 161 Mich. 169, ante, p. 466, 125 N. W. 740, was decided mainly upon the issue of a proper recordation of the mortgage by having it accompanied with an affidavit of verification. The usual statutory provision is that the mortgagor named in the mortgage, or conveyance intended to operate as a mortgage, or some person for him, having knowledge of the facts, shall, before the filing of the mortgage, make and annex thereto an affidavit setting forth that the consideration of said instrument was actual and adequate, and that the same was given in good faith for the purposes in such instrument set forth, and that no officer shall receive such instrument or file the same in his office until such affidavit is made and annexed thereto. This is substantially the statutory requirement; the deviations from it are not material, the object of all the enactments being that the mortgage shall be verified by the mortgagors or some one knowing the facts, and that the contents of the mortgage shall be authenticated, having in view the possibility of liens and other encumbrances. In some states an affidavit is to be made by the mortgagee, and in others by all the parties to the mortgage. Taking into our consideration that the highly technical definition of an affidavit as given in the principal case, ante, p. 466, that an affidavit is a sworn statement reduced to writing and evidenced by the fact that it has been subscribed and sworn to before an officer having authority to administer oaths, it need cause little surprise that a very large number of cases on the validity of chattel mortgages has been determined by the proper form or inaccuracy of the affidavit, as the case may be. All other things being correct, a bad affidavit vitiates the mortgage as against creditors and subsequent encumbrancers.

a. Omission of Affidavit.—If the affidavit is absent, the same result will ensue: *Milburn Mfg. Co. v. Johnson*, 9 Mont. 537, 24 Pac. 17; *First Nat. Bank v. Beley*, 32 Mont. 291, 80 Pac. 256; *Field v. Silo*, 44 N. J. L. 355; *Hall v. Nash*, 58 N. J. Eq. 554, 43 Atl. 683; *Marsden v. Cornell*, 2 Hun, 449; *Hanes v. Tiffany*, 25 Ohio St. 549; *Blandy v. Benedict*, 42 Ohio St. 295; *Benedict v. Peters*, 58 Ohio St. 527, 51 N. E. 37; *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737; *Carstens v. Moyer*, 22 Wash. 61, 60 Pac. 51. The omission of the affidavit, however, has been held not to avail in favor of one who had knowledge that the mortgage was made for a good and valid consideration: *Roberts v. Crawford*, 58 N. H. 499.

Where the mortgage was recorded without the affidavit, and the affidavit was subsequently filed, the defect was not cured and the mortgage was invalid against creditors of the mortgagor who had proceeded to attach the property in the hands of the mortgagor. The only cure would have been the re-recording of the instrument in accordance with the statute: *Alferitz v. Scott*, 130 Cal. 474, 62 Pac. 735.

As between the parties themselves, as we have already pointed out, such defects are immaterial: *Marchand v. Ronaghan*, 9 Idaho, 95, 72 Pac. 731; *Wilson v. Lippincott* (N. J. Ch.), 44 Atl. 989; *Hicks v. National S. Co.*, 50 Wash. 16, 126 Am. St. Rep. 883, 96 Pac. 515.

In *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899, 56 Atl. 11 (which was affirmed 196 U. S. 516, 25 Sup. Ct. Rep. 306, 49 L. ed. 577), the mortgagee had elected to treat his mortgage as a common law, in lieu of statutory, security, and no affidavit was necessary, although there was an affidavit attached to the mortgage. "Some or all of the amount due from the mortgagor to the defendant for rent of buildings accrued after the giving of the mortgage, and the plaintiff contends that so much thereof as did thus accrue is not covered by the mortgage, because rent is not a 'contemplated loan and liability' within the meaning of that expression in the affidavit attached to the mortgage. But when the defendant is considered as standing upon a mortgage, at common law, no affidavit is necessary; and regarding the sufficiency of the description of the debts, obligations and undertakings intended to be secured thereby, the rules governing similar questions arising in connection with real estate mortgages are applicable. Under the holdings of this court in cases involving such mortgages, it is clear that the description is sufficient in this regard: *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Seymour v. Darrow*, 31 Vt. 122; *Soule v. Albee*, 31 Vt. 142."

b. Should an Affidavit be Subscribed by the Affiant.—This question is suggested by the opinion in the principal case, ante, p. 466, and while there is some doubt about it, we should warn those who desire to use that form of declaration by no means to hazard an unsigned affidavit in any important matter. The question arose in *Lutz v. Kinney*, 23 Nev. 279, 46 Pac. 257. It appears that in the state of Nevada the statute relating to chattel mortgages does not call for the affidavit annexed to a chattel mortgage to be subscribed by the affiant, and the court accordingly upheld a mortgage verified in that style. It is true there is some authority for the proposition, but it should be born in mind that affidavits from time immemorial have been signed, and a search among the authorities will show that

in nearly every instance when the correctness of the practice has been impugned, it has been to cover some act of carelessness on the part of the affiant or his scrivener. Blackstone defines an affidavit as "a voluntary oath before some judge or officer of the court, to evince the truth of certain facts": 3 Blackstone's Commentaries, 304. The affidavit must be "made"; that is, the affiant must swear to the facts stated, and they must be in writing. It is then his affidavit, and as evidence that it was sworn to by him, whose oath it purports to be, it must be certified by the officer before whom it was taken, which certificate is commonly called the "jurat" and must be signed by such officer: *Gill v. Ward*, 23 Ark. 16. In *Alford v. McCormac*, 90 N. C. 151, we find: "The signing or subscribing of the name of the affiant to the writing is not generally essential to its validity; it is not, unless some statutory regulation requires it. . . . The signature of an affiant can in no case add to or give force to what is sworn, and what is sworn is made to appear authoritatively by the certificate of the officer. This seems to us to be a reasonable view of the principal requisites of an affidavit, and, although there is some contrariety of judicial decisions upon the subject, the weight of authority sustains it."

An affidavit need not be signed by the affiant, unless such signature is required by some statute or by a rule of court: *Bloomington v. Chittenden*, 75 Mich. 305, 42 N. W. 836; *Norton v. Hague*, 47 Minn. 405, 50 N. W. 368; *Garrard v. Hitsman*, 16 N. J. L. 124; *Shelton v. Berry*, 19 Tex. 154, 70 Am. Dec. 326. In California in *Ede v. Johnston*, 15 Cal. 53, the court said: "It is not necessary that the parties should sign the affidavit (an affidavit attached to a chattel mortgage). This is too well settled to require discussion. It sufficiently appears that the affidavit was taken by a competent officer." This case was cited with approval and followed in *Pope v. Kirchner*, 77 Cal. 152, 19 Pac. 264; *State v. Washoe Co.*, 5 Nev. 317; and *Lutz v. Kinney*, above referred to (23 Nev. 279, 46 Pac. 257). It has also been followed in two later California decisions: *A. P. Hotaling & Co. v. Brogan*, 12 Cal. App. 500, 107 Pac. 711, and *Fairbanks, Morse & Co. v. Getchell*, 13 Cal. App. 458, 110 Pac. 331. In *Gambrinus Stock Co. v. Weber*, 41 Ohio St. 689, the agent of the corporation mortgagee in a chattel mortgage omitted to affix his name to the affidavit. There was a certificate by a notary public, duly signed and sealed, which in effect stated that the statement was sworn to by the mortgagee before him; and the court held that the verification was *prima facie* sufficient, and could only be overcome by evidence that the statement was not in fact sworn to by a proper agent of the corporation. In *Stone v. Marvel*, 45 N. H. 481, the parties to the mortgage wrote their names at the beginning of the affidavit instead of subscribing it as required by the statute, and the affidavit was in consequence declared invalid.

In this conflict of authority with practice and custom, we unhesitatingly admonish those whose duty it is to make affidavits to make them by first subscribing them and then swearing them before the proper officer, and then to see that the jurat is completed as to date and place of swearing, and that the officer also subscribes them before they are used. In the greater number of statutory provisions, the subscription is called for; in the greater number of cases the absence of the subscription is not based on principle, but on carelessness, and

it follows that the adoption of the universal rule of signing the affidavit will obviate many difficulties at a time when perchance the affiant is not "looking for trouble."

c. Insufficiency of Affidavit.—In *Ehler v. Turner*, 35 N. J. Eq. 68, Van Fleet, V. C., delivered an enlightening opinion on what the verifying affidavit should contain. He said: "The purpose of the legislature is clear. The statute was designed to prevent the use of chattel mortgages as a means of fraud. It was intended as a guard against dishonesty, and to secure fairness and good faith in such transactions. To this end the mortgagee, his agent or attorney, is required to state, under oath, the consideration of the mortgage; that is, not simply to state the amount or sum for which the mortgage is given, but to state how the debt on which it is founded arose; what was the cause of the debt; or how the relation of creditor and debtor was created between the parties. The legislature, I think, meant to compel the mortgagee to commit himself to a statement or disclosure of his debt or claim, when he made his mortgage a matter of public record, sufficiently precise and explicit to afford the creditors of the mortgagor, in case fraud was suspected, a fair opportunity to ascertain, by legal investigation or otherwise, whether the mortgage was an honest security or a mere fraudulent cover." The courts have decided almost universally on similar lines. Regarding the statutory safeguard as intended to promote commercial transactions, they almost uniformly hold that failure to comply with such enactments will insure the rejection of the mortgage in favor of creditors and subsequent encumbrancers. Accordingly, an insufficient affidavit is regarded as practically no affidavit at all, and the filing of the mortgage becomes a nullity: *Modesto Bank v. Owens*, 121 Cal. 223, 53 Pac. 552; *Denton v. Griffith*, 17 Md. 301; *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. 580; *Marcum v. Coleman*, 10 Mont. 73, 24 Pac. 701; *Belknap v. Wendell*, 31 N. H. 92; *Kennard v. Gray*, 58 N. H. 51; *Throop v. Knight* (N. J. Eq.), 28 Atl. 1037; *Miller v. Gourley*, 65 N. J. Eq. 237, 55 Atl. 1083; *Hanes v. Tiffany*, 25 Ohio St. 549; *Benedict v. Peters*, 58 Ohio St. 527, 51 N. E. 37; *Tarbell v. Jones*, 56 Vt. 312. In *Throop v. Knight* (N. J. Eq.), 28 Atl. 1037, the court dealt at some length with the comprehensiveness of the statute: "It is so comprehensive as to include every possible case. Detail was wisely avoided, because of the impossibility of anticipating the necessities or exigencies which the multitudinous forms or devices of men, in the transactions of their affairs, are constantly creating. It was not intended that the skillful or ingenious should say, 'I have escaped the statute.' A reasonable amount of certainty is required; if not so full as in pleadings, yet so far approaching thereunto as to guide the inquirer to that which is certain. Information as to the nature of claims or demands of one who makes an assertion of right, as against others, is insisted upon in every code or system of pleading."

Even where the faultiness of the affidavit is the result of an honest mistake, the paramount question is the construction of a statute which defines what the affidavit must contain and makes no allowance or exception for mistakes. In *Kennard v. Gray*, 58 N. H. 51, a case arising out of a faulty affidavit, it is said the statute condemns such securities because their natural tendency is to deceive and defraud creditors, however honest the intention of the parties. In *Fletcher v. Bonnet*, 51 N. J. Eq. 615, 28 Atl. 601, Mr. Justice Dixon said that

the validity of the chattel mortgage depends on the correctness of the information in the affidavit and not on the knowledge of the affiant of its truth; and in *Boice v. Conover*, 54 N. J. Eq. 531, 35 Atl. 402, we find: "Neither, as it seems to me, can the validity of the mortgage depend on the honesty of an affiant in making an affidavit which is substantially untrue." In that case the affidavit set forth that the true consideration for the chattel mortgage was a loan of four thousand eight hundred dollars to the firm then due and owing, and the facts were that the mortgage was given to secure a loan of two thousand dollars to one of the partners individually, and the balance of two thousand eight hundred dollars to secure the indorsements of unmatured firm notes for that amount. The mortgage was held void under the statute.

It may be taken therefore as law that as to the true consideration, where it is required by law to be stated, the courts will not be satisfied unless the affidavit tells "the truth, the whole truth and nothing but the truth." Conclusions in the mind of the affiant unexpressed are valueless; the courts seek the *littera scripta* for interpretation, although the cases do not go so far as to require the insertion of the words "So help us God" where the affidavit was sworn to by more than one affiant: *Comey v. Pickering*, 63 N. H. 126. In all other respects, however, the affidavit must comply strictly with the statutory directions both with regard to form and substance as we have shown above.

Describing the affiant by his name, and following it the word "mortgagor" sufficiently designates the person who made the mortgage: *In re Shannahan-Wrightson Hardware Co.*, 5 Penne. (Del.) 138, 58 Atl. 1023. In the same case the affiant omitted to sign the affidavit otherwise regularly made before a notary public as required by the statute, without affecting the validity of the mortgage. In that state, however, under the Revised Code of 1852, amended in 1893, chapter 112, section 9, the certificate of the notary under his hand and official seal is *prima facie* conclusive. As to the description of the person making the affidavit, a recent California case, *Old Settlers' Inv. Co. v. White*, 158 Cal. 236, 110 Pac. 922, decides that since the statute makes no provision as to who shall make the affidavit when a corporation is a party to a chattel mortgage, and does not require the person who makes it for the corporation to declare on oath his official position or relation, it is sufficient if he declares it in the introductory statement describing the person who makes the affidavit. In *Sanborn v. Cunningham* (Cal.), 33 Pac. 894, the court held the affidavit valid notwithstanding the misnomer of the mortgagor in one place in it. In Illinois the agent of the mortgagee may make the statutory affidavit: *Fuller v. Smith*, 71 Ill. App. 576. The fact of the affiant being a trustee need not be averred in the affidavit if the mortgage itself does not refer to the *cestui que trust*: *Cope v. Minnesota Type Foundry Co.*, 20 Mont. 67, 49 Pac. 387. That case also decided that the affidavit was not sufficient under section 1538 of the Compiled Statutes of 1887. Under that section it was decided in *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. 580, that the absence of a party to a chattel mortgage should be set out in the affidavit before an agent could be permitted to make it. In *Cope v. Minnesota Type Foundry*, 20 Mont. 67, 49 Pac. 387, the affidavit did not contain the specific averment required, although the mortgage itself did, but the court upheld the literal strictness of the section. The affidavit in question was held insufficient on the further ground that it was made by the

"Ross, Frank & Eaves Publishing Company, per Eaves Ross & Frank." As the court pointed out, it should have been made by Eaves, Ross and Frank individually. The affidavit should correctly describe the nature of the liability and how the debt arose, to secure which the mortgage is given: *Parker v. Morrison*, 48 N. H. 280; *Receiver of Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120, 24 Atl. 571; *Dunham v. Cramer*, 63 N. J. Eq. 151, 51 Atl. 1011; *Collerd v. Tully* (N. J. Eq.), 77 Atl. 1079, in which the whole subject of chattel mortgages is dealt with most exhaustively by Garrison, V. C., covering most of the divisions of this note, and deciding, among many other excellent and important rulings, that where the mortgage is based on a judgment, the affidavit is not required to set out the subject matter of the judgment; and where both a debt and a liability are thus secured, but the affidavit is only as to the debt, the security is valueless as to the liability: *Sumner v. Dalton*, 58 N. H. 295. In *Bonnet v. Hope Mfg. Co.*, 51 N. J. Eq. 162, 26 Atl. 685, a chattel mortgage was given by a trading corporation to one Fletcher to secure a debt of two thousand dollars due to himself, and also certain debts to seven other persons, aggregating one hundred and fifty-three thousand dollars. The affidavit annexed was made by Fletcher and stated that the mortgage was made to him as trustee, to secure the payment of certain indebtedness of the mortgagor, specifying the several sums, and persons to whom due, and stating in each instance that the indebtedness consisted of money loaned and advanced to the mortgagor by the creditor named, and that there was due, in the aggregate, the sum above mentioned, but did not state that the deponent was the agent or attorney of the several creditors, or either of them, or that he had any personal knowledge of such consideration. The court held that the affidavit was insufficient, except as to the amount due to Fletcher himself. In *Throop v. Knight* (N. J. Eq.), 28 Atl. 1037, the general statement that the consideration was the indorsement of certain notes of the mortgagor without particulars was not sufficient to sustain the mortgage. In *Horowitz v. Weidner* (N. J. Eq.), 31 Atl. 771, the consideration as expressed in the affidavit was to secure to deponent the due performance of a particular agreement, and to indemnify deponent for any breach of it to an amount not exceeding two thousand dollars. In that the mortgage was given to secure something other than the payment of money and was in reality an indemnity and that the affidavit said in effect, "There is nothing now due, and the utmost that may become due is two thousand dollars," the court held it sufficient. The same reasoning was adopted in *Camden Safe Deposit & Trust Co. v. Burlington Carpet Co.* (N. J. Eq.), 33 Atl. 479, where the affidavit recited that "the true consideration of the above mortgage is the issue of four hundred thousand dollars in bonds of the mortgagor for the purpose specially set forth in the mortgage," the affidavit itself not setting forth the circumstances or purpose other than as appeared. This principle of reference to the mortgage is to be found in the older cases of *Tompkins v. Crosby* (N. J. Eq.), 19 Atl. 720; *Fletcher v. Bonnet*, 51 N. J. Eq. 615, 28 Atl. 601; *Gardiner v. Parmalee*, 31 Ohio St. 551, and was followed in *Black v. Pidgeon*, 70 N. J. L. 802, 58 Atl. 372. In *Hall v. Nash*, 58 N. J. Eq. 554, 43 Atl. 683, a bill of sale intended as a mortgage was placed in the same category as a chattel mortgage with regard to the affidavit of consideration. That case decided that

a mortgage of book accounts was not a chattel mortgage requiring the verifying affidavits. But in *Tarbell v. Jones*, 56 Vt. 312, where the averment of indebtedness in the affidavit was contrary to the fact, the mortgage was held invalid. Both affidavit and mortgage recited an indebtedness in lieu of an indemnity, and the Vermont statute, section 1969, requires the contract of indemnity to be specially set out. The same statute requires also an allegation that the debt was not created for the purpose of the chattel mortgage; and in *Sherman v. Estey Organ Co.*, 69 Vt. 355, 38 Atl. 70, the omission of that allegation was held fatal to the mortgage. The state of New Jersey has been specially prolific of cases on this point. In *W. & B. Douglass v. Williams* (N. J. Eq.), 48 Atl. 222, two important matters were involved in the decision. The first one was that it was not necessary to name in the affidavit the person lending the money when the fact of the loan and the amount were duly set out, and the second, that where reference was made in the affidavit directly to the mortgage, such reference was permissible, so that the statements of fact in the mortgage might be read with the affidavit, more fully to set forth the consideration. In Vermont the same ruling prevails: *Enright v. Amsden*, 70 Vt. 183, 40 Atl. 37. In *Watson v. Rowley*, 63 N. J. Eq. 195, 52 Atl. 160, the rule for the person who should make the affidavit was interpreted that it must appear in the affidavit that the affiant is the holder of the mortgage or his agent or attorney, and that a valid affidavit cannot be made by the holder's agent or attorney unless the agency and power to represent the holder are special, and finally that so long as the mortgagor retains any interest in the property he cannot be the agent of the holder. In *Gardner v. Parmalee*, 31 Ohio St. 551, it was decided that the affidavit need not be in any set form, so long as it complied substantially with the statute and an affidavit which stated the aggregate of two notes secured by the mortgage was held sufficient. But in *Blandy v. Benedict*, 42 Ohio St. 295, it was held that an affidavit did not substantially comply with the statute when it omitted to state truly the mortgagee's liability as surety, and that the mortgage was really an indemnity, and merely stated an amount of indebtedness. In Utah the courts have adopted the same rule of substantial compliance, and where the affidavit expressed that the mortgage was bona fide and not intended to delay creditors, omitting the words "or hinder," the court took the view that the words were synonymous and the affidavit good: *Petrovitzky v. Brigham*, 14 Utah, 472, 47 Pac. 666; and in the later case of *Deseret Nat. Bank v. Kidman*, 25 Utah, 379, 95 Am. St. Rep. 856, 71 Pac. 873, the omission of the word "defraud" from that part of the affidavit which deposes that the security was not to hinder, delay or defraud creditors, was held not to vitiate the mortgage. But where the mortgage is given for a sum larger than that due, although the mortgagee deducted the excess by an indorsement on the note, the mortgage was invalid: *Nichols v. Bingham*, 70 Vt. 320, 40 Atl. 827. In *Tingley v. International Dynetectron Co.*, 74 N. J. Eq. 538, 70 Atl. 919, where the affidavit differed in a material averment from the mortgage, the latter omitting to state that the mortgagee was a trustee, the information appearing in the affidavit only and the affidavit failing to state truly the substantial facts relating to the consideration as they existed at the time of recording it, the mortgage was declared invalid. In *Simpson v. Anderson* (N. J.), 70 Atl. 696, 73 Atl. 493, the affidavit of consideration attached to a chattel mort-

gage stated that it was given to secure the payment of a bond and mortgage executed and delivered by the maker of the chattel mortgage to one Hendrickson, which Hendrickson, in consideration of fifteen hundred dollars paid to him by the deponent, had assigned to deponent, and that the amount due thereon was fifteen hundred dollars. This was a sufficient statement of the consideration to comply with the statute, because it was not necessary to set out the consideration which passed between the original parties to the bond and mortgage, the consideration of the chattel mortgage being the amount paid by the assignee. This case also contains a ruling on the form of the affidavit. The deponent set out the facts disclosing the consideration commencing with "Whereas," and the court held that that word did not make the affidavit uncertain or destroy the positive statement that the consideration was as thereafter set out. In an earlier case, *American Soda Fountain Co. v. Stolzenbach* (N. J. Eq.), 68 Atl. 1078, the court showed the same disposition to leniency where the affidavit was substantially but artificially in compliance with the statute. The affidavit in that case stated that the true consideration was for one soda fountain, and continuing, that the amount due and to grow due thereon was two thousand two hundred and twenty-seven dollars, with interest from the 1st of August, 1901.

As to the person by whom the affidavit must be made and which has been referred to incidentally throughout this note, the statute must be strictly followed or the mortgagee takes the security at his peril. The agent of a bank, acting with plenary authority for them, is a competent deponent: *Lathrop v. Blake*, 23 N. H. 46; the selectman of a town where the mortgage was for a debt due to the town: *Sumner v. Dalton*, 58 N. H. 295; a trustee for creditors so long as he has personal knowledge of the consideration: *Bonnet v. Hope Mfg. Co.*, 51 N. J. Eq. 162, 26 Atl. 685. An unauthorized statement by the mortgagor, where the statute required a statement of the interest of the mortgagee is insufficient. Such statement must be made by the mortgagee in person or by attorney: *Newell v. Warner*, 44 Barb. 258.

The secretary of a banking corporation signed the affidavit and added to his signature "Secretary." It was held sufficient: *Yost v. Commercial Bank*, 94 Cal. 494, 29 Pac. 858; an affidavit by one of several partners in his individual name and without reference to his firm is insufficient: *Baker v. Power*, 7 Mont. 326, 16 Pac. 589; a reference to his firm makes it sufficient: *Randall v. Baker*, 20 N. H. 335. The fact of the affidavit being sworn before a justice of the peace of another state does not invalidate it: *Gibbs v. Parmalee*, 64 N. H. 66, 6 Atl. 93. So long as the affidavit is sworn it is sufficient. In *Whitehead v. Hamilton Rubber Co.*, 53 N. J. Eq. 454, 32 Atl. 377, the language of the jurat was, "Sworn and subscribed before me this 8th of May, 1891. Alex Ramsey, Notary Public." The act imposed upon the notary the duty of certifying to his own official character, and to do this three things are essential: First, he must certify to his official character; second, he must sign the same and annex thereto his official designation; and third, these things must be attested under his official seal. In the case last referred to the first was omitted, but the court held that when the affidavit required by the statute is sufficient in substance, and there is lack of form as to the certification required by the statute, the court will not hesitate to allow such extraneous proof as would supply the deficiency, where it did not appear that any injustice would be done, and especially where it was manifest

that the rights of those dependent upon such affidavit would otherwise be absolutely lost. The case of *Magowan v. Baird*, 53 N. J. Eq. 656, 33 Atl. 1054, was if anything stronger against the validity of the affidavit. The mortgage in that case had an affidavit annexed, made in Pennsylvania before a notary public of that state, but the jurat did not contain a recital that the officer taking it was a notary public as provided for in section 5 of the oaths act (Revision, p. 740). The court held that the mortgage had annexed to it an affidavit within the meaning of section 4 of the chattel mortgage act (Supp. Revision, p. 491), and was not void, as to the creditors of the mortgagor, for lack of such recital in the jurat. In *People v. Burns*, 161 Mich. 169, ante, p. 466, 125 N. W. 740, there was no jurat at all, or rather there was a blank jurat and the paper purporting to be the affidavit did not show on its face either who administered the oath or that any oath at all was administered. The court, citing *Knapp v. Duclo*, 1 Mich. N. P. 189, held it to be a nullity and the mortgage therefore void. We confess to a sturdy adherence to the views of the court when it said: "It was clearly the duty of the mortgagee, if he wished to take advantage of the statute, to see that all its requirements had been complied with, and, if the mortgagee is content, as in this case, to take chances in that regard, and to leave it to the mortgagor, and the mortgagor does not comply with the statutory requirements, then the mortgagee should suffer the consequences, and not the creditor who seeks to collect his judgment." In *Ashley v. Wright*, 19 Ohio St. 291, it was held that other parts of the notarial certification being correct, the absence of the seal would not invalidate the document, the statute only requiring the statement to be verified before some justice of the peace or other officer authorized to administer oaths, and the court said that it showed no want of compliance with the letter of the statute, nor in their opinion did the spirit and purpose of such act require an authentication by the notary under his official seal. The failure of the notary to state his place of residence in his certificate was regarded as venial: *Vincent v. Snoqualmie Mill Co.*, 7 Wash. 566, 35 Pac. 396.

VIII. Necessity for Delivery of Copy of Mortgage.

As a rule, there is no necessity for delivering a copy of the chattel mortgage to the mortgagor, but where it is required by statute, it must be strictly complied with, and more especially where the statute directs that the fact of the copy being so delivered shall be written on the instrument filed above the mortgagor's signature. In South Dakota, it is so provided in Laws 1897, chapter 95. In *Commercial State Bank v. Interstate Elevator Co.*, 14 S. D. 276, 86 Am. St. Rep. 760, 85 N. W. 219, the fact that the receipt for the delivery of the copy mortgage was inserted in the body of the mortgage and signed before the execution of such mortgage did not render the mortgage invalid. In *Park v. Robinson*, 15 S. D. 551, 91 N. W. 344, the acknowledgment that the copy had been delivered was below the mortgagor's signature and was held insufficient and left the mortgage open to attack by subsequent mortgagees and attaching creditors.

IX. Effect of Failure to File or Record.

a. **The Governing Law.**—It almost goes without saying that the mode and correctness of the recording of an instrument is governed by the law of the state in which it is recorded; and this law of the

recording is to be kept separate and distinct from that dealing with the ownership of property outside the state in which the document is recorded. A chattel mortgage executed and recorded in one state is not constructive notice to purchasers or attaching creditors of property covered by it, but situated in another state at the time the mortgage is executed, for, if a valid chattel mortgage is executed and recorded in one state, on property situated in another, and such property is attached by the mortgagor's creditor in the latter state, the rights of the mortgagee and such creditor must be determined by the law of the state where the property is situated: *Aultman & Taylor Machinery Co. v. Kennedy*, 114 Iowa, 444, 89 Am. St. Rep. 373, 87 N. W. 435. In the case of *In re Brannock*, 131 Fed. 819, the point is directly dealt with. In that case Brannock, a railway contractor, in June, 1903, at Council Bluffs, Iowa, made to the petitioner, one Wickham, a chattel mortgage of his grading outfit, then in Johnson county, Iowa, there being used by him in railroad work, which mortgage was duly acknowledged by Brannock as required by the laws of Iowa, and was filed by Wickham in the office of the recorder of deeds of Johnson county on June 29, 1903, and afterward duly recorded in that county. The mortgage set forth the goods as being in Iowa, though the mortgagor was described as of Nebraska. The mortgagor being declared bankrupt the property was sold by order of the referee free from the mortgage lien, the proceeds being held in lieu of the property. Wickham made proof of his debt and claimed priority for his lien. Creditors objected on the grounds that the bankrupt at the time of making the mortgage was a resident of the state of Nebraska, and that the record of the mortgage in Johnson county, Iowa, was unauthorized and other grounds not material to this note. In his certificate the referee said that the presumption was raised that the mortgagor had no legal residence in Iowa, being there only for a temporary purpose, on fulfillment of which he returned to Nebraska, and that the recording of the mortgage in Johnson county, Iowa, was not in accordance with the statute, and did not give constructive notice of the mortgage. The Iowa code, section 2906, provided that: "No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors, or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides." It will be seen that the whole controversy pivoted upon the word "resides," the last word in the section. The court dealt with the objection by pointing out: 1. That the property being situated in Iowa when the mortgage was made, record of it in the state of Nebraska, even though the mortgagor had then resided there, would have been wholly ineffective in Iowa, as constructive notice to creditors of, or purchasers from the mortgagor: *Ames Ironworks v. Warren*, 76 Ind. 512, 40 Am. Rep. 258; *Aultman & Taylor Co. v. Kennedy*, 114 Iowa, 444, 89 Am. St. Rep. 373, 87 N. W. 435; *Golden v. Cockrill*, 1 Kan. 259, 81 Am. Dec. 510; *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62; *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003. 2. That such a mortgage was governed by the law of the place where the chattels were situated at the time it was made, and the question of its priority, as between different lienholders, was to be determined by

the law of such place: *Ames Ironworks v. Warren*, 76 Ind. 512, 40 Am. Rep. 258; *Aultman & Taylor Co. v. Kennedy*, 114 Iowa, 444, 89 Am. St. Rep. 373, 87 N. W. 435; *Harrison v. Sterry*, 5 Cranch, 289, 3 L. ed. 104; and 3. As to the contention that the evidence showed that the legal residence of the mortgagor at the time the mortgage was made was in Nebraska which was based on the description, "I, James Brannock, Omaha, Nebraska, of the county of Douglas and state of Nebraska," such recital was not evidence of his residence and did not control as to the place where the instrument should be recorded. The actual residence controls, and the recital in the mortgage was of no importance, and might, for the matter of security, be omitted altogether: *Stewart v. Platt*, 101 U. S. 731, 25 L. ed. 816.

In a later case, *In re Greene*, 134 Fed. 137, the principle is reaffirmed and with if anything greater force. A chattel mortgage was executed in New York by a bankrupt, the parties living in New York. The chattels mortgaged were in Connecticut and the mortgage was duly recorded in that state, and was valid as against the bankrupt's creditors and the trustee in bankruptcy. The contention was that, since the mortgage was void under the laws of New York state where it was made, it was void everywhere, and that recording it properly did not make it sound. The referee drew attention in his report to the rule stated in *Chillingworth v. Eastern Tinware Co.*, 66 Conn. 306, 33 Atl. 1009: "The general rule that the *lex loci contractus* shall govern in this matter is, theoretically at least, founded upon the presumed intention that the parties contracted with reference to that law; and when the contract is to be performed elsewhere, or is to have its entire beneficial operation and effect elsewhere, then the law of the latter place is to govern, because, in the absence of anything to the contrary, it is presumed that the parties so intended." This rule was reaffirmed in *Beggs v. Bartels*, 73 Conn. 132, 84 Am. St. Rep. 152, 46 Atl. 874, where we find that the law of the state in which a conditional sale is to be performed, or is to have its beneficial effect and operation, rather than the law of the state in which it was made, determines its validity as between the purchaser and his attaching creditors. Contracts are to be construed according to the laws of the state in which they are made, unless it is perceived from their tenor that they are entered into with a view to the laws of some other state: *Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183. In *Hervey v. R. I. Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003, Mr. Justice Davis said that every state has the right to regulate the transfer of property within its limits. The court, in *Re Greene*, 134 Fed. 137, in adopting this view of the law, said that if New York and Rhode Island parties chose to take their property to Illinois, they by implication consented to be bound by the regulations as to transfer there in force. "If the property happens to be in the other state when the parties make their contract, the conclusion reached by the supreme court becomes all the more irresistible. To sustain the contention of the objecting creditors in the case before me would be unfortunate from any point of view. It might be subversive of a bedrock principle of commercial life, and, at best, it would lead to the necessity for adopting complicated and useless details, in order that validity might attach to a very simple transaction." The case of *State Bank of Williamson v. Fish*, 120 N. Y. Supp. 365, must not be considered with reference to this subdivision, as it is not a case of recording in another state, but of the invalidity of a mortgage of both real and personal estate,

inoperative as to the chattels because not filed in the office of the clerk of the town where the mortgagor resided.

b. As Between the Parties Themselves.

1. The Mortgagor and the Mortgagee.—Whatever protection the statutory requirements afford to creditors and encumbrancers, legislation has kept aloof from any interference between the parties themselves. Some of the cases go the length of declaring such chattel mortgages valid, though unrecorded and unacknowledged. The statutes do not make the irregular mortgage invalid as between the immediate parties; third persons, in whose favor it might be held void must be persons having some right or interest in the property. It has been held in cases too numerous to name that such a mortgage is valid between the parties themselves: *Killough v. Steele*, 1 Stew. & P. 262; *Merrick v. Avery*, 14 Ark. 370; *Hampton v. State*, 67 Ark. 266, 54 S. W. 746; *Lemon v. Wolff*, 121 Cal. 272, 53 Pac. 801; *Fuller v. Paige*, 26 Ill. 358, 79 Am. Dec. 379; *Alcock v. Loy*, 100 Ill. App. 573; *McTaggart v. Rose*, 14 Ind. 230; *Warner v. Warner*, 30 Ind. App. 578, 66 N. E. 760; *American Lead Pencil Co. v. Champion*, 57 Kan. 352, 46 Pac. 696; *Shaw v. Wilshire*, 65 Me. 485; *Clagett v. Salmon*, 5 Gill & J. 314; *Simpson v. McFarland*, 18 Pick. 427, 29 Am. Dec. 602; *Lyle v. Palmer*, 42 Mich. 314, 3 N. W. 921; *McNeil v. Finnegen*, 33 Minn. 375, 23 N. W. 540; *Johnson v. Jeffries*, 30 Mo. 423; *Bagley v. Harmon*, 91 Mo. App. 22; *McFarlan Carriage Co. v. Wells*, 99 Mo. App. 641, 74 S. W. 878; *Fitzgerald v. Andrews*, 15 Neb. 52, 17 N. W. 370; *Smith v. Moore*, 11 N. H. 55; *Williamson v. New Jersey Southern R. Co.*, 26 N. J. Eq. 398; *Law v. Smith*, 68 N. J. Eq. 81, 59 Atl. 327; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Pancoast v. American Heating & Power Co.*, 66 How. Pr. 49; *Hardin v. Dolge*, 46 App. Div. 416, 61 N. Y. Supp. 753; *Williams v. Jones*, 95 N. C. 504; *Union Nat. Bank v. Oium*, 3 N. D. 193, 44 Am. St. Rep. 533, 54 N. W. 1034; *Kilbourne v. Fay*, 29 Ohio St. 264, 23 Am. Rep. 741; *Thompson v. Dyer*, 25 R. I. 321, 421, 55 Atl. 824, 56 Atl. 446; *McKnight v. Gordon*, 13 Rich. Eq. 222, 94 Am. Dec. 164; *McGowan v. Reid*, 27 S. C. 262, 3 S. E. 337; *Texas Moline Plow Co. v. Kingman Texas Imp. Co.*, 32 Tex. Civ. App. 343, 80 S. W. 1042; *Deseret Nat. Bank v. Kidman*, 25 Utah, 379, 95 Am. St. Rep. 856, 71 Pac. 873; *Johnson v. Hibbard*, 27 Utah, 342, 75 Pac. 737; *Darland v. Levins*, 1 Wash. 582, 20 Pac. 309; *Scruggs v. Burruss*, 25 W. Va. 670; *Manson v. Phoenix Ins. Co.*, 64 Wis. 26, 54 Am. Rep. 573, 24 N. W. 407; *Schlessinger v. Cook*, 9 Wyo. 256, 62 Pac. 152; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. ed. 235; *In re Williams*, 120 Fed. 542; *In re Cutting*, 145 Fed. 388; *Ward v. Ward*, 145 Fed. 1023, 74 C. C. A. 146. The case of *In re Rogers and Woodward*, 132 Fed. 560, is not in conflict with these cases, merely because it decides that a certain building did not pass by a chattel mortgage unwitnessed and unrecorded. The reason such mortgage was not held valid was, that purporting to be a mortgage of chattels, it could not be held to cover the building if it was real property, and it was held to be such an interest in land by the court as precluded its inclusion. In the language of the court the mortgage was "a good chattel mortgage for what it covers. . . . The statute authorizes such a mortgage of 'personal property' only."

2. Representatives of Insolvent Mortgagor.—The assignee in bankruptcy is in no better position than the mortgagor so far as the mort-

gagee is concerned. In *Stewart v. Platt*, 101 U. S. 731, 25 L. ed. 816, the court said: "In *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. ed. 589, we held it to be an established rule that, 'except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or encumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt: *Brown v. Heathcote*, 1 Atk. 160; *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9673; *Gibson v. Warden*, 14 Wall. 244, 20 L. ed. 797; *Cook v. Tullis*, 18 Wall. 332, 21 L. ed. 933; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 993; *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 136. He takes the property in the same plight and condition that the bankrupt held it: *Winsor v. McLellan*, 2 Story, 492, Fed. Cas. No. 17,887.'"

One important case, *Bingham v. Jordan*, 1 Allen, 373, 79 Am. Dec. 748, holds that a mortgage of personal property is invalid against the assignee in insolvency of the mortgagor when the mortgage is not recorded and the property is not delivered to the mortgagee, but is retained by the mortgagor until the insolvency. It is distinguished, however, in *Re Griffiths*, Fed. Cas. No. 3540, which traces the history of the reasons actuating such a decision in the state of Massachusetts, which are that since 1832 the statute of that state required possession to be taken and kept by the mortgagee, or a due record of the mortgage; and if neither was done, the mortgage was not valid "against any other person than the parties thereto": Gen. Stats., c. 151, sec. 1. "The supreme judicial court of the commonwealth have construed this language strictly, and have held that actual notice of the mortgage would not defeat the title of a purchaser: *Travis v. Bishop*, 13 Met. 304. And they had before intimated that probably an attaching creditor, with actual notice, would hold his attachment against the mortgage: *Denny v. Lincoln*, 13 Met. 200. From these decisions and intimations the step was easy to a ruling that an assignee in insolvency had a better title than such a mortgagee: *Bingham v. Jordan*, 1 Allen, 373, 79 Am. Dec. 748." Before the last-named case was decided, however, Judge Story had held differently in *Winsor v. McClellan*, 2 Story, 492, Fed. Cas. No. 17,887, and that the assignee representing the bankrupt takes only what he had and subject to such encumbrances as were valid against the insolvent. The court in *Re Griffiths*, Fed. Cas. No. 3540, above referred to, says that Judge Story's opinion was evidently not brought under the notice of the Massachusetts court, but even if it had been, the cases are not in direct conflict, for the reason that by the insolvent law of the state the assignee takes not only all the debtor's property, but all that could be taken on execution against him at the time of the insolvency; and under the earlier decisions and intimations, such chattels could have been taken by an execution creditor even though he had actual notice of the mortgage.

3. **Representatives of Deceased Mortgagor.**—As it is with representatives in insolvency so it is with the personal representatives of a mortgagor who is deceased. His heirs or administrator are not a "third person" within the meaning of the statutes. In *Griffin v. Wertz*, 2 Ill. App. 487, the court says there is some conflict in the authorities upon the question, but they were of opinion that both sound rea-

son and the weight of authority were against the proposition that such personal representative had any different rights than the decedent, and that view is supported, as stated, by the weight of decision: *Mayer v. Myers*, 129 Ind. 366, 27 N. E. 740; *Williams v. Jones*, 95 N. C. 504.

c. As Against Third Parties.—Since by the statutes in general the chattel mortgage is of no force or effect except it is made and recorded in accordance with the conditions imposed by law, and we have considered the effect of the failure to comply with those statutory requirements for the execution of such mortgages, taking in their order the executing, acknowledgment, stamping where required, the affidavit to accompany the instrument and when it is necessary the delivery to the mortgagor of a copy of the document, we have only finally its completion by putting it on record. We have not here considered the form of the instrument nor the description of the parties or the chattels intended to be mortgaged. The sufficiency of description of property in chattel mortgages formed the subject of a note to *Barrett v. Fisch*, 76 Iowa, 553, 14 Am. St. Rep. 238, 41 N. W. 310.

The first question as to who third parties are might be readily answered by saying that they were all others than the parties themselves as already dealt with, but, in this connection, when third parties are spoken of, they are to be taken as meaning creditors of the mortgagor, subsequent purchasers and mortgagees and assignees of the mortgagee.

The mortgage, while good between the parties, is almost universally held invalid against third parties unless it is recorded in accordance with the law of the state in which it is so recorded. Recordation is dispensed with similarly when the mortgagor transfers the possession of the chattels mortgaged to his mortgagee. We have not to consider this phase of the transaction here. The authority is abundant for the reasons already given, namely evidence of good faith inter partes, notice to the world of the dealing, and consequent protection to those who have business negotiations with either mortgagor or mortgagee, readiness of adjusting liens and the greater confidence of the trading community, that chattel mortgages unaccompanied by any transfer of possession are invalid if not legally recorded: *Whittleshoffer v. Strauss*, 83 Ala. 517, 3 South. 524; *Woods v. Rose*, 135 Ala. 297, 33 South. 41; *Garner v. Wright*, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715; *Berson v. Nunan*, 63 Cal. 550; *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371; *Ankele v. Elder*, 19 Colo. App. 330, 75 Pac. 29; *In re Wilcox & Howe Co.*, 70 Conn. 220, 39 Atl. 163; *Hope v. Johnston*, 28 Fla. 55, 9 South. 830; *Armitage-Herschell Co. v. Muscogee Real Estate Co.*, 119 Ga. 552, 46 S. E. 434; *Gregg v. Sanford*, 24 Ill. 17, 76 Am. Dec. 719; *Roberts v. Kingsbury*, 71 Ill. App. 451; *State v. Griffin*, 16 Ind. App. 555, 45 N. E. 935; *Blackman v. Baxter, Reed Co.*, 125 Iowa, 118, 100 N. W. 75, 70 L. R. A. 250, 2 Ann. Cas. 707; *Fromme v. Jones*, 13 Iowa, 474; *Cameron v. Marvin*, 26 Kan. 612; *Lehmann-Higginson Grocer Co. v. McClain*, 63 Kan. 881, 64 Pac. 1029; *Westinghouse Electric Mfg. Co. v. Citizens St. R. Co.*, 24 Ky. Law Rep. 334, 68 S. W. 463; *Morrill v. Sanford*, 49 Me. 566; *Kelley v. Goodwin*, 95 Me. 538, 50 Atl. 711; *Gill v. Griffith*, 2 Md. Ch. 270; *Shurtleff v. Willard*, 19 Pick. 202; *Harrison v. J. J. Warren Co.*, 183 Mass. 123, 66 N. E. 589; *Waite v. Matthews*, 50 Mich. 392, 15 N. W. 524; *People v. Burns*, 161 Mich. 169, ante, p. 466, 125 N. W. 740; *Hargreaves v. Reese*, 66 Minn. 434, 69 N. W. 223; *Clarke v. National Citizens' Bank*, 74 Minn. 58, 76 N. W.

965, 1125; *Rock Island Nat. Bank v. Powers*, 134 Mo. 432, 34 S. W. 869, 35 S. W. 1132; *Harrison v. South Carthage Min. Co.*, 95 Mo. App. 80, 106 Mo. App. 32, 68 S. W. 963, 79 S. W. 1160; *John Caplice Co. v. Beauchamp*, 22 Mont. 258, 56 Pac. 278; *Sanford v. Jensen*, 49 Neb. 766, 69 N. W. 108; *National Bank of Commerce v. Bryden*, 59 Neb. 75, 80 N. W. 276; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 65 N. J. Eq. 181, 55 Atl. 231; *Button v. Rathbone*, 59 Hun, 615, 12 N. Y. Supp. 667; *Dickinson v. Oliver*, 96 App. Div. 65, 89 N. Y. Supp. 52; *Lawrence v. Weeks*, 107 N. C. 119, 12 S. E. 120; *Sykes v. Hannawalt*, 5 N. D. 335, 65 N. W. 682; *Hennessey First Nat. Bank v. Hesser*, 14 Okl. 115, 77 Pac. 36; *Horn v. Livesley*, 44 Or. 501, 75 Pac. 1057; *City Bank v. Easton Boot & Shoe Co.*, 187 Pa. 30, 40 Atl. 1026; *Harris v. Chaffee*, 17 R. I. 193, 21 Atl. 104; *Burdeck v. Coates*, 22 R. I. 410, 48 Atl. 389; *London v. Youmans*, 31 S. C. 147, 17 Am. St. Rep. 17, 9 S. E. 775; *Noyes v. Brace*, 8 S. D. 190, 65 N. W. 1071; *Williams v. Farmers' Nat. Bank*, 22 Tex. Civ. App. 581, 56 S. W. 261; *Sturgis v. Warren*, 11 Vt. 433; *Hunt v. Allen*, 73 Vt. 322, 50 Atl. 1103; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349, 44 Pac. 867; *Dunsmuir v. Port Angeles Gas etc. Co.*, 24 Wash. 104, 63 Pac. 1095; *Morrow v. Reed*, 30 Wis. 81; *Dornbrook v. M. Rumely Co.*, 120 Wis. 36, 97 N. W. 493; *Robinson v. Elliott*, 22 Wall. 513, 22 L. ed. 758; *Crooks v. Stuart*, 2 McCrary, 13, 7 Fed. 800; *Tuck v. Olds*, 29 Fed. 738; *Guarantee Trust Co. v. Galveston City R. Co.*, 107 Fed. 311, 46 C. C. A. 305; *In re H. G. Andrae Co.*, 117 Fed. 561. In addition to the authorities cited, reference to the majority of the cases cited in support of the proposition that mortgages do not need to be recorded inter partes will be found to substantially support the converse proposition, that as to third parties the necessity is vital.

d. As to Time of Recordation.—The statutes variously require the recordation to be within a specified time, which unfortunately is not standardized, in some states ten days, in others twenty, thirty or forty as the case may be. Whatever the time limit may be, the mortgage should be recorded at the earliest possible opportunity after execution in order to obtain the recognition of its priority. Where the statute provides for the "immediate" recordation of the mortgage, the law is satisfied if it is recorded as soon as may be by reasonable diligence and despatch under the circumstances of the case: *Roe v. Meding*, 53 N. J. Eq. 350; *Hardcastle v. Stiles & McClay*, 69 N. J. L. 551, 55 Atl. 104. A reasonable time is practically what the law demands: *Summerville v. Kelliher*, 144 Cal. 155, 77 Pac. 889; *E. Spencer Co. v. Papach*, 103 Iowa, 513, 70 N. W. 748, 72 N. W. 605; *Cutler v. Steele*, 85 Mich. 627, 48 N. W. 631; *Way v. Braley*, 44 Mo. App. 457; *Dunham v. Cramer*, 63 N. J. Eq. 151, 51 Atl. 1011; *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073.

e. As to Place of Recordation.—Here again there is a wide diversity of statutory requirement. The general provision is that the mortgage shall be recorded in the town or county where the mortgagor resides. Special provision has been made in several states that the mortgage shall be recorded at the place the chattels are, if the mortgagor is a nonresident of the state. Others provide for recording in both places, and others again for recording in the place to which the goods may be removed. The importance of the phrase, "where the property is," with reference to recording the mortgage at such place, was recognized in *Marquette First Nat. Bank v. Weed*, 89 Mich. 357, 50 N. W. 864, and received the interpretation that the filing should be

in the township or city where the property is at time of the execution and delivery of the mortgage. The law governing recording is dealt with ante, IX, a, and we have only to urge the necessary obedience to the requirement of the local statute to insure safety for mortgagees. There is scarcely a point as to the place of recording that has not been settled, and in a great number of cases new code provisions have met doubtful cases presented to the courts.

f. **The Onus of Seeing That the Mortgage is Duly Recorded.**—To many it will come as a surprise to learn that, after having complied with each and every requirement of the directing statute both as to the substance and form of his security, after having discovered the proper place for recording his security, after having handed his mortgage to the proper officer for recording, the duties of the mortgagee are not yet completed. The law now casts on him the burden of seeing that his mortgage is duly recorded by the officer. The careful opinion in *People v. Burns*, 161 Mich. 169, ante, p. 466, 125 N. W. 740, does not fail to note this and to point out that "one who seeks to benefit from the recording laws must incur all risks of the failure to put his papers duly upon record, whether the fault shall be his own or that of an officer: *Barnard v. Campau*, 29 Mich. 162; *Grand Rapids Nat. Bank v. Ford*, 143 Mich. 402, 114 Am. St. Rep. 668, 107 N. W. 76, 8 Ann. Cas. 102." We draw attention specially to the words, "whether the fault shall be his own or that of an officer." Most of our lawyers were nourished on the proposition that once the instrument was handed to the proper officer it was filed for record. So long as it was delivered to some person apparently in authority at the recording office (it was not sufficient merely to leave it there, no one being present to receive it: *Standard Implement Co. v. Parlin & Orendorff Co.*, 51 Kan. 566, 33 Pac. 363; *Crouse v. Johnson*, 65 Hun, 337, 20 N. Y. Supp. 177), the general reliance on the authorities was justified that the task of the one seeking registration of the instrument was accomplished: *McGregor v. Hall*, 3 Stew. & P. (Ala.) 397; *Truss v. Harvey*, 120 Ala. 636, 24 South. 127; *Case v. Hargadine*, 43 Ark. 144; *Meherin v. Oaks*, 67 Cal. 57, 7 Pac. 47; *Craig v. Dimock*, 47 Ill. 308; *Holman v. Doran*, 56 Ind. 358; *Chandler v. Scott*, 127 Ind. 226, 26 N. E. 797, 10 L. R. A. 374; *Day & Congleton Lumber Co. v. Mack*, 24 Ky. Law Rep. 640, 69 S. W. 712; *Head v. Goodwin*, 37 Me. 181; *Jordan v. Farnsworth*, 15 Gray, 517; *Gorham v. Summers*, 25 Minn. 81; *Miller v. Whitson*, 40 Mo. 97; *Parker v. Palmer*, 13 R. I. 359; *Hunt v. Allen*, 73 Vt. 322, 50 Atl. 1103; *Davis v. Turner*, 56 C. C. A. 669, 120 Fed. 605. And, of course, where the statute in some such words enacts that the mortgage has priority from the time it is left with the register, in effect making that the equivalent of recording, the mortgagee is protected, but otherwise he must see by an examination of his instrument that it has been recorded, and properly and legally recorded, or he must take the risk of losing the benefit of it. If a statute provides that deeds and mortgages shall be recorded in separate books kept for that purpose (and most statutes do), a deed, absolute in form, though intended as security for a loan of money, and accompanied by an unrecorded defeasance, is void as to a bona fide purchaser if recorded in the book of deeds instead of mortgages: *Grand Rapids Nat. Bank v. Ford*, 143 Mich. 402, 114 Am. St. Rep. 668, 107 N. W. 76, 8 Ann. Cas. 102. "It has been held," says the opinion in that case, "that our statute, section 8988, puts the burden upon the person offering the paper for record, of seeing to it that the

instrument is properly recorded: *Barnard v. Campau*, 29 Mich. 162; *Gordon v. Constantine Hydraulic Co.*, 117 Mich. 620, 76 N. W. 142. . . . If the grantee in a conveyance complies with the terms of the statute, he is protected. If he fails to comply with the plain requirements of the statute, the subsequent purchaser in good faith is protected and is not to be charged with constructive notice."

X. Summary.

While the courts have with infinite pains decided innumerable questions of law arising out of the important subject of chattel mortgages, inquiry that is not merely academic will show that their faces are always averted from the consideration of the points presented and objections taken as ordinary technicalities. No word is perhaps worse jargonized than "technicalities," and it is invariably used by the defeated contestant in the legal tournament. "The point was a purely technical one and I lost," is a much more common proposition than "the point was a purely technical one and I won." As we said in opening, we do not regard the rigid demand for compliance with the statutory requirements relating to chattel mortgages in any other aspect than that in which we view substantive law, and when "technicalities" is used, it should not be taken to mean the pernicky caviling of the stickler for literal compliance with every word of a statute or the quibbling nicety of the stranger to common sense, but rather the recognition of the full and trained mind of those matters exclusively belonging to the science and the study of the law relating to a special subject. The technical lawyer would then be above the plane of the pettifogger. In its broad sense, therefore, the technicality with which the subject of chattel mortgages has been invested calls for the continued support of the courts. Hitherto, they have been champions of the cause, they have seen nothing in the statutory demands with which the prudent cannot comply, they have only asked the trader and business man to avail himself of the protection the law undoubtedly holds out to him, and they have held the scales even in favor of the suppliant whose rights have accrued by reason of the mortgagee's neglect. The law is parental in its anxiety to see that when securities are given, the parties contracting shall be protected from each other, and that third parties who have rights and claims shall not be hindered, delayed or prejudiced through the want of care or honesty of the mortgagor or mortgagee. Throughout the operation, the contract, the execution, attestation, acknowledgment and recording, the law provides a safe guide, and if its votaries prefer to worship the false god of carelessness, they must suffer, but they must not ascribe their suffering to the technicalities of the law which will only not aid them because of their neglect to abide its precepts. We hope to see the whole machinery regulated to a standard form of mortgage and affidavit and a uniform period within which the document should be recorded, with full provision for alias recordations.

The decisions of the various state courts will then be even more valuable than they are at present, the work of research correspondingly lightened, and the ability to transact business connected with such mortgages rendered easier, not alone to those immediately concerned, to those whose rights may grow out of the subject matter, but to the public at large.

GRAND RAPIDS AND INDIANA RAILROAD COMPANY v. CHEBOYGAN CIRCUIT JUDGE.

[161 Mich. 181, 126 N. W. 56.]

ATTORNEY—Agreement and Lien for Compensation.—An agreement between attorney and client in a personal injury case that the former shall have one-half of the amount of any judgment recovered or settlement obtained, and shall have a lien thereon, is valid and operates as an assignment to the attorney of any judgment or settlement obtained, to the extent of the lien. (p. 500.)

ATTORNEY—Agreement and Lien for Compensation.—The plaintiff in a personal injury case can give the defendant no valid discharge of his claim to the prejudice of the lien of his attorney, if the defendant has notice of the lien. (pp. 500, 501.)

ATTORNEY—Lien Before Judgment.—There can be No lien in favor of an attorney before judgment, except by special agreement. (p. 501.)

ATTORNEY—Notice of Lien for Services.—Where the attorney for the plaintiff in a personal injury case notifies the general counsel of the defendant corporation that he has a lien for his services upon any money which the client may obtain by judgment or settlement, this is sufficient notice to put the defendant upon inquiry, and it is not necessary that the defendant be apprised of the exact terms of the attorney's contract with his client. (p. 501.)

ATTORNEY—Enforcement of Lien for Services.—Where the plaintiff in an action for personal injuries has stipulated for a settlement and discontinuance, his counsel, in order to proceed in the original suit for the recovery of their fees under contract for one-half of any judgment recovered or settlement obtained, must have the stipulation of settlement and discontinuance set aside or stricken from the files. But this will not interfere with the defendant's right to prove the compromise agreement at the trial. (p. 502.)

ATTORNEY.—A Client may Assign an Interest to his attorney in a cause of action for personal injuries. (p. 502.)

ATTORNEY—Enforcing Compensation After Settlement.—Where the plaintiff in a personal injury case, who has agreed that his attorney shall have one-half of any judgment recovered or settlement obtained, and have a lien therefor, makes a settlement with the defendant who has notice of the attorney's lien, the proper practice for the attorney, in enforcing his rights under the agreement, is to proceed in the original cause. He should present to the court, by petition or otherwise, the alleged agreement and his claim thereunder. The defendant will be permitted to give notice of its settlement agreement, in the nature of a plea puis darrein continuance. If upon the trial both agreements are established, the attorney may recover in the name of the plaintiff the amount of his fees as shown by the agreement, upon the basis of the settlement. If the making of the settlement agreement is not shown, the attorney may prosecute the original action and prove the case as though there had been no settlement and recover his contract share of the damages awarded. (p. 503.)

James H. Campbell, for the relator.

Benjamin & Quay and De Vere Hall, for the respondent.

¹⁸³ STONE, J. The case of *Foley v. Grand Rapids & I. Ry. Co.* was before this court in 157 Mich. 67, 121 N. W. 257.

Another phase of the case was before the court in *Grand Rapids etc. R. Co. v. Cheboygan* Circuit Judge, 159 Mich. 210, 123 N. W. 591. The original suit was brought by Foley to recover damages for personal injuries. Plaintiff recovered a verdict and judgment for \$10,000, which judgment was reversed, and a new trial ordered in the case first above cited, May 26, 1909. Thereafter, and on December 22, 1909, the relator effected a settlement of Foley's claim for damages. The agreement of settlement and the memorandum agreement made contemporaneously are as follows:

"STATE OF MICHIGAN.

"In the Circuit Court for the County of Cheboygan.

"JAMES FOLEY,

"Plaintiff,

v.

"THE GRAND RAPIDS & INDIANA RAILWAY COMPANY,

"Defendant.

"I, James Foley, plaintiff in this cause, do hereby acknowledge the payment to me by the Grand Rapids & Indiana Railway Company of the sum of five thousand one hundred forty dollars, in full settlement and satisfaction of all claims, demands, damages, and cause of action which I now have or might hereafter have against said railway company on account of personal injuries sustained by me on or about the 9th day of September, 1906, at ¹⁸⁴ Kegomic, Michigan, when I was run over when getting off a train on which I had ridden from Petoskey. The suit begun by me against the said railway company, and now pending in said circuit court, is hereby discontinued and dismissed without costs to either party, and an order accordingly shall be entered on filing this stipulation.

"Dated, December 22, 1909.

"JAMES FOLEY.

"Witnessed by

"B. T. HALSTEAD.

"JOHN FOCHTMAN.

"State of Michigan,
County of Emmet,—ss.

"On this 22d day of December, 1909, before me, a notary public in and for said county of Emmet, personally appeared James Foley, to me personally known, and known to me to be the same person named in and who signed the foregoing instrument and acknowledged that he had executed the same of his own free act and deed.

[Notarial Seal.]

"B. T. HALSTEAD,

"Notary Public in and for Emmet County, Michigan.

"My commission expires February 17, 1913."

“Memoranda of agreement made and concluded, this 22d day of December, A. D. 1909, by and between James Foley of Keweenaw, Mich., party of the first part, and the Grand Rapids & Indiana Railway Company, a corporation, party of the second part.

“The said party of the second part as part consideration for settlement, this day made by and between the parties hereto, hereby covenants and agrees with said first party to pay to the attorneys of said first party as compensation for their fees and disbursements for and on behalf of said first party, an amount not to exceed the sum of one thousand dollars (\$1,000).

“In witness whereof the said parties aforesaid have hereunto set their respective signatures in duplicate the day and year above written.

“G. R. & I. RY. CO.,
“By C. W. JONES.”

The law firm of Benjamin & Quay had been the attorneys of record for Foley, and had tried the case in the circuit, and had argued the cases in this, court. They ¹⁸⁵ claim to have had a written agreement with said Foley, made before suit was brought, in the words and figures following:

“This agreement made and entered into this 17th day of February, 1908, by and between James Foley of Petoskey, Michigan, of the first part, and Benjamin & Quay, of Cheboygan, Mich., of second part:

“Whereas, said first party has this day restrained second parties as attorneys to begin suit against Grand Rapids & Indiana Railway Co., a corporation, for personal injuries received by said first party during September, 1906, it is hereby agreed that said second parties, as their fees, shall receive one-half of whatever judgment or settlement they shall obtain from said railroad company, and in case first party does not recover judgment or obtain a settlement, then second parties shall receive no pay for such services as they may render in said cause; and second parties shall have a lien on any judgment or money that may be obtained from said railroad company. First party to pay all witness fees, second party all other clerk and county fees.

“JAMES FOLEY. [Seal.]

“BENJAMIN & QUAY. [Seal.]”

It is undisputed that on June 11, 1909, the said attorneys for Foley wrote and mailed a letter to James H. Campbell, general counsel for relator, relating to a rumored attempt of relator to effect a settlement of Foley's claim with him direct, in which the following language was used:

“Also we wish to notify you that we have a lien upon any money which Mr. Foley may obtain, either by judgment or settlement, for our services rendered, and in case your com-

pany settles direct with Mr. Foley without our knowledge or consent, we shall have to hold you responsible for the amount of our fees."

It is conceded that Mr. Campbell received this letter by due course of mail, and replied to the same on June 25, 1909. Again, on November 27, 1909, De Vere Hall, Esq., who had been employed to assist Messrs. Benjamin & Quay in the retrial of said cause, wrote a letter to Mr. Campbell, in which he said, among other things:

186 "I am advised that your claim agent called upon the plaintiff and offered to pay him \$5,000 in full settlement of his claim, telling him that if he accepted this amount he would be under no obligations to pay his attorneys anything, and that it would be as much as he would get out of it if he obtained another judgment for \$10,000, and that if he did not accept, the case would be dragged along in the courts for the next four or five years. I am also advised that another offer of \$6,000 is to be made to him by some of your claim agents, and I write you this that you may be advised of the situation.

"It is apparent from the record of the former case that the attorneys for Mr. Foley have been representing his interests faithfully, and that they are entitled to full consideration, and I presume that it will be unnecessary to give the matter of attempted settlement any further consideration by them, and that if they are rightly advised, your claim agents will deal only with such attorneys.

"I have no doubt that the attorneys for Mr. Foley have an arrangement with him under which they are to be paid a portion of the sum secured, either by settlement or by suit, and that the proposed settlement, if effected, except through them, would ignore their rights entirely.

"Will you please give this matter your earliest attention and advise me."

On November 30, 1909, Mr. Campbell replied to this letter, and said in part:

"It has always been my practice to deal only with attorneys in cases placed in their hands. . . . In writing Benjamin & Quay I made an offer of settlement, and wrote that if we could agree upon an amount, I would let judgment be entered for that sum, and pay it into court, or to the attorneys direct. We had some correspondence.

"They wanted \$10,000, and later wrote that they would take \$9,000, if paid within fifteen days. I wrote them that the company would not pay that, and asked them if they had any better offer to make. That was about four months ago. I have had no reply.

"I have had no thought of doing anything that would deprive Benjamin & Quay of a fee in the case. Our claim

agent has been in Petoskey several times within the last month or six weeks upon other matters. I said nothing to him about the Foley case, and he tells me that ¹⁸⁷ he had nothing to say about it when he was there, and did not see Foley.

"I am still willing to make a reasonable settlement of the case; and shall be glad to have you say what in your judgment should be paid by the company upon a settlement. My own view of it is that if \$3,500 was paid to Foley, and \$1,000 to Benjamin & Quay, with \$500 to you, making \$5,000 in all, it would be about right."

On December 10, 1909, Benjamin & Quay wrote Mr. Campbell referring to the correspondence between Mr. Hall and Mr. Campbell, and stating that they would accept \$10,500, and nothing less, and that Mr. Campbell could have twenty days in which to take the matter up with the company. This seems to have ended the correspondence upon the subject of a settlement. Thereafter the case was settled with Foley as above set forth. On January 3, 1910, the said attorney for the railroad company paid into said court said \$1,000, and the clerk's fees, and caused notice of a motion to dismiss said cause without costs to either party to be served upon the said attorneys for said Foley, based upon the said settlement agreement which had been filed in said cause and the affidavit of James H. Campbell. Said motion was to be heard before the respondent on January 7th. Whereupon the said Benjamin & Quay, as attorneys for said Foley, served and filed a counter-motion to have the said settlement agreement and stipulation for discontinuance stricken from the files of said cause, and for an order permitting said plaintiff's attorney to proceed with the trial of this cause for the purpose of determining what amount of fees they were entitled to. Said motion was noticed to be heard before the respondent at the same time and place as defendant's motion. Said motion of plaintiff's attorneys was based upon the records and files in the cause, and the affidavit of Maxwell W. Benjamin, which is set out in this record. Affidavits of James H. Campbell and C. W. Jones were read in opposition to the motion of said plaintiff's attorneys. They also appear in this record.

The said two motions were heard by the respondent at ¹⁸⁸ the same time, and were considered together. After the hearing of said motions, and on January 7, 1910, the said respondent made a finding and order substantially as follows:

(1) He found that the said Benjamin & Quay, attorneys for said plaintiff, James Foley, had a legal and existing contract for their compensation and fees to be paid them by plaintiff, for their services and expenditures in said cause,

and that said agreement constituted a lien of fifty per cent upon any judgment or settlement that the said Benjamin & Quay might obtain for said plaintiff, in said cause.

(2) That the said defendant had due and legal notice of said special contract for services, and the said lien of said Benjamin & Quay.

(3) That the settlement, made direct between James Foley, plaintiff, and the defendant, was collusive, and made with the intent to defraud said Benjamin & Quay, plaintiff's attorneys, out of their just and legal costs, expenditures, and fees, to which they would have been lawfully entitled if settlement of said cause had been made through them, or if they had proceeded with the trial of said cause and obtained a judgment.

(4) It was ordered that the said motion of defendant for an order dismissing said cause be denied.

(5) It was further ordered that the said stipulation of settlement and discontinuance, dated December 22, 1909, and filed in said cause December 27, 1909, be stricken from the files in said cause.

(6) It was further ordered that Benjamin & Quay, attorneys for plaintiff, be permitted to proceed with the trial of said cause in the name of James Foley, plaintiff, for the purpose of determining the amount of their fees, under and by virtue of their special contract with said James Foley.

After a motion to vacate the above order was duly made and denied, the relator filed this petition for mandamus. It prays that the writ of mandamus issue to the respondent, requiring him to vacate and set aside the said order of January 7th, and to enter an order withholding an order dismissing the case until the claim of plaintiff's attorneys against the defendant for their services and disbursements ¹⁸⁰ shall be presented in some proper form, and tried and determined and satisfied. The respondent has answered said petition, and the matter has been argued in this court, and many authorities have been cited by counsel for the respective parties. An examination of the questions involved satisfies us that most of them have been already ruled upon by this court.

1. We are of opinion that the agreement of date February 17, 1908, by and between Benjamin & Quay and James Foley is upon its face a valid agreement between the parties, and, if made in good faith, constituted a lien of fifty per cent upon any judgment that might be recovered, or upon any settlement that might be made of the plaintiff's claim in said cause, and operated as an assignment to said attorneys of any judgment or settlement, to the extent of their said lien, and that the plaintiff could give no valid discharge of the claim to the defendant therein to the preju-

dice of the lien of said attorneys in said fund; provided defendant, relator here, had notice of such lien. We think that this view is fully supported by the following decisions of this court: *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269; *Carpenter v. Myers*, 90 Mich. 209, 51 N. W. 206; *Heavenrich v. Alpena Circuit Judge*, 111 Mich. 163, 69 N. W. 226; *Simon v. Pack*, 115 Mich. 669, 74 N. W. 185; 1 *Jones on Liens*, 2d ed., secs. 43, 62, 223, 224. Of course we recognize the rule that in this state there would be no lien before judgment, except by special agreement.

2. Did the defendant in that suit, relator here, have notice or knowledge of said lien? It will be borne in mind that Benjamin & Quay, in their letter to Mr. Campbell, of date June 11, 1909, said: "We wish to notify you that we have a lien upon any money which Mr. Foley may obtain, either by judgment or settlement, for our services rendered, and in case your company settles direct with Mr. Foley without our knowledge or consent, we shall have to hold you responsible for the amount of our fees."

¹⁹⁰ In our opinion this was sufficient notice to put the defendant in that suit upon inquiry: *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269; *Jackson etc. R. Co. v. Davison*, 65 Mich. 437, 37 N. W. 537.

In *Young v. Dearborn*, 27 N. H. 324, it is held that, if a party obtains a discharge of an action under such circumstances as ought to have put him on inquiry as to the claim of the attorney, the discharge will be void as to the attorney as it would be after actual notice of his lien. If the party defendant acts in the face of circumstances which are sufficient to put him on inquiry, he acts contrary to good faith, and at his peril. Defendant knew that plaintiff's attorneys could have no lien before judgment, except by express agreement. We think that notice of lien on amount of settlement was equivalent to saying there was an agreement. It was not necessary that plaintiff's attorneys should apprise the relator of all and the exact terms of their special contract in order to put it upon inquiry.

What would have been the effect had plaintiff's attorneys served a copy of their agreement of February 17, 1908, upon the defendant, relator? A careful examination of such agreement will show that there is nothing in its terms to prohibit Foley from settling his case with the defendant. It says: "It is hereby agreed that said second parties, as their fees, shall receive one-half of whatever judgment or settlement they shall obtain from the said railroad company, and in case first party does not recover judgment, or obtain a settlement, then second parties shall receive no pay for such services as they may render in said cause; and second parties shall have a lien on any judgment or money

that may be obtained from said railroad company. First party to pay all witness fees, second party all other clerk and county fees."

We think that here is a clear recognition of the right of Foley to settle said cause, but not to the prejudice of the lien of one-half thereof. In their letter to Mr. Campbell of June 11, 1909, Benjamin & Quay say: ¹⁹¹ "We wish to notify you that we have a lien upon any money which Mr. Foley may obtain, either by judgment or settlement, for our services rendered, and in case your company settles direct with Mr. Foley without our knowledge or consent, we shall have to hold you responsible for the amount of our fees."

Manifestly, there is nothing here to prohibit a direct settlement with Mr. Foley, but there is notice that defendant will be held responsible for the amount of the attorneys' fees.

3. We agree with respondent's counsel that, in order for them to be able to proceed in the original suit for the purpose of recovering their fees under their agreement, it was necessary for them to have the stipulation of settlement and discontinuance set aside, or stricken from the files: *Potter v. Hunt*, 68 Mich. 242, 36 N. W. 58; *Kittridge v. Toledo etc. Ry. Co.*, 53 Mich. 354, 19 N. W. 32. This does not interfere with defendant's right to prove its agreement at the trial. Foley's cause of action was one that would survive upon his death, and he had a right to assign an interest in it. We have already discussed the terms of that agreement. They were consistent with his right to settle the case, but not to the prejudice of his attorneys' agreement for fees.

4. We have no doubt that the proper and better practice is for the plaintiff's attorneys to proceed in the cause, upon the forming of a proper issue, to recover the amount of their fees. This is an adequate remedy, and seems to be supported by the decisions in this state, already cited upon the first point, and by the great weight of authority in other states. While it has been severely criticised as illogical and clumsy, yet it has been upheld. In *Miedreich v. Rank*, 40 Ind. App. 393, 82 N. E. 117, the court, in speaking of the practice, said: "This procedure has been designated as clumsy, and it has been said that it was a device of the courts, not of the legislature, and sprang from the necessity of providing some remedy against fraudulent settlements. The necessity ¹⁹² is no less at this time in Indiana than it was in England years ago, when the procedure was first followed."

In our opinion the proper practice will require the plaintiff's attorney in said suit to present to the court in proper form, by petition or otherwise, their alleged agreement and their claim thereunder. The defendant in that suit will, under circuit court rule 9, be permitted to give notice of its

alleged settlement agreement, in the nature of a plea puis darrein continuance.

(a) Upon the trial it will devolve upon the plaintiff's attorneys to show that their agreement with Foley was duly made, and was in good faith.

(b) It will devolve upon the said defendant to prove the making of the alleged settlement agreement with Foley, and that the settlement was made in accordance with its terms.

(c) Should both agreements be established by evidence, plaintiff's attorneys will be entitled to recover, in the name of said plaintiff, the amount of their fees as shown by their said agreement with Foley, upon the basis of said settlement.

(d) Should the said plaintiff's attorney establish their agreement with said Foley as valid and binding, and should the defendant fail to show the making of said settlement agreement, and a settlement with Foley thereunder, then and in such case the plaintiff's attorneys will be permitted to prosecute the said original action, and prove the plaintiff's case, as though there had been no attempted settlement, and recover their contract share of any damages awarded.

(e) Should the plaintiff's attorneys fail to prove and establish as bona fide their alleged agreement with said Foley, then they will not be entitled to recover any sum whatever.

It follows logically from what we have already said, that the finding of the respondent, marked above "1," wherein he found that the agreement of said plaintiff's attorneys with said Foley was legal and binding, should ~~193~~ be vacated and set aside. The finding above marked "3," wherein the respondent found that said defendant's alleged settlement agreement with said Foley was collusive, and made with the intent to defraud said plaintiff's attorneys, should also be vacated and set aside. Both of said findings were made upon affidavits, and were unauthorized. The statements contained in the affidavit of Maxwell W. Benjamin are largely hearsay, and such findings were not warranted by any evidence: *Voigt Brewing Co. v. Wayne Circuit Judge*, 103 Mich. 190, 61 N. W. 343.

That part of said order, marked above "6," will be so modified as to permit an issue to be framed as above indicated. The remainder of said findings and order will stand. We have examined with care the authorities cited by counsel, but we refrain from quoting them here, for the reason that we find authority for the course here indicated in our own decisions.

The writ will issue in the modified form above indicated, but without costs.

Moore, McAlvay, Brooke and Blair, JJ., concurred.

The Validity of Contracts Between Attorney and Client is the subject of a note to *Shirk v. Neible*, 83 Am. St. Rep. 159.

The Right of an Attorney to Continue a Suit, for the purpose of enforcing his lien for compensation, after his client has settled with the adverse party, is considered in the note to *Cameron v. Boeger*, 93 Am. St. Rep. 175.

HUGHES v. CITY OF DETROIT.

[161 Mich. 283, 126 N. W. 214.]

MUNICIPALITY—Liability for Streets in Hands of Contractor. Under a statute requiring a city to keep its streets reasonably safe and fit for public travel, a city cannot relieve itself of the liability by turning over a street to a paving contractor. (p. 507.)

MUNICIPALITY—Notice of Defects When Street is Being Paved.—Where, in an action against a city by a pedestrian for injuries received from walking on planks placed by a contractor at a crossing while he is paving the street, there is evidence tending to show that the planks had been in the condition they were at the time of the accident for several days prior, and the paving has been under the supervision of the department of public works, and the city has authority to have an inspector in charge of the street, the question of notice of the condition of the planks to the city is properly submitted to the jury. (p. 507.)

MUNICIPALITY—Planks for Use While Street is Being Paved. In an action against a city by a pedestrian for injuries received from walking on planks placed at a crossing by a contractor while he is paving the street, the fact that plaintiff had crossed over there in the morning of the day of the accident may be considered as bearing upon the question of the use of the crossing in its then condition by the public. (p. 507.)

MUNICIPALITY—Planks for Use While Street is Being Paved. Where a pedestrian is injured while walking over planks placed at a crossing by a contractor while he is paving the street, the contributory negligence of the pedestrian and the condition of the planks are ordinarily questions for the jury. (p. 507.)

TRIAL—Misconduct in Cross-examination and Argument.—In an action against a city for injuries received by a pedestrian walking on planks at a crossing which a contractor supplied for the use of the public while he was paving the street, it is reversible error to permit, over objection, plaintiff's counsel on cross-examination to question a witness in regard to the contractor's bond, and on argument to remark, "Why does the city take this bond from the contractor if it is not to cover just such cases as this?" (p. 507.)

TRIAL—Misconduct of Counsel in Argument.—It is cause for reversal for plaintiff's counsel in a personal injury case to state in his argument to the jury: "Would you take all the money in the city of Detroit and have your sister go through with what this young woman has gone through with? You have anybody crippled in the family, or where their usefulness is gone, and see how they stand the care, and wear away whatever affection there may be. . . . As my associate said, you would not take that injury for all the money that could be piled up in front of us." (p. 508.)

Edmund Atkinson and P. J. M. Hally, for the appellant.

George P. Codd and A. B. Hall, for the appellee.

²⁸⁴ McALVAY, J. Plaintiff recovered a judgment against defendant in an action for damages for personal injuries. Defendant upon a writ of error has appealed to this court for reversal on account of errors committed upon the trial.

²⁸⁵ At the time of the injury, and for some time previous, Townsend avenue, in said city, which runs north and south, was being paved with cedar blocks on concrete foundation from Mack avenue north to Gratiot avenue by W. W. Hatch Sons' Co., under contract with the department of public works of Detroit. Plaintiff lived on the west side of Townsend avenue, between Mack avenue and Sylvester avenue, about one hundred feet south of Sylvester avenue. Plaintiff was injured July 1, 1907. In constructing this pavement the excavating is first done, the roadbed prepared to receive the concrete foundation, and the blocks are then put in. At the time of the injury the concrete foundation was finished from Gratiot avenue south nearly to Sylvester avenue. Grading across and south of Sylvester avenue past plaintiff's home had been completed ten days. The concrete foundation at and south of Sylvester avenue had not been put in. Curb had been set the entire length of the street. Cedar paving blocks had been piled all along the street between the curb and the sidewalk. Work on this pavement at Sylvester avenue and south had been suspended for about ten days, and was not resumed at the time of the accident. At the southeast corner of Townsend and Sylvester avenues a pile of earth about one foot high had been thrown out of the excavation on the crosswalk over Townsend avenue. The excavation was at least twenty inches deep. Two planks had been placed side by side at this point, the lower ends resting on the bottom of the excavation, and the upper ends upon the top of the curb. Plaintiff had frequently gone over the street while the work was progressing. Across the roadway of Sylvester avenue on the east side there was a barrier, and red lights were hung. Toward evening on the day of the accident plaintiff left her home on Townsend avenue, on her way to her sister's home on Sylvester avenue to the east. She proceeded north on the west side of Townsend until she came to Sylvester, and, turning east, crossed Townsend by going into the excavation and up these planks, then east ²⁸⁶ along the south side of Sylvester to her sister's. She returned in a short time by the same route, carrying a basket in her hand. At the intersection of these streets, before starting to cross Townsend, she stopped to talk with Mr. Grundy, who was sitting on the steps of his store at that corner. She then proceeded on her way home, and, reach-

ing the planks, got as far as the middle when, according to her testimony, the plank she was walking on broke, throwing her to the ground and injuring her foot. It was not yet dark, and she could readily see where she was going. The electric light at this corner was lighted. These facts do not appear to be disputed, except as to whether the plank broke with the weight of plaintiff, or whether she slipped from the plank. The plaintiff claimed and offered proof tending to show that these planks were put at this crossing by a watchman of the paving contractor, and that they had been kept there.

When the testimony in the case was closed, defendant moved for an instructed verdict, on the ground that no negligence on the part of defendant was shown, for the reason that the wrongdoer was not connected with the contractor, or with the city; that the city had no notice of this condition of the street; that plaintiff was guilty of contributory negligence. The motion was denied, and the case was submitted to the jury. The trial resulted in a verdict and judgment for plaintiff. A motion for a new trial was made upon the ground that the verdict was excessive, and for specified errors which occurred during the trial, and which are also relied upon before this court. This motion was also denied. Errors are assigned upon the refusals to grant these motions, certain portions of the charge as given, and refusals to charge, upon exception taken to the admission of evidence, and argument of counsel.

We shall first consider whether from this record the court can say, as a matter of law, there was no question of defendant's liability to submit to the jury. The condition of the street at that time and place is not in dispute. Who²⁸⁷ put these planks there, how many days previous planks had been placed there in the same manner, and how plaintiff received her injury, were in dispute. The witness Grundy, who lived and kept a store on this corner, and who helped plaintiff after her fall, testified that he saw the watchman put them there that evening before the accident; also: "They had thrown quite a lot of earth up on the cross-walk over Sylvester, and kept the planks up. The grade being taken out made a pretty deep step in there; in the neighborhood of twenty inches, anyway, maybe more."

His wife testified that she had seen the watchman "fix walks there, how many days before I cannot say; simply laid boards there for people to walk up and down."

We cannot say that there is no evidence tending to show that these planks had been placed and remained more or less continuously for several days prior to the accident. The work had been suspended about ten days. The contract for this paving contained the usual provisions relative to putting

up lights, etc. The work was to be done under the supervision and direction of the department of public works at all times. The contractor was required to have a representative upon the street day and night continuously. If the work was delayed or interrupted for any cause, defendant was authorized to put an inspector in charge of the street. The record shows that the crossing at this cross-walk over Townsend avenue was not barricaded nor any lights upon it. The earth on the cross-walk a foot high cannot be called a barricade, or held to have been placed there for that purpose. The barricade and the lights were upon the roadway of Sylvester avenue.

This court has repeatedly held that, under the statute requiring it to keep the streets reasonably safe and fit for public travel, the city cannot relieve itself of liability by turning a street over to a contractor. The work here had been interrupted for about ten days, and a fair inference might be drawn from the testimony that this condition as to these planks existed during a considerable portion of that time. ²⁸⁸ There was evidence to submit to the jury on the question of notice of this condition to defendant. Plaintiff had crossed over there in the morning of the same day, which fact might be considered as bearing upon the question of the use of the crossing in its then condition by the public. Upon this branch of the case we do not think it distinguishable from *Beattie v. City of Detroit*, 129 Mich. 20, 88 N. W. 71, and *Barker v. City of Kalamazoo*, 146 Mich. 257, 109 N. W. 427. The question of contributory negligence, under the circumstances, was a question of fact for the jury, and also the question of the condition of the plank in question.

Error is assigned upon the allowance by the judge of cross-examination by plaintiff's counsel of defendant's witness Talbot, relative to an indemnity bond. This examination is defended upon the ground that it was proper to show the interest of this witness. The witness was open to attack, on account of his interest in connection with the contractor, but to show his interest in the contract, it was not necessary to examine him as to the indemnity bond. He had already testified without reserve that he had an active interest in this contract to an extent of one-third of the profits. To permit the questioning of this witness relative to this bond, over the repeated objection of counsel, was reversible error, and the conduct of plaintiff's counsel in the use made of it, on the argument, in saying, "Why does the city take this bond from the contractor if it is not to cover just such cases as this?" indicates the purpose of the improper cross-examination, and was highly prejudicial. Reference to our former opinions on this subject makes comment unnecessary:

Clink v. Gunn, 90 Mich. 185, 51 N. W. 193; Turner v. Muskegon M. & F. Co., 97 Mich. 166, 56 N. W. 356; Kerr v. National etc. Mfg. Co., 155 Mich. 191, 118 N. W. 925.

Other parts of this argument objected to are: "Would you take all the money in the city of Detroit and have your sister go through with what this young woman has gone through with? You have anybody ²⁸⁹ crippled in the family, or where their usefulness is gone, and see how they stand the care, and wear away whatever affection there may be. As my associate said, you would not take that injury for all the money that could be piled up in front of us."

In giving a few excerpts from this argument we have omitted everything which was claimed to be in answer to defendant's argument, but by doing so we do not wish to be understood that it is approved. That this argument above quoted was inflammatory and prejudicial is apparent. It was cause for reversal: Ward v. Reed, 134 Mich. 392, 96 N. W. 438; Hillman v. Railway, 137 Mich. 184, 100 N. W. 399.

We do not consider it necessary to discuss other errors assigned which are confined largely to the charge of the court. Some of them will be controlled by this opinion, and others will not be likely to occur on another trial.

The judgment is reversed, and a new trial ordered.

Moore, Brooke, Blair and Stone, JJ., concurred.

The Liability of a Municipal Corporation to Persons Injured by defects in public streets is the subject of a note to Dudley v. City of Flemingsburg, 103 Am. St. Rep. 257. A city is not absolved from its duty of keeping its streets in a safe condition because it has employed a contractor to do work thereon and the streets become unsafe through his neglect, nor because it has not accepted his work: Turner v. City of Newburgh, 109 N. Y. 301, 4 Am. St. Rep. 453. But see Deming v. Terminal Ry. of Buffalo, 169 N. Y. 1, 88 Am. St. Rep. 521.

TOWNSHIP OF JASPER v. MARTIN.

[161 Mich. 336, 126 N. W. 437.]

EVIDENCE—Ancient Document.—A Lease Executed nearly forty years ago, and found among old papers in the office of a township clerk, may be treated as an ancient document and admitted in evidence without proof of its execution, there being no indicia of fraud. (p. 509.)

HOMESTEAD—Lease not Signed by Wife.—A lease of a part of the homestead of the lessor, without the signature of his wife, is void. (p. 512.)

ADVERSE POSSESSION—Tenant Entering Under Void Lease. The possession of a tenant who enters the premises under a lease which

proves void because not signed by the wife of the lessor is not adverse, and the tenant is estopped from claiming that it is. (p. 512.)

ADVERSE POSSESSION.—A Mere Permissive Possession, or one consistent with the title of another, however long continued, cannot ripen into a title by prescription. (p. 512.)

DEDICATION—Absence of Signature of Wife.—A dedication of part of a homestead to the public cannot be implied from a lease thereof, not signed by the wife of the lessor, to a township for municipal purposes, and the subsequent occupancy of the premises for nearly forty years for a town hall. (p. 512.)

Robert H. Lane, for the complainant.

C. W. Giddings, for the defendant.

³³⁷ STONE, J. The bill in this cause was filed on December 26, 1908, to remove an alleged cloud upon, and to quiet the title of, the complainant township to the premises in question. The facts are not much in dispute. They are substantially as follows: On May 25, 1872, one William Murray was the owner in fee of the west half of the west half of the southwest quarter of section 21, in the township of Jasper. Said Murray, at the time aforesaid, resided upon the said forty acres of land as a homestead with his wife and family, and he had been so living there for some years prior to said date. Said homestead at that time did not exceed in value one thousand dollars. On or about said twenty-fifth day of May, 1872, the said William Murray met R. C. Martin, A. J. Bates, Thomas Martin, and A. J. Martin (the last four named persons probably composing the township board of said township) at some place in said township, and the following described instrument was drawn, and probably signed by the parties.

We say probably signed, for the reason that there was no satisfactory evidence that William Murray signed the paper; but, as it was found among other old papers in the ³³⁸ office of the township clerk, and as there is no evidence or indicia of fraud, we think we should treat this instrument as an ancient document, and that proof of its execution may be well dispensed with. It is as follows:

“Know all men by these presents that William Murray of the town of Jasper in the county of Midland and State of Michigan of the first part, for the consideration herein mentioned does hereby lease unto the township of Jasper in the county and State aforesaid party of the second part and their assigns the following parcel of land, to wit: ten rods square located in the southwest corner of section 21 in said township. With all the privileges and appurtenances thereunto belonging to have and to hold the same for and during of years the same shall be used for town purposes with the privilege to move or sell any building erected thereon. And the said party of the second part for

themselves and their assigns do covenant and agree to pay the said party of the first part for said premises one dollar in full of rent, in testimony whereof the said parties have hereunto set their hands and seals this 25th day of May A. D. 1872.

“WILLIAM MURRAY,

“R. C. MARTIN,

“A. J. BATES,

“THOMAS MARTIN,

“A. J. MARTIN, Clerk.

“Township Board of the Township of Jasper.

“Signed, sealed and delivered in presence of

“WILLIAM HUNT.

“GEORGE SMOCK.”

The said township agreed to pay the consideration or rent named, and at once went into possession of the premises described in said lease (the same being a part of said William Murray's homestead), cleared it, built a fence around it, and erected thereon a small frame building for a town hall for the use of said township, and said building continued to be so used and to remain on said premises, and was still on said premises when the bill of complaint was filed in said cause. On March 11, 1891, the said William Murray (his wife having died in the meantime) conveyed the said forty acres to his daughter, ³³⁹ Deborah Murray. She conveyed the same to her brother, Thomas Murray, on the fifth day of March, 1894. Said last-named person on July 3, 1894. reconveyed the same to his said sister, Deborah Murray, and the said Deborah Murray, being then married to one George J. Bunker, on the eighteenth day of February, 1902, conveyed said forty acres of land for an expressed consideration of sixteen hundred dollars to the defendant herein, in which said deed her husband, George J. Bunker, joined. All of said deeds, from William Murray down to and including the said deed to the defendant, were warranty deeds, and were all made without any exception of the lands described in said lease; said lease not being referred to in any of said deeds. All of said deeds were duly recorded in the office of the register of deeds of said county.

The defendant has lived in said township of Jasper since early boyhood, and he was forty-seven years old at the time of the hearing of this cause, which was in the month of April, 1909. He knew where the town house stood when he bought the premises above described, but he did not know under what terms or arrangement the township was occupying the house or premises. Soon after the purchase of said forty acres by the defendant, he went to the township board to ascertain by what right, if any, the township was occupying the said ten rods square, and he was informed by members of

said board that they did not know. He then asked the board to look the matter up, saying that he was a poor man, and that, if the township had no right there, he would like a little rent. The board, on examination of the records, was unable to find any papers or records showing any right in the township to the premises. Matters remained in this condition until the fall following, when the board interviewed the defendant, and asked him what rent he would charge the township for the premises in question, and the defendant replied that he would leave it to the supervisor. Afterward, and on June 26, 1903, the defendant, at the request of the township board, entered into a written lease with said ²⁴⁰ township, whereby he leased to it the premises so occupied by said township for its town hall for a period of three years, from and after April 15, 1903, at an annual rental of ten dollars, which amount was paid by said township to the defendant. At the expiration of this lease, at the request of said township board, another written lease was entered into by defendant and said township for said premises for a period of two years longer, at the same rental, which was paid by said township to the defendant. At the expiration of the last-mentioned lease, and at the request of the township board, the defendant entered into an oral lease of said premises for one year at the same annual rental, which rental was paid by said township to defendant. Under said oral lease (which did not expire until April 15, 1909), the said township of Jasper was occupying the premises in question at the time of the filing of the bill in this cause. It is undisputed that the defendant knew nothing of the existence of the instrument (Complainant's Exhibit 1), or of the claim of the township thereunder, until after this suit was brought. Such instrument or lease had been found by the township clerk about two years before the hearing of the cause. The leases above referred to as having been made between the defendant and said township were all made in pursuance of a resolution of the township board.

The cause, being at issue by the filing of a general replication to the defendant's answer, was heard upon the admitted facts and the testimony taken in open court. The position of the complainant was stated by its solicitor at the hearing: "We come into a court of equity, and ask a decree that we shall have the use of that property so long as used for township purposes under the lease; and, if the court should find the lease was not good, we ask a decree for title to the land under adverse, actual and hostile possession."

The circuit judge decreed that the right of possession, title, ownership and fee in the said premises were and ²⁴¹ should be in and belong to the complainant, and, further, that defendant should repay to the said township the

sixty dollars received for rent, and that the said defendant should pay the costs. The defendant appealed.

In our opinion, to state this case is to decide it. Under the statement of the case we must hold:

1. That the lease of a part of the homestead by William Murray without the signature of his wife was absolutely void: *Mailhot v. Turner*, 157 Mich. 167, 133 Am. St. Rep. 333, 121 N. W. 804; 15 Am. & Eng. Ency. of Law, 2d ed., p. 674, subd. 4; *Maatta v. Kippola*, 102 Mich. 116, 60 N. W. 300; *Lott v. Lott*, 146 Mich. 580, 109 N. W. 1126, 8 L. R. A., N. S., 748.

2. It is undisputed that the complainant entered into possession of the premises under the lease, and the fact that the lease was void, because of the infirmity above stated, would not make the holding of the complainant hostile. The complainant entered into possession of the premises by the consent of the owner, to whom it agreed to pay the rental named. Such holding and occupancy could not in a hundred years ripen into an adverse holding, and the complainant would be equitably estopped from so claiming: 1 Cyc., p. 1059. A mere permissive possession, or one consistent with the title of another, however long continued, can never ripen into a title by adverse possession: *Perkins v. Nugent*, 45 Mich. 156, 7 N. W. 757; *Smeberg v. Cunningham*, 96 Mich. 378, 35 Am. St. Rep. 613, 56 N. W. 73; *Butler v. Bertrand*, 97 Mich. 59, 56 N. W. 342; 1 Am. & Eng. Ency. of Law, 2d ed., p. 794. and note, citing more than fifty cases from the courts in this country. As Chief Justice Marshall said in *Kirk v. Smith*, 9 Wheat. 241, 6 L. ed. 81: "It would shock that sense of right which must be felt equally by legislators and judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title."

That possession was taken here in recognition of Murray's title cannot be questioned: *Menter v. First Baptist Church*, 159 Mich. 21, 123 N. W. 585. There is no evidence of a repudiation of the tenancy in this case.

3. It appears by the testimony of the township clerk that he first saw the lease (Complainant's Exhibit 1) about two years before he gave his testimony; that he found it among some old papers in the office. Yet with knowledge of the existence of this paper the township authorities made the last lease with defendant and paid the rental, which lease was in force when the bill of complaint was filed. Such conduct is hardly consistent with good faith.

We cannot agree with complainant's contention that there was here a dedication of the land to the public. If there were such dedication, without the signature of the wife, it would be unavailing. In *Greenwood v. School District*, 126 Mich. 81, 85 N. W. 241, cited by complainant, there was no

homestead question involved. There was here no parol gift, as was the case in *Schafer v. Hauser*, 111 Mich. 622, 66 Am. St. Rep. 403, 70 N. W. 136, 35 L. R. A. 835. It was a void lease, but there was recognition of the lessor's superior title by the agreement to pay rent. Complainant is estopped from saying it did not agree to pay such rent. Such holding cannot ripen into a hostile holding. It entered as a tenant, and not as owner.

In our opinion the complainant has no standing in this case. The decree below is reversed, and the bill dismissed, with costs of both courts to the defendant.

Moore, McAlvay, Brooke and Blair, JJ., concurred.

The Validity of a Lease of a Homestead Signed by One Spouse Only is the subject of a note to *Mailhot v. Turner*, 133 Am. St. Rep. 336. The effect of a conveyance or encumbrance of a homestead by only one of the spouses is the subject of a note to *Jerdee v. Furbush*, 95 Am. St. Rep. 909.

The Estoppel of a Tenant to Deny His Landlord's Title is the subject of a note to *Davis v. Williams*, 89 Am. St. Rep. 62.

BRADFORD v. CITIZENS' TELEPHONE COMPANY.

[161 Mich. 385, 126 N. W. 444.]

TELEPHONE—Discrimination Against New Subscribers.—For a telephone company to charge new subscribers a higher rate than it does old subscribers for the same service is discrimination in violation of section 5270, 2 Compiled Laws. (p. 517.)

Charles H. McBride and Charles R. Wilkes, for the complainant.

W. J. Stuart and Kleinhans & Knappen, for the defendant.

STONE, J. The bill of complaint in this cause was filed to compel the defendant to furnish the complainants telephone service through defendant's exchange at the city of Holland at the same price charged to other subscribers at said city. Complainant relies upon the provisions of section 5270 of 2 Compiled Laws. This section of the statute provides, among other things, that upon the payment or tender of the usual or customary rental sum: "It shall be the duty of every telephone company, or person, firm or corporation engaged in the business of leasing telephones to the public, or supplying the public with telephones and tele-

phonic service, or operating a telephone exchange, to furnish without unreasonable delay, without discrimination, and without any further or additional charge, to the person, firm or corporation ³⁸⁶ applying for the same, including all telegraph companies, a telephone, or telephones, with all the proper or necessary wires and fixtures, and the use of such telephones, wires and fixtures, as well as connection with the central office, or telephone exchange, if desired, and shall connect the telephone of such person, firm or corporation, with the telephone of any other person, firm, or corporation having connection with the same, or a connecting exchange or central office, whenever requested so to do, without regard to the character of the message to be transmitted, provided they are not obscene nor profane; and every company, person, firm or corporation neglecting or refusing to comply with any of the provisions of this act shall forfeit all right to transact a telephone business in this state, and may be enjoined therefrom, and from leasing telephones to the public, from supplying the public with telephones and telephonic service, and from operating a telephone exchange, by bill of complaint filed in any court of competent jurisdiction, by any person, firm or corporation, injured, interested, or denied any of the rights herein given."

The bill alleges that the defendant corporation had been guilty of discrimination against complainant, in that it refused to give him telephonic service from its exchange in said city as it did to other residents thereof using the same service, and in the same manner as complainant requested, unless he paid a higher price or rental for such service than was required of the other subscribers.

The facts are not much in dispute. The answer of defendant practically admits the facts as set forth in the bill, but denies that it discriminates against complainant. It appears that in 1898 the defendant purchased the telephone exchange in said city from the Ottawa Telephone Company, and since that time the said telephone exchange has been operated and carried on in said city by the defendant. In the summer of 1907 the defendant installed an automatic telephone exchange, taking out the phones which had been previously used, and replaced them with new phones connected with the automatic system. Upon installing the automatic system aforesaid, the rates charged to all subscribers were fixed at fifteen dollars for residences, and ³⁸⁷ twenty-four dollars for business places, and contracts for service, for ten years in some instances, and five years in others, were entered into between the defendant, and some of its patrons, at these rates, and other contracts for three and two years were also entered into by the defendant and some of its patrons, at the same rate. However, on the first day of

January, 1908, the defendant fixed new rates for all new subscribers at eighteen dollars for residences, and at thirty dollars for business places. The new subscribers were to be served with identically the same service, and were to use the same fixtures as the old subscribers. The phones were placed free to all patrons, whether new or old subscribers. Upon the hearing, a decree was entered for complainant and defendant appeals.

We quote from the opinion and finding of the learned circuit judge: "In February, 1908, the complainant applied to defendant company, through its manager, to be supplied with telephonic service at his business place in Holland, and tendered the sum of twenty-four dollars for a year's service by the automatic system, and offered to enter into a ten year contract at the same rate, but the defendant company refused to place a phone in complainant's business place for less than thirty dollars per year, because complainant was a new subscriber, and not entitled to the rate granted the old subscribers; that is, those who applied for service before the first day of January, 1908. There was no claim on the part of the company at this time that it would be more expensive to connect complainant's business place with the exchange than any other of its old subscribers, or that the location of complainant made it more expensive or difficult to reach than any of the old subscribers, and no claim, then or now made, that complainant's business place was substantially different than any other place in Holland, but was centrally located, and could easily have been connected with said automatic exchange. There was nothing shown upon the hearing in this case, or any reason given, for refusing to comply with complainant's request, except that he was a new subscriber, and new subscribers after January 1, 1908, were to be charged thirty dollars, instead of twenty-four dollars, for business phones."

*** There was evidence introduced by the defendant showing the amount invested in said exchange, the increase in telephones, the increased expense of operating the greater number of telephones, and the profits on the investment for the different years, and it argues that the business cannot live at the rates charged, and that the loss is occasioned by the investment for new subscribers, and the increased expense of operating the exchange which they cause; that it is just and reasonable that they should be charged more than old subscribers, and that any discrimination which is just and reasonable in itself is lawful; that by reason of the increased cost, both of investment and service, which they cause, the new subscribers are in a class by themselves. It is also urged that the old subscribers had previously a service that was limited in its numbers and efficiency.

These contentions, in our opinion, are not impressed with merit. These ideas, carried to their full extent, would require every later subscriber to pay more for the same service than his former neighbor subscriber. While it is probably true that the cost of operating a telephone exchange increases with the increased volume of business, it is equally true that the whole body of subscribers, whether new or old, makes the added expense, and reaps the added benefit. A telephone exchange with one thousand members is manifestly more valuable to every subscriber than one with one hundred members, but it is equally valuable to each member in the same class, and its value to the subscriber does not depend, in any degree, upon whether he is a new subscriber or an old one. It is difficult to understand why new subscribers should pay any more for the right to talk to old members than the latter do for the right to talk to new ones. What by way of investment or extension benefits one equally benefits the other. If the defendant is running its business at a loss at the price charged old subscribers, and taking on new subscribers increases the loss, then it may increase its rates, but it should do so without discrimination, and treat alike the ³⁸⁹ subscribers getting the same class of service. The manager of the defendant testified that he stated to complainant that there was no charge for installation, that the basis of defendant's charge of thirty dollars to complainant was not based on installation expense, but that the sum named was an established rate for new subscribers, and that was the only reason for making that charge. The statute above quoted is but declaratory of the common law, and in addition provides the remedy in case a telephone company attempts to discriminate between subscribers of the same class.

In 27 American and English Encyclopedia of Law, second edition, at page 1021, it is said: "Telephone companies, whether corporations or not, are affected with a public interest and are bound to serve impartially, and without unjust discrimination, all who apply for their service and offer compliance with their reasonable regulations. In many of the states statutes exist which provide for the recognition and enforcement of these obligations, but it seems that these are merely declaratory of the common law on the subject." See many cases there cited. Counsel upon both sides cite Western Union Tel. Co. v. Call Publishing Co., as it appears in 44 Neb. 326, 48 Am. St. Rep. 729, 62 N. W. 506, 27 L. R. A. 622, 58 Neb. 192, 78 N. W. 519, and 181 U. S. 92, 21 Sup. Ct. Rep. 561, 45 L. ed. 765. Counsel for defendant relies upon the following language, taken from the decision of the United States supreme court in said cause: "There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service

shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. . . . It is not an undue preference to make to one patron a less rate than to another ³⁹⁰ when there exist differences in conditions as to the expense or difficulty of the services rendered which fairly justifies such a difference in rates."

The distinction is clearly pointed out in the headnote to the case cited, as follows: "Where there is dissimilarity in the services rendered by a telegraph company to different persons, a difference in charges is proper."

In the case at bar no such distinction exists or is present. The service to the old and to the new subscriber is identical. The case is readily distinguished from the Call case. We have examined the following cases cited by counsel: American Waterworks Co. v. State, 46 Neb. 194, 50 Am. St. Rep. 610, 64 N. W. 711, 30 L. R. A. 447; Richmond Natural Gas Co. v. Clawson, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744; Snell v. Clinton etc. Power Co., 196 Ill. 626, 89 Am. St. Rep. 341, 63 N. E. 1082, 58 L. R. A. 284; Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240. We are of opinion that the defendant in its conduct complained of was guilty of a discrimination against the complainant in violation of the letter and spirit of the statute, and that the circuit judge reached the proper conclusion.

The decree below is affirmed, with costs to complainant.

Ostrander, Hooker, Moore and Blair, JJ., concurred.

The Business of a Telegraph or Telephone Company is Public in its nature and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations in its business of receiving and transmitting messages: Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 75 Am. St. Rep. 184; Western Union Tel. Co. v. Call Pub. Co., 44 Neb. 326, 48 Am. St. Rep. 729; Stewart, Morehead & Co. v. Postal Tel. C. Co., 131 Ga. 31, 127 Am. St. Rep. 205.

AMERICAN TRUST AND SAVINGS BANK v. MOORE.

[161 Mich. 436, 126 N. W. 716.]

BILLS AND NOTES—Parting With Value by Vendor of Chattel.—Where a seller of an automobile keeps it under control by putting it in the hands of one of his employés as driver until he can ascertain whether a certificate of deposit received in payment is good, he does not part with value for the instrument, and cannot recover thereon. (p. 519.)

SALES—Rescission by Seller—Restoring Consideration.—It is the duty of the seller of a chattel to tender back the note or money received, as a condition to the right to recover the property, except when the paper is worthless or the tender impossible. (p. 520.)

SALES—Recaption by Vendor—Suit for Purchase Price.—Where the vendor of an automobile receives a certificate of deposit in payment, but, on being informed by the bank that the certificate is not good, takes and retains possession of the machine, he cannot recover on the certificate of deposit. (p. 520.)

Clifford A. Bishop and John H. Farley, for the appellant.

Andrew L. Moore and Henry E. Walbridge, for the appellees.

437 HOOKER, J. The plaintiff is the assignee in bankruptcy of the Weber Company, a Chicago concern, which was engaged in the sale of automobiles before it became insolvent. Gilmore applied to it to purchase an automobile. A machine and price were agreed on, the latter being three thousand three hundred dollars. Gilmore tendered in payment a certificate of deposit, issued to him by the defendants, copartners, **438** doing business in Michigan under the name of the "Bank of Linden." Whether the machine was delivered unconditionally to Gilmore or not is a disputed question of fact. He was allowed to use it, at all events, the same being driven by a man whom plaintiff claims to have been employed by him at the suggestion of Weber. The certificate was deposited to the credit of the Weber concern, and both the bank with which it was deposited and Weber telegraphed the Bank of Linden to know if it was good. The following telegram was received by the Weber Company in reply: "No good. Hold certificate and arrest man." Thereupon the Weber Company ordered the driver to leave the machine in a garage adjoining its salesroom, run by another concern, Orlando Weber being president of both companies. Gilmore disappeared, and has not been seen since. The machine remained from that time under the control of the Weber Company, and it was ultimately sold by said company for two thousand dollars, after putting upon it somewhat extensive repairs and paying storage. This action was begun by the Weber Company soon after the discovery that

defendants repudiated the certificate. Subsequently it was declared a bankrupt, and the assignee was substituted as the party plaintiff by stipulation. An amended declaration in all respects similar to the original declaration, except in the matter of the names of parties, was filed. This declaration was "the common counts," with a copy of the certificate of deposit attached. To a plea of the general issue a notice was attached alleging the fraudulent character and invalidity of the instrument and the want of good faith in its purchase. A verdict for the defendants was directed, judgment was entered thereon, and plaintiff has appealed.

The counsel for the plaintiff in the opening statement to the jury admitted the foregoing facts, but claimed that the Weber Company was a purchaser in good faith and for value, and that plaintiff was entitled to recover the face of the instrument, but was willing, if it could be properly secured against a claim by Gilmore, to take a verdict ⁴³⁹ for its actual damages, stated to be about two thousand dollars, otherwise it would ask the full amount of the certificate. To establish its case, plaintiff offered testimony showing its sale of the car and its acceptance of the certificate as payment. Cross-examination brought out many of the other facts relied on by the defense. This was supplemented by testimony offered by the defendants. In rebuttal, the plaintiff sought to show the expense put upon the car and what it had lost in the transaction. This was taken under objection. Counsel for defendants then asked that the testimony in rebuttal be stricken out and a verdict directed for the defendants upon the ground that unliquidated damages could not be recovered in an action on the common counts. The court thereupon directed a verdict for the defendants and plaintiff has appealed.

At the threshold of the case was a disputed question of fact; i. e., whether plaintiff's president parted with the title to the automobile. He claims that on receipt of the certificate he made and delivered a statement of the item marked "Paid in full," and signed by him, and delivered the machine to Gilmore, who took it away. On the other hand, defendants offered testimony tending to show that he actually kept control of it until he should hear from the certificate by putting it in the hands of one of plaintiff's employes as driver for Gilmore. This was an important question, for, if defendants' claim is found true, it cannot be said that the plaintiff parted with value for the instrument, and therefore it could not recover, but this was a question that the court erred in taking from the jury, unless some other question in the case justified such a charge. It is claimed that there is at least one such question in the case.

It is contended that, by the recaption of the automobile, the plaintiff recovered back all that it paid Gilmore for the certificate, and therefore that it cannot now claim to be a purchaser for value; that this was a rescission of the contract; and that it had no longer any ⁴⁴⁰ title to the certificate, having repudiated the transaction upon which its alleged title rests. Let us suppose that it had paid three thousand three hundred dollars in money for this certificate, and had succeeded in recapturing the identical money paid. We doubt if it would be, and still more if it could be, successfully contended that the plaintiff still had a title to the instrument, which under the old case of *Vinton v. Peck*, 14 Mich. 287, would entitle it to sue upon and recover the full face of the certificate. In that decision we held that if a purchaser in good faith paid any value, the face of the note, and not the lesser amount paid, was the measure of damage in a suit upon the paper: See, also, *Hunter v. Parsons*, 22 Mich. 96.

Upon what ground, then, could we hold, as I think we would, that the plaintiff could not recover, except upon the theory that, having elected to take back his money, he no longer owned the note. It might be a rescission though he did not recover all or any of the money, and the effect of the disaffirmance would be the same. We all know that in such a case it is usually the duty of the vendor to tender back the note or property paid, as a condition to the right to recover his property. Exceptions to this condition are when, as in this case, the paper is worthless in the hands of the vendee, and where the vendor is unable to tender back the paper. In this case money was not paid for the certificate, but upon plaintiff's theory an automobile was sold and delivered. Grant it; but two or three days later the plaintiff acted. It had a choice of remedies, viz.: (1) It might have let the sale stand and rely on its bona fides; (2) It might disaffirm the contract and take its property. It claims that it did neither, but that it seized the automobile for the benefit of the defendants, admitting that it was a wrongdoer in taking the property.

We have examined the proof in this case, and we think that it conclusively shows a plain case of rescission as against Gilmore in law. Having done this, plaintiff cannot ⁴⁴¹ recover upon the instrument, which it sought to do, and the court did not err in saying so.

The judgment is affirmed.

Ostrander, Brooke and Blair, JJ., concurred.

Montgomery, C. J., who heard the arguments in this case, resigned before decision rendered.

The Law Concerning Certificates of Deposit is the subject of a note to *Hillsinger v. Georgia R. R. Bank*, 75 Am. St. Rep. 43.

That a Vendor of Goods cannot, on the Ground of Fraud, recover possession of them without the return or tender of the amount received on account of the sale, see Adam etc. Co. v. Stewart, 157 Ind. 678, 87 Am. St. Rep. 240. A vendor, who seeks to have a contract of sale set aside upon the ground of fraud, must offer to return the purchase money in order to put the purchaser in statu quo: *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733. But if he is entitled to rescind for fraud, he does not waive his right by demanding payment of the purchase price: *Pelham v. Chattahoochee Grocery Co.*, 146 Ala. 216, 119 Am. St. Rep. 19. That a vendor of goods cannot maintain an action for the price while the possession remains in him, see *McCormick etc. Machine Co. v. Balfany*, 78 Minn. 370, 79 Am. St. Rep. 393.

BOWEN v. CLEMENS.

[161 Mich. 493, 126 N. W. 629.]

LEASE—Rent After Destruction of Premises.—Where a lot with the building thereon is leased for saloon purposes, the lessor covenanting for a quiet enjoyment and the lessee to keep the premises in repair, and the building is destroyed by fire before the expiration of the term, the lessor may recover the insurance and the stipulated rent for the period after the fire, the lot being larger than the building and it being possible for the lessee to rebuild without trespassing. (p. 522.)

Assumpsit by Bowen against Clemens for rent. There was judgment for the plaintiff and the defendant brings writ of error.

Charles R. Henry, for the appellant.

Frost & Sprague, for the appellee.

494 MOORE, J. On the ninth day of October, 1905, one Carl Theis rented lot 5 in block 3 of the village of Tower, and all buildings thereon, for the term of six years from and after May 1, 1904, to be occupied for saloon purposes, at the stated price of twenty-five dollars per month for the property. The lease contained the usual covenant for quiet enjoyment, and a covenant on the part of the lessee to keep the premises in the usual repair; damage by the elements excepted. After the making of this lease, the defendant entered into possession of the premises and occupied the same according to the terms of the lease until the 15th of January, 1908, when the building was destroyed by fire without the fault of the defendant. The lessor, Theis, assigned his right of action to plaintiff, and he brings suit to recover the stipu-

lated rent for the period since the destruction of the building by fire.

The defendant contends that, where the property leased is destroyed by fire and rendered worthless for the purpose for which it was intended, this relieves the lessee from the payment of rent. There is a line of cases which hold that where the property leased is a portion of a building, and it is destroyed or damaged so that the lessee may not, without trespassing upon other's rights, enter to repair or rebuild, these circumstances excuse the lessee from the payment of rent. The test seems to be whether the lessee has the right to go on and rebuild, and whether the loss covers the land as well as the building. In the present case, there was a lot larger than the building, and it was occupied by one William Downs, a tenant of the defendant. The case in all essential particulars is ruled by our own two cases of *Chesebrough v. Pingree*, 72 Mich. 438, 40 N. W. 747, 1 L. R. A. 529, and *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. 115. We discover nothing to distinguish the present case from the case last cited. The suggestion that there is something in the contract relation which changes the rule is based apparently upon the covenant for quiet enjoyment. But accidental injuries to the premises from natural causes, ⁴⁹⁵ which interfere with the lessee's enjoyment of the premises, are not considered a breach of the lessor's covenant for quiet enjoyment: 18 Am. & Eng. Ency. of Law, 2d ed., p. 628. The fact that the building was damaged and that the owner recovered the insurance does not release the lessee from the payment of the rent: 18 Am. & Eng. Ency. of Law, 2d ed., p. 308, and cases cited.

We think no error was committed in the case.

Judgment is affirmed.

Ostrander, Hooker, Blair and Stone, JJ., concurred.

The Liability of a Tenant for Rent upon the Destruction of a Leased Building is considered in the note to *Wattles v. South Omaha I. & C. Co.*, 61 Am. St. Rep. 566. A provision in a lease that the tenant shall return the premises in as good condition as when received, "loss by fire, inevitable accident, or ordinary wear excepted," obligates the tenant, upon the termination of the lease by agreement after a fire, to remove the debris and rubbish resulting from the partial burning of his goods: *Boardman v. Howard*, 90 Minn. 273, 101 Am. St. Rep. 409.

UNION TRUST AND SAVINGS BANK v. TYLER.

[161 Mich. 561, 126 N. W. 713.]

GIFT OF BANK DEPOSIT.—Where a Depositor in a Bank causes one of its officers to write upon her bankbook that in the event of her death the account is payable to her daughter, and afterward she sends for the daughter and tells her she has something to give her, and she states to others that she has fixed the matter so that her daughter can get the money, and the daughter has possession of the book after the death of the mother, this is sufficient to show a gift of the deposit. (p. 524.)

GIFT OF BANK DEPOSIT.—The Mere Possession by a Daughter of her mother's bankbook after the death of the latter raises no presumption of ownership. (p. 524.)

GIFT FROM PARENT TO CHILD.—Conclusive Evidence of a Gift from parent to child is not necessary. It requires less positive testimony to establish the delivery of a gift from a parent to a child than between persons not related, and when there is no suggestion of fraud or undue influence, slight evidence will suffice. (p. 525.)

GIFT OF BANK DEPOSIT.—Delivery of Book.—A valid gift of money in a savings bank may be effected by the delivery of the depositor's passbook to the donee, with intent to give the deposit. (p. 525.)

Brown, Farley & Selby and John H. Tyler, for the appellant.

Clinton Roberts, for the appellee.

562 BROOKE, J. Esther Hynan, deceased, for many years prior to her death, had a savings account with complainant's bank. She died September 4, 1908, leaving several heirs, and among them defendant Catherine Gordon, her daughter. Sometime in the year 1906 deceased took her bankbook to complainant, an officer of which, at her request, wrote upon the book the following words: "In the event of her death, this account is payable to her daughter, Catherine Gordon."

A similar entry was made upon the account in complainant's books. Early in August, 1908, deceased, being very ill, sent for her daughter, who, with her husband, went at once to the home of deceased. Upon their arrival, the husband testifies that they found deceased much out of breath, and fanning herself; that deceased said to her daughter: "I thought you would never get here. I have something I want to give you."

The husband did not see deceased give the bankbook to his wife, but it was shown him by his wife a few days later, but before Esther Hynan's death, and it was shown by both of them to the complainant bank before that event transpired. In a conversation had by deceased with one Elizabeth Rankin, an old friend, after the visit testified to by the husband, and about a week before her death, deceased said she

had divided her property among her children; that she had it fixed up so it would be unnecessary to probate, and that she thought she had got it all right so that Kitty (appellee) would draw the money. ⁵⁶³ Both defendants having made demand upon complainant for the money deposited, it filed its interpleader bill. Each defendant answered, claiming the fund, Tyler, as administrator of the estate of Esther Hynan, and Catherine Gordon, as donee of a gift made to her by Esther Hynan in her lifetime. From a decree in favor of defendant Gordon, defendant Tyler appeals.

It is urged by appellant, and we do not understand it to be questioned by appellee, that the indorsement upon the bankbook was testamentary in character, and wholly inoperative to convey any interest in the fund, because lacking in all the statute formalities relative to the execution of a will. There is no doubt that appellee can take nothing by virtue of the writing. We think it may be considered, however, as bearing upon the intention or desire of deceased to possess her daughter of this fund at the time of her death. At the time the indorsement was made, it is evident that deceased intended to retain possession and control of the deposit during her lifetime, but supposed that the indorsement would empower her daughter to draw the money after her death. Less than a month before her death, the book (without which the money cannot be drawn) passed from the possession of the deceased into the possession of her daughter. The evidence of a gift from the mother to the daughter is neither very clear nor very satisfactory. It is apparent that no one, except the parties, was present at the moment the transfer was made, and the daughter's lips are sealed as to what occurred. We are, however, of the opinion that, meager as the proof of a gift is, it is still sufficient to support the inference drawn by the circuit judge that Esther Hynan, in her lifetime, gave to the defendant Catherine Gordon the bankbook evidencing the deposit, with the intention of conferring upon her daughter a present ownership in the fund.

It may be conceded, as claimed by appellant, that the mere possession of the book by the daughter raises no ⁵⁶⁴ presumption of ownership, but we think that the possession of the book, coupled with the mother's statement to the daughter, in the presence of her husband, and the further statement of the mother to the witness Rankin, that she had fixed the matter so her daughter could get the money, indicates that the mother was unwilling, death being near, to have the daughter's right to the deposit rest upon the writing, and therefore gave her the book, and with the book the deposit represented thereby. It must be borne in mind that for two years or more deceased had intended the deposit to go to her daughter at the time of her own death, and that at the time

the daughter gained possession of the book the mother was very ill, and clearly expecting to die in the near future. Conclusive evidence of a gift from parent to child is not necessary.

In the case of *Love v. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, 29 N. W. 843, this court said: "It requires less positive and unequivocal testimony to establish the delivery of a gift of a father to his children than it does between persons not related, and in cases where there is no suggestion of fraud or undue influence very slight evidence will suffice": See, also, *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178; *Thatcher v. St. Andrew's Church*, 37 Mich. 264, and *Bangs v. Browne*, 149 Mich. 478, 112 N. W. 1107, and cases there cited.

That a valid gift of the money deposited in a savings bank may be effected by the delivery, to the donee, of the depositor's passbook, with intent to give the donee the deposit represented by it, is settled law: See 20 Cyc. 1239, where the authorities from the various states are collected; *Reed v. Whipple*, 140 Mich. 7, 103 N. W. 548; *State Bank of Croswell v. Johnson*, 151 Mich. 538, 115 N. W. 464.

The judgment is affirmed, with costs.

Ostrander, Hooker, Moore and McAlvay, JJ., concurred.

As to What Amounts to a Gift of a Bank Deposit, see the recent cases of *Supple v. Suffolk Sav. Bank*, 198 Mass. 393, 126 Am. St. Rep. 451; *Coolidge v. Knight*, 194 Mass. 546, 120 Am. St. Rep. 573; *Bailey v. New Bedford Inst. for Savings*, 192 Mass. 564, 116 Am. St. Rep. 270; *Matter of Barefield*, 177 N. Y. 387, 101 Am. St. Rep. 814; *Murphy v. Bordwell*, 83 Minn. 54, 85 Am. St. Rep. 454. A gift or transfer of a deposit in a savings bank may be accomplished by the delivery of the bankbook without any written assignment: *Bryant v. Abington Sav. Bank*, 196 Mass. 254, 124 Am. St. Rep. 552.

Gifts Causa Mortis are discussed in the note to *Johnson v. Colley*, 99 Am. St. Rep. 890.

FARLIN v. SANBORN.

[161 Mich. 615, 126 N. W. 634.]

WILL—Life Estate With Power of Disposal.—Where a man devises all his property to his wife for life, with power to convey, and in the clause following devises, upon her death, the estate that may be remaining to his heirs living at the time of his decease, the will creates a life estate in the wife with a vested remainder over to such heirs. (p. 528.)

WILL—Power of Disposal—Life Estate.—Where an estate is given generally or indefinitely, with a power of disposition, it carries the fee, except when the testator gives the first taker an estate for life

only, by certain and express words, and annexes to it a power of disposal. (pp. 528, 529.)

WILL—Life Estate With Power of Disposal.—Where a man devises all his property to his wife for life, with power to use and dispose of it for her use, support and comfort, this does not give her a right to dispose of the property by will or gift inter vivos. (p. 529.)

JUDGMENT—Res Judicata—Probate Proceedings.—The approval by the probate court of such dispositions as the executor and devisee of an estate for life has made is not res judicata in a subsequent suit in equity upon the question of the construction of the will. (p. 529.)

Guy A. Miller, Lucking, Emmons & Helfman and Alex. J. Groesbeck, for the complainants.

H. M. & D. B. Duffield and Orla B. Taylor, for the defendant.

616 **STONE, J.** Complainants are all the living heirs of Charles D. Farlin, deceased, and filed their bill in this cause to obtain a construction of the will of said Charles D. Farlin, to set aside certain transfers of property made by the widow, Sarah M. Farlin, to the defendant, and to secure an accounting of the property of the estate of said Charles D. Farlin that came to the possession of, and was enjoyed by, said Sarah M. Farlin during her lifetime. The defendant is the executrix and devisee under the will of said Sarah M. Farlin, and is the niece of Mrs. Farlin. From a decree dismissing the bill of complaint, the complainants have appealed.

So far as material to the issues in this case, the said will of Charles D. Farlin, deceased, reads as follows:

“First. I do hereby will, devise and bequeath all and singular the estate of which I may die seised, real, personal and mixed, to my wife Sarah M. Farlin for and during her natural life, with full power and authority to use and dispose of the same for her use, support and comfort, as to her shall seem best. Also with full power and authority to sell and convey all or any of the real estate, of which I shall die seised, at her own option as fully as I myself could do.

“Secondly. Upon the death of my said wife, Sarah M. Farlin, I do hereby give, devise and bequeath all the property 617 that may be remaining of my estate, whether real, personal or mixed, to my heirs living at my decease.

“Thirdly. I hereby constitute and appoint Sarah M. Farlin the executrix of this my last will and testament, with full power as such executrix to sell and convey any of the real estate of which I may die seised.”

The above will was executed June 1, 1867. Charles D. Farlin, a resident of Detroit, died in 1884. The will was admitted to probate in Wayne county upon the petition of Mrs. Farlin. At the time of the execution of the said will

Mrs. Farlin was forty-seven years of age. She died in 1908 at the age of eighty-eight years. There were no children.

Complainants' position and contentions are as follows:

(1) That the will of Charles D. Farlin created a life estate in Sarah M. Farlin, with a vested remainder over to his heirs living at the time of his decease.

(2) That under the will the life tenant had the following rights: (a) To use the property; (b) to dispose of it—both rights being for her use, support, and comfort only. That she had no right to give away the property, either by gift inter vivos, or by testamentary disposition, and in that manner defeat the will of the testator.

(3) That the property in the possession of Sarah M. Farlin at her decease being now in the possession of the defendant as her executrix, complainants are now entitled to an accounting with respect to the property derived from the estate of Charles D. Farlin.

As we understand the position of the defendant, it is:

(1) That the decree dismissing the bill should be affirmed: (a) Because an absolute estate was devised to the wife; that an estate in words for life, but coupled with an unlimited power of disposition, creates an estate in fee. (b) That the probate court having jurisdiction to construe wills, and the widow expressly asserting from the beginning that she was the sole legatee, the order of the court discharging her, and canceling her bond, could only have been made upon a construction of the will favorable to her contention, which construction, at the end of ten years, it is too late to question.

(2) If the power of disposition shall be construed as limited, then no complaint can be made of the widow's ⁶¹⁸ disposition, since it has been in accordance with her own sound judgment and discretion for her use and comfort, as to her seemed best.

(3) That if an accounting should be ordered, it should not antedate the discharge of the executrix in 1903, since at that time she showed to the probate court, and obtained its approval of, such dispositions as she had theretofore made, which cannot now be reopened.

It should be stated that the defendant has been appointed executrix of the will of Sarah M. Farlin, and claims by virtue of the bequests therein contained to be the absolute owner of the entire estate, whether derived from the estate of Charles D. Farlin, deceased, or from the separate property of Mrs. Farlin. It also appears that on December 21, 1893, Sarah M. Farlin filed her petition in the probate court, in the matter of the estate of Charles D. Farlin, deceased, representing that she was executrix; that all the proceedings required by law for the examination and allowance of all claims against said deceased, and for the proper administration and settle-

ment of said estate, had been taken; that all the debts, funeral charges, and expenses of administration had been fully paid; that she was the sole devisee under the last will and testament of deceased.

The petition prayed that a day be fixed for hearing the petition, and due notice thereof given to all persons interested, as the court should direct, and that such residue of said estate might be, by the decree of said court, duly assigned and set over to her, and that said estate be closed and petitioner's bond as executrix canceled. Attached to said petition was a paper writing purporting to be a partial inventory of estate of Charles D. Farlin, showing part undisposed of by Sarah M. Farlin, executrix. Notice of hearing on said petition was published for three weeks in the Detroit "Free Press." No other notice thereof was given. The said petition is indorsed as follows:

"No. 11,907. State of Michigan. The Probate Court for the County of Wayne. Estate of Charles D. Farlin, deceased. Petition to close estate. Filed December 21, 1893. Morse Rohnert, Deputy Register of Probate. Examined and allowed as stated. Executrix discharged and her bond canceled. January 23, 1894. Edgar O. Durfee, Judge of Probate. Recorded Liber 190, page 603."

No other or further entry appears to have been made in said estate in the probate court.

1. Referring to the first question raised in this case, counsel for defendant have well said that there are two lines of authorities to be found in our reports which, on a superficial examination, seem to reach opposite conclusions on the same facts. A careful analysis of the cases, however, discloses a clear line of distinction. After a careful examination of our decisions, we are of opinion that the will of Charles D. Farlin here under consideration created a life estate in Sarah M. Farlin, with a vested remainder over to his heirs living at the time of his decease. In our opinion the case is ruled by the following cases in this court: *Glover v. Reid*, 80 Mich. 228, 45 N. W. 91; *Gadd v. Stoner*, 113 Mich. 689, 71 N. W. 1111; *Jones v. Deming*, 91 Mich. 481, 51 N. W. 1119; *In re Mallary's Estate*, 127 Mich. 119, 86 N. W. 541, 89 N. W. 348; *Defreese v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584, 67 N. W. 505, 32 L. R. A. 744; *Hull v. Hull*, 122 Mich. 338, 81 N. W. 89. Many other cases might be cited to the same effect. We leave this branch of the case by quoting the following language of Chancellor Kent, in *Jackson v. Robins*, 16 Johns. 537: "We may lay it down as an incontrovertible rule that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee. The only exception to the rule is where the testator gives to the first taker an estate for life only, by

certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion."

With this doctrine in mind, we think that *Jones v. Jones*, 25 Mich. 401, *Dills v. La Tour*, 136 Mich. 243, 98 ⁶²⁰ N. W. 1004, and kindred cases, are readily distinguishable from the case at bar.

2. Under the will of her husband, Mrs. Farlin, as life tenant, had the right to use and dispose of the property for her use, support and comfort. This did not give her a right to give away the property, either by gift inter vivos or by testamentary disposition, and in that manner defeat the will of the testator. The right to convey and dispose of was for a specific purpose, to wit, for her use, support and comfort: *Glover v. Reid*, 80 Mich. 228, 45 N. W. 91. It was said by Justice Montgomery, in *Gadd v. Stoner*, 113 Mich. 689, 71 N. W. 1111: "In the same connection it is said that there is no limitation on the power of sale. But if the estate vested in her is less than a fee, certainly the limitation of good faith will be affixed by law."

Was the action of the probate court in 1893-94 *res judicata* upon the subject of either the construction of the will, or the assignment of the estate? We think not. The court made no order upon either subject. It will be noticed that in *Glover v. Reid*, 80 Mich. 228, 45 N. W. 91, the order or decree of the probate court was explicit: "And turn the same over to her as legatee and absolute owner thereof."

Such was not even the prayer of the petition of Mrs. Farlin. She simply prayed that the residue of the estate be duly assigned and set over to her. This might well have been done, for she, in any view of the matter, was entitled to it during her life. But even that order was not made. We think that, if anything can be gathered from the action of the probate court, it is that it refrained from any attempted construction of the will. Neither was there any such settlement of the account and administration of the executrix as would preclude inquiry into the manner of the disposition of the property of the estate of Charles D. Farlin, deceased. The record fails to show that any statement or account of the disposition of the property was before ⁶²¹ the probate court. At most there was simply a statement showing the residue of the estate then undisposed of. How the property had been disposed of did not appear. We are of the opinion, from this record, that the action of the probate court was not *res judicata* upon any question here involved.

The decree of the court below must be reversed.

We agree with the contention of defendant's counsel that the case should be remanded to the circuit court for an accounting. Not only does the record fail to show a proper basis for an accounting, but we think that the statement of complainants' counsel on the hearing below justified defendant in not then going into an accounting. The case will be remanded accordingly. The complainants will recover their costs in this court.

Ostrander, Hooker, Moore and Blair, JJ., concurred.

A Life Estate Expressly Created by Will is not converted into a fee merely because there is coupled with it a power of disposal: *Mansfield v. Shelton*, 67 Conn. 390, 52 Am. St. Rep. 285; *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135. Thus a clause in a testator's will leaving his property to his wife "to be sold, retained and exchanged, used and managed by her as she may think proper, during her life, and in case anything may be left after her death, she shall make some arrangement to have it equally divided among our children," passes a life estate to the wife, with remainder to the children, but with power to the wife to dispose of the fee: *Skinner v. McDowell*, 169 Ill. 365, 61 Am. St. Rep. 183. But see in this connection *Galligan v. McDonald*, 200 Mass. 299, 128 Am. St. Rep. 421; *Jackson v. Littell*, 213 Mo. 589, 127 Am. St. Rep. 620; *Allen v. Hirlinger*, 219 Pa. 56, 123 Am. St. Rep. 617.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

CASEY v. BRABEC.

[111 Minn. 43, 126 N. W. 401.]

WILL—Gift Void for Uncertainty.—A provision in a will bequeathing a sum of money to the executors “to use as they see proper” is void for uncertainty. (p. 532.)

DECREE OF DISTRIBUTION—Who may Appeal.—Only a Party Aggrieved by it can question a specific provision of a decree of distribution entered in probate court. (p. 532.)

DECREE OF DISTRIBUTION—Costs.—Upon Affirmance by the District Court of such decree, respondent is entitled to costs: Revised Laws 1905, section 3880. (p. 532.)

(Syllabi by the court.)

John M. Casey, pro se.

J. T. Alley, for respondent.

44 O'BRIEN, J. The will of John Casey, deceased, was duly probated in Wright county. The estate consisted principally of real property, all of which was specifically bequeathed to one or other of testator's children, consisting of a son and two daughters. The bequests to the daughters were made upon the condition that each would keep two of the children of a deceased daughter of the testator “until such time as they are able to provide for themselves, or until their father will come and claim them.” By a codicil the real estate bequeathed to one of the daughters was charged with a bequest of five hundred dollars to one of the grandchildren above mentioned. There was also bequeathed four hundred dollars to the executors “to use as they see proper.”

The will was admitted to probate July 25, 1906, and in July, 1908, a citation was issued requiring John M. Casey, who seems to have been the only active executor, to show cause why the estate should not be settled. Casey filed an account, in which he asked for an allowance of fifty dollars

to himself as attorney's fee. The court disallowed the claim as attorney's fees, but allowed him fifty dollars as executor. The provision of the will for the payment of four hundred dollars to the executors, to use as they saw proper, was held void for uncertainty. A decree was thereupon entered assigning the real estate according to the provisions of the will. The executor appealed from the portions of the decree disallowing his claim for attorney's fees, and holding the four hundred dollar bequest void. Judgment was entered in the district court affirming the decree, in which judgment there was included ten dollars statute costs taxed against the appellant. This appeal is from the judgment so entered.

We do not consider it necessary to determine whether plaintiff ⁴⁵ should have been allowed the sum awarded him in his capacity as executor or as an attorney. There is no contest as to the amount, and that is the final consideration.

It is claimed that the decree fails to give effect to the provisions of the will imposing upon the daughters of the testator the duty of caring for the grandchildren. We do not think this question is properly before us, for the reason that the appellant is not the aggrieved party, and we cannot undertake upon this appeal to say what effect should be given those provisions, or whether or not they should be considered as specific charges upon the real estate devised to the testator's daughters.

We think the probate court correctly held the legacy of four hundred dollars to the executors void for uncertainty. It was evidently intended to constitute a trust fund to be disposed of in the discretion of the executors, or for some undisclosed purpose of the testator. Had the legacy been made to some named individual, to use as he saw proper, it might be argued that the person named took the beneficial interest in the fund. But, being made to the executors, who might or might not be the persons named as such in the will, it is apparent that the sum of four hundred dollars was not intended for their use. The purpose of the testator is so indefinite and uncertain that it is impossible for a court to say that it can be ascertained and carried into effect.

Under section 3880, Revised Laws of 1905, costs were properly taxed in the district court: *Tracy v. Tracy*, 79 Minn. 267, 82 N. W. 635.

Judgment affirmed.

If a Testatrix Devises All of Her Property to whoever shall take care of her, at her request, providing that the person so selected shall have a written statement to that effect, the will is not invalid for the reason that no devisee is named: *Dennis v. Holsapple*, 148 Ind. 297, 62 Am. St. Rep. 526.

INGLE v. ANGELL.

[111 Minn. 63, 126 N. W. 400.]

ACCOUNT STATED—What Constitutes.—In the Last Analysis an account stated is nothing more than an agreement between the parties as to the items considered. (By the editor.) (p. 534.)

ACCOUNT STATED—What Constitutes—Action.—Parties holding mutual and open claims against each other may agree as to some of such items, leaving other items for future adjustment, and an action upon an account stated may be maintained for the balance arrived at from the items considered. (p. 534.)

ACCOUNT STATED—Setoff in Action for Balance.—In such action the party against whom the balance is claimed may offset against it any balance which he claims from the items not included in the settlement. (p. 534.)

(Syllabi by the court except when stated to be by the editor.)

Lewis E. Jones, for the appellant.

McCumber & Forbes and Henry G. Wyvell, for the respondent.

⁶³ O'BRIEN, J. The plaintiff's demand consists of three causes of action—two hundred and thirty-six dollars and seventeen cents, a balance claimed to be due upon an account stated between J. G. Ingle and defendant, and assigned to plaintiff; three dollars, upon another account between those persons, also assigned to plaintiff; and a balance of fifty dollars, for personal services rendered to defendant by plaintiff. There was a conflict of evidence as to each of these claims, making a plain question of fact as to each, and they were all fully and fairly submitted to the jury, which found for the plaintiff in the sum of two hundred and eighty-three dollars and twenty-five cents. This appeal is from an order denying a new trial.

⁶⁴ The principal contention of the defendant is with reference to the first cause of action, based upon the alleged stated account. The testimony upon behalf of the plaintiff was to the effect that for some time prior to March, 1908, defendant and J. G. Ingle had various transactions resulting in valid claims by each against the other, and that some time during March, 1908, they met and came to an agreement with reference to each of said claims, with the exception of one item for spelt claimed to have been furnished Ingle by the defendant, amounting to about thirty-four dollars. This item the plaintiff concedes was left for future determination. The defendant denied that any balance was agreed upon, and, according to his testimony, there was no agreement which would establish an account stated.

The court submitted to the jury the question whether or not any such agreement was made, with the instruction that

plaintiff could recover upon the first cause of action only in case they found it was so agreed. In submitting to the jury plaintiff's claim as to an account stated the learned trial judge said:

"If you find, gentlemen of the jury, upon the evidence, that there was certain item or items that the parties agreed to suspend or leave out, pending future investigations or future inquiry, and if they agreed that they should take up other matters and claims, and examine the claims of each party; and that as to these claims that they did take up and examine, if you find that they arrived at a correct balance upon these claims, and that it was found that—that there was a balance due from the defendant to J. G. Ingle as claimed by plaintiff, the plaintiff would be entitled to recover upon that agreed balance. In other words, gentlemen of the jury, the right of the plaintiff to recover in this action would not be defeated because of the fact—if you find it to be a fact—that one or two items were left unexplained and omitted from the account by agreement between the parties."

The defendant contends that the court erred in so charging, and insists that, where the transactions between the parties resulted in mutual, open and current accounts between them, there can be no account stated, unless all of the items claimed by each are included; in other words, that the balance found must be complete and final. ⁶⁵ We do not agree with the contention. In the last analysis an account stated is nothing more than an agreement between the parties as to the items considered. If the agreement is that the balance found is final and complete, it constitutes an account stated as to every item; but, upon the other hand, we do not see how a court can limit the right parties have to make such lawful contracts as they choose, and, therefore, to agree as to certain items and leave open for adjustment or adjudication other items. It is not apparent that injury can result from such a rule. In the present case the defendant was at liberty to claim the amount of any omitted item as an offset to plaintiff's demand, and by such means be fully protected. The result is that the instruction complained of was correct: *Tuggle v. Minor*, 76 Cal. 96, 18 Pac. 131.

In the third cause of action plaintiff alleged an agreement to pay the amount claimed, and also that the services were reasonably worth the amount. Defendant moved that plaintiff be required to elect whether to rely upon the agreement or the reasonable value. This motion was addressed to the discretion of the court, of which, in denying it, there was no abuse: *Plummer v. Mold*, 22 Minn. 15.

There were some slight discrepancies in the amounts claimed in the complaint and those shown by the testimony.

Those discrepancies do not affect plaintiff's right to recover, the recovery being less than the amount claimed in the complaint. We have examined the evidence as contained in the record, and find no error in the rulings of the court with reference to its admission, and also find that the evidence was sufficient to justify the verdict. The charge very clearly submitted the questions involved to the jury, and there is no reason for disturbing the verdict rendered.

Order affirmed.

Accounts Stated are discussed at length in the recent note to *Jasper Trust Co. v. Lampkin*, 136 Am. St. Rep. 37.

SPEAR v. JOHNSON.

[111 Minn. 74, 126 N. W. 402.]

APPEAL—Deposit in Lieu of Bond.—The Proper Procedure to Obtain money deposited with the court on an appeal in lieu of the statutory bond, under Revised Laws of 1905, section 4366, is to apply to the court having jurisdiction of the fund for an order directing its application. Either party may make such application. (p. 536.)

EXECUTION—Deposit in Lieu of Appeal Bond.—The Successful Party on such an appeal is not required, as a matter of law, to resort to the fund; but if his judgment be not paid, he may proceed by execution to enforce it. (pp. 536, 537.)

(Syllabi by the court.)

Frederick L. Spear, pro se.

Bardwell & Levy, for the respondents.

⁷⁴ BROWN, J. Defendant Johnson brought an action against plaintiff in the municipal court of Minneapolis, and recovered a judgment for fifty dollars and costs. Defendant therein, plaintiff in this action, appealed from the judgment to this court, where an affirmance was ordered: 102 Minn. 516, 113 N. W. 1134. In lieu of a bond on that appeal, ⁷⁵ defendant deposited, under Revised Laws of 1905, section 4366, the sum of two hundred and fifty dollars in money with the clerk of the municipal court as security for the costs and disbursements which might be awarded against him in this court. On November 29, 1907, judgment was entered in this court upon the affirmance of the judgment appealed from against the appellant for the sum of forty-four dollars and twenty-five cents costs and disbursements. The judgment not being paid, plaintiff therein caused the issuance of an execution and delivered it to the sheriff of

Hennepin county for collection on December 13, 1907. The sheriff levied upon certain real estate owned by the defendant, and subsequently sold the same, the plaintiff in that action being the purchaser, for the sum of twenty-five dollars and twenty-three cents, the exact amount of the costs on execution sale. The sheriff thereafter returned the execution unsatisfied. Plaintiff then brought this action to set aside the execution and sale thereunder upon the ground that the same were illegal and unauthorized. The precise point made is that the plaintiff in the former action could have gone to the clerk of the municipal court and there obtained from the appeal fund deposit an amount sufficient to pay the judgment for costs, and, having that right, the proceedings under the execution were illegal and void. After trial before the court below without a jury, the facts stated were found, and the action ordered dismissed, upon which judgment was entered, and plaintiff appealed.

Our statutes (Rev. Laws 1905, sec. 4366) provide for a deposit of money in lieu of an appeal bond, but make no provision for the disposition of the money on the final determination of the appeal. No specific procedure being provided by which the party entitled to the money may demand and receive the same, we must apply the procedure appropriate in analogous cases. In cases where money is deposited with the court to abide the event of an action, the successful party may obtain the same by applying to the court for an order to the clerk directing its payment: 13 Cyc. 1038, and cases cited. The application being made upon notice, the rights of all parties will be protected, and the clerk, custodian of the money, relieved from responsibility. Such should be the procedure in cases like that at bar, where money in lieu of an appeal bond is deposited with the clerk.

⁷⁶ It is the contention of plaintiff that defendant was required, as a matter of law, to resort to this deposit for the payment of his judgment, and that, by applying therefor to the court, he could have obtained it, and that he had no right to proceed to the enforcement of his judgment by execution.

While it is true that defendant could have satisfied his judgment by a resort to this fund, we cannot hold that he was required to do so. His judgment was valid, and, not having been paid, he had the undoubted option to adopt for its collection any method permitted by law. Plaintiff was the debtor in that action, and if he wished to avoid additional expense, he could have paid the judgment, and upon a proper showing obtained from the court an order for the return of the deposit fund. But, if he wished that particular money applied in payment, he should have initiated proceedings for that purpose. We are clear that the defendant was

not required, there being no statute to that effect, to resort to that particular fund, any more than he would be required to proceed against the bond on appeal.

The further contention of plaintiff that the sheriff could have levied upon the fund in the custody of the clerk as personal property, and that therefore he had no right to levy upon the land, is not sound. The money was in the custody of the law, and no levy could be made thereon. The only legal way in which the clerk could be compelled to surrender the money was by application to the court in the manner already stated, though no doubt he would have been justified in doing so by the consent or stipulation of the parties. But in the absence of such stipulation he is entitled for his protection to an order of the court.

Judgment affirmed. No statutory costs will be taxed.

Appeal—Bond and Substitute Therefor.—Liability on appeal bonds is the subject of a note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 702. Although there is no statute providing that a mortgage of real or personal property may be given in lieu of an undertaking on appeal from a judgment, still, if the parties agree upon and execute a mortgage for such purpose, it is valid, and may be enforced as between them: *Comron v. Standland*, 103 N. C. 207, 14 Am. St. Rep. 797.

PETERSON v. MERCHANTS' ELEVATOR COMPANY.

[111 Minn. 105, 126 N. W. 534.]

MASTER AND SERVANT—Removal of Cover from Dangerous Machine.—If, while the cover provided for a dangerous machine has been removed for the purpose of discovering defects in the machinery, an employé is injured by coming in contact with the machine, the question whether the machine has been left uncovered an unreasonable length of time is for the jury. (By the editor.) (p. 539.)

MASTER AND SERVANT—Presumption of Due Care.—In an action against an employer for the death of his employé by coming in contact with dangerous machinery, it will be presumed that the employé exercised due care for his own protection. (By the editor.) (p. 540.)

MASTER AND SERVANT—Unguarded Machinery.—In an Action for the death of one of defendant's employés by coming in contact with uncovered and dangerous machinery, it is held that the questions of defendant's negligence, the employé's contributory negligence, and assumption of risk were properly submitted to the jury. (pp. 539, 540.)

EVIDENCE—Conversation With Deceased.—A Stockholder in a corporation, though acting in the capacity of manager or superintendent, cannot be heard to give in evidence a conversation with a deceased employé upon matters material to the issues in litigation against the corporation for wrongfully causing his death. (pp. 540, 541.)

DEATH—Damages not Excessive.—Damages awarded by the jury held not excessive. (p. 541.)

DEATH.—Five Thousand Dollars Damages are not Excessive for the death of an industrious man, with a wife and several minor children, who had a natural expectancy of life for nineteen years and was earning two dollars and twenty-five cents per day. (By the editor.) (p. 541.)

(Syllabi by the court except when stated to be by the editor.)

Trafford N. Jayne, for the appellant.

Mead & Robertson, for the respondent.

¹⁰⁶ **BROWN, J.** Defendant was engaged in operating a grain elevator in the city of Minneapolis. Plaintiff's intestate was in its employ as a laborer, and was killed while in the discharge of his duties by coming in contact with an uncovered dangerous machine, and this action was prosecuted by his personal representative in behalf of the next of kin. A verdict was returned for plaintiff, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or a new trial.

The short facts are that on the second floor of defendant's elevator, in which decedent was at the time of his death engaged at work, defendant operates two electric motors, designated in the record as motor No. 1 and No. 2, supplied with electricity from outside the building. Attached to motor No. 2, and a part of its running gear, are two sets of cogwheels, one twenty-four and the other six inches in diameter. A shaft attached to these wheels makes nine hundred revolutions a minute, and the wheels, when uncovered, were a source of extreme danger to any workman coming in contact with them. A cover had been provided for the same, but was not attached at the time of the accident. The motor became out of order, and on November 5, 1908, was taken out for repairs, and was returned and installed in the proper place on the nineteenth of the same month. For some reason it did not work properly on its return, and the cover to the cogwheels was not replaced; the reason for this action being to enable the employes to learn the nature of the defect preventing its proper operation. The cover remained off until the day of decedent's death, a period of about nine days. Decedent, while attempting to oil some of the bearings of the motor, was caught in the cogwheels and almost instantly killed.

1. It appearing to have been practicable, it was the duty of defendant, ¹⁰⁷ under the statutes, to guard or cover the cogwheels, to the end that employes engaged in work about the motor might be protected from injury. The court so charged the jury, and of this no complaint is made. A cover had been provided, but for a week or more had not been in

place, and the dangerous part of the machine was exposed. The trial court recognized the rightfulness of defendant's conduct in leaving the cover off for the purpose of discovering the defect in the mechanism of the motor, but submitted to the jury to determine whether the failure to replace the cover within nine days was reasonable or unreasonable, saying, in effect, that defendant had the right to remove the cover for the purpose stated for a reasonable length of time. In this view we discover no reason for disagreeing with the trial court. The question whether the machine was left uncovered for an unreasonable time was properly submitted to the jury, and we affirm their conclusion that defendant was chargeable with negligence in not sooner discovering the defect referred to and replacing the cover: *Davidson v. Flour City Ornamental Iron Works*, 107 Minn. 17, 131 Am. St. Rep. 433, 119 N. W. 483, 28 L. R. A., N. S., 332.

2. The principal contention on the facts is that decedent assumed the risks of working about the uncovered motor, and therefore plaintiff cannot recover. Our conclusion upon this branch of the case is that the question was properly submitted to the jury.

Decedent had been in the employ of defendant for two or three months, during which time he had been engaged in different kinds of work, among other things being charged with the duty of oiling the machinery whenever directed to do so, or whenever in his judgment it was necessary or proper. He was, however, a common laborer, not a mechanic, and not shown to have been familiar with the construction and operation of the motors used in this elevator. Another servant, one Noreen, had charge of this particular motor, and the evidence tends to show that he attended to the matter of oiling its various parts during all the time it remained uncovered up to the day decedent met his death. On the morning of that day decedent was set to work on the floor upon which this motor was located, and within one-half hour thereafter was killed in attempting to oil the machine. Though he was a man of mature years, and had ¹⁰⁸ worked about similar elevators eighteen or twenty years, the evidence is far from conclusive that he knew the cover was off the motor at the time he was killed. Nor is it conclusive that he had worked about the motor previously, or attempted to oil it, knowing that the cover had been removed. Of course, when approaching the machine, he could, by the exercise of ordinary care, have discovered the absence of the cover; but whether he understood and appreciated the dangers incident to the work was, on the evidence, a fair question for the jury to determine.

We are bound to presume, in the absence of evidence to the contrary, since he is dead and not here to speak for him-

self, that he exercised due care for his own protection. The evidence is ample that he was caught in the machine and there killed: *Hawkins v. Great Northern Ry. Co.*, 107 Minn. 245, 119 N. W. 1070, 1135; *Seely v. Tennant*, 104 Minn. 354, 116 N. W. 648. The evidence is not so conclusive that he had a general knowledge of and familiarity with the dangers incident to the uncovered motor as to justify the conclusion, as a matter of law, that he assumed the risks of his employment: *Christianson v. Northwestern Compo-Board Co.*, 83 Minn. 25, 85 Am. St. Rep. 440, 85 N. W. 826; *Rase v. Minneapolis etc. Ry. Co.*, 107 Minn. 260, 120 N. W. 360, 21 L. R. A., N. S., 138. Nor can it be said, as a matter of law, that he was guilty of contributory negligence. Defendant is not, therefore, entitled to judgment notwithstanding the verdict; and, as the court below, by its order denying a new trial, has determined that the jury fully and fairly considered the evidence, we discover no reason for ordering a reversal or granting a new trial.

3. Defendant called as a witness one of its stockholders, J. C. Hensey, superintendent in charge of the elevator, and elicited from him the fact that some time prior to the accident he had a conversation with decedent in reference to the motor and the uncovered cogwheels, and he was asked the question, "What was the conversation?" Upon the fact appearing that the witness was a stockholder in defendant corporation, the court sustained plaintiff's objection to the question, based upon section 4663, Revised Laws of 1905, which prohibits the giving in evidence by a party or person interested in an action ¹⁰⁹ a conversation with a deceased party or person. The subject was referred to again later in the examination of the witness, and he was asked whether he said anything to decedent about oiling the motor, and the court again sustained plaintiff's objection. Again, at the close of the trial, counsel interrogated the witness further in reference to a conversation with decedent, the last question being, "But you did have some talk with him after the hood had been taken off the gear?" To which the witness answered in the affirmative. Upon objection being made to further evidence along that line, counsel offered to show that the witness warned decedent of the dangers of working about the motor when the cover was off and instructed him how safely to oil it. The court sustained plaintiff's objection, and the ruling is assigned as error.

The fact that the witness was a stockholder in the corporation was not disputed, and the question presented is whether he came within the provisions of the statute respecting the admissions of evidence of conversations with a deceased person. The question does not require extended discussion. That the witness was an interested party, within the meaning

of the statute, cannot be seriously questioned. He was a stockholder and pecuniarily interested in the result of the action—a direct, and not a remote or speculative, interest.

The case of *Perine v. Grand Lodge*, 48 Minn. 82, 50 N. W. 1022, is not in point. The defendant in that case was a mutual benefit association, and the person called as a witness for the purpose of giving a conversation with a deceased member, upon whose certificate of membership the action was founded, was not a member of the association at the time the conversation took place, and, though he was such when called as a witness, he did not become a member until after the death of the certificate holder, and not until the rights of the parties thereunder had become fully vested. His interest in the result of that action was extremely remote, and not such as to come within the meaning of the statute.

We need not stop to inquire whether in an action of this kind a stockholder of a corporation, who is also its superintendent and manager, may be heard to testify to the fact that in his capacity ¹¹⁰ as manager or superintendent he warned an employé, since dead, of the dangers of his employment, and which dangers were the cause of his death: *Robbins v. Legg*, 80 Minn. 419, 83 N. W. 379. Such is not the question here presented. The examination of the witness upon this subject clearly indicated to the court below that the warning, if any was given, was the result of a conversation with decedent. The witness, on the occasions when the subject was under inquiry, was asked whether he had a conversation or talk with decedent, and, upon an affirmative answer being given, finally made the offer to show the warning; and though at one point in the examination of the witness counsel stated that he did not intend to show a conversation, it is clear that the "warning" was in fact a part of a conversation and was properly excluded.

4. Defendant also contends that the damages awarded, five thousand dollars, are excessive, and that for that reason a new trial should be granted. In this we do not concur. Decedent was an industrious man, with a wife and several children, a number of whom were minors, and had a natural expectancy of life for about nineteen years, and was earning a competency of two dollars and twenty-five cents per day. The trial court has approved the amount, and we do not feel justified in interfering with the conclusion there reached: *Bolinger v. St. Paul & D. R. Co.*, 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; *Johnson v. C. A. Smith Lumber Co.*, 99 Minn. 343, 109 N. W. 810.

We have fully considered all other assignments of error, and discover no reason for reversing the order of the court below.

Order affirmed.

Witness—Testimony Against Deceased Person.—In an action by a corporation against an executor or administrator, the general manager of the company is not disqualified to testify under the rule that a party shall not be allowed to testify, where the adverse party is an executor or administrator, of facts which occurred before the death of the decedent: *Cockley Milling Co. v. Bunn*, 75 Ohio St. 270, 116 Am. St. Rep. 741. See, in this connection, *Cronin v. Supreme Council etc.*, 199 Ill. 228, 93 Am. St. Rep. 127; *First Nat. Bank v. Payne*, 111 Mo. 291, 33 Am. St. Rep. 520; *Consolidated Ice-Machine Co. v. Keifer*, 134 Ill. 481, 23 Am. St. Rep. 688.

MALMSTED v. MINNEAPOLIS AERIE NO. 34.

[111 Minn. 119, 126 N. W. 486.]

FRATERNAL ORDER—What Constitutes Illegal Expulsion.—Where the president of a grand lodge suspends the charter of a local lodge and restores it on condition that certain persons be dropped from the membership, and they are thus notified and forced to withdraw from a meeting of the local lodge, the conditional restoration of the charter in effect expels them without trial provided by the organic law of the order, and the treatment accorded them is illegal. (By the editor.) (p. 544.)

FRATERNAL ORDER—Remedy for Illegal Expulsion.—Where a fraternal order, acting without authority, expels a member, he may bring action for damages without first pursuing remedies within the order. (By the editor.) (p. 544.)

FRATERNAL ORDER—Damages for Wrongful Expulsion.—A member of a fraternal order who has been wrongfully expelled may maintain an action for damages. The damages are necessarily limited in extent, but injury to his feelings is a proper element. (By the editor.) (p. 545.)

FRATERNAL ORDER—Joint Liability for Wrongful Expulsion.—Where officers of a grand lodge and those of a local lodge, acting on behalf of each lodge, wrongfully expel a member from the local lodge, the lodges are joint tort-feasors, and the member may recover damages from both. (By the editor.) (p. 545.)

FRATERNAL ORDER—Expulsion of Member—Remedies.—The president of the grand lodge suspended the charter of the local lodge to which plaintiff belonged. The charter was restored on condition, among others, that plaintiff, among others, be excluded from membership. Plaintiff was notified of this in writing, and was forced to withdraw from a meeting of the local lodge which he attended. Plaintiff was not given the trial required by the organic law of the order. Whereupon he brought action for damages against both the grand lodge and the local lodge. It is held that:

1. This conduct of defendants amounted to the illegal expulsion of plaintiff. (p. 544.)

2. Plaintiff was entitled to use legal remedies, without having first exhausted appeals within the order. (p. 544.)

3. Plaintiff was entitled to damages for injuries sustained. (p. 545.)

4. Both the grand lodge and local lodge were responsible. (p. 545.)

(Syllabi by the court except when stated to be by the editor.)

A. C. Finney and Durment, Moore & Sanborn, for the appellants.

M. C. Brady, for the respondent.

¹²⁰ JAGGARD, J. Plaintiff and respondent sued the Minneapolis subordinate Order of Eagles and the Grand Aerie of Eagles for having wrongfully and unlawfully expelled him from the local lodge and prevented him from participating in any of its proceedings. The evidence showed that the affairs of the local lodge came to be "in bad shape." The charter of the local lodge had been suspended by the grand worthy president with the approval of the trustees. That officer in the course of negotiations agreed to remove the suspension and reinstate the charter on condition that new officers be put into the place of the old ones, and that the membership should be purged by dropping certain names to be thereafter furnished to the officers of the local lodge. The intention was to rid the lodge of some undesirable members. The conditions were accepted and the charter renewed. The ¹²¹ list of members to be dropped was furnished to the local lodge by the grand worthy president. The local lodge notified the plaintiff in writing that his name had been stricken off its reorganized membership. Plaintiff appeared at a meeting, and while no action was taken to expel him, he was forced to withdraw from the meeting. Plaintiff was granted a verdict for five hundred dollars in the trial court.

The grand and the subordinate lodge made separate motions in the alternative. The trial court denied the motions, but granted a new trial unless plaintiff would remit all of the verdict except fifty dollars. The plaintiff would not remit the excess of the verdict. Both the grand and local lodge appealed from the order denying their respective alternate motions. The only question on this appeal is the right of the grand lodge and the local lodge, respectively, to have judgment for defendant ordered.

The organization of the Eagles in general resembles that of the usual benevolent or fraternal association. Its constitution provided, among other things, that "subordinate aeries shall be subject to the authority of the Grand Aerie, which may revoke the charter or dispensation for cause, or impose such fines and penalties for disobedience as in manner hereinafter provided. No member of this order shall be suspended or expelled except by the subordinate aerie having jurisdiction over him, and then only in the manner herein-after provided." That subsequent provision was for suspension and expulsion after notice of charges formulated, with opportunity to defend and on a trial before a specified tribunal; that is, the analogy of a judicial proceeding was followed. The charter or dispensation of a subordinate aerie

may be forfeited and the aerie suspended for cause by the Grand Aerie, or by the grand worthy president, with the consent of the board of grand trustees. Provision was also made for an appeal, within the order, for improper action by officers in violation of the rights of individual members similar to that contained in orders of this kind.

1. The first question presented by this appeal of the grand lodge is whether its president had a right to impose as a condition to the restoration of the charter that certain names should be dropped from its rolls. It is to be noted that in the case at bar the local charter ¹²² was not revoked, but was suspended. What happened here, therefore, was not equivalent to granting a new charter. The conditional restoration of the charter in fact and in effect suspended or expelled the member without the trial provided for by the organic law of the order. To this trial he was entitled, unless the approval of the order as to conditional restoration by the grand lodge gave validity to it and its sequences, including plaintiff's expulsion: See *State v. Grand Lodge*, 70 Mo. App. 456. It would, however, be a forced construction to regard any action appearing in the record to have been taken to operate as an implied repeal of the provisions of the laws of the order as to "Trials and Penalties." The conclusion follows that plaintiff has been illegally treated.

2. It is also urged that plaintiff was not at liberty to acquiesce in his expulsion, and take no steps to have the wrong remedied under the laws of the order, and yet recover damages as for a wrongful expulsion. It is, however, well settled that "If the action of the lodge be a usurpation, or without notice or authority, it cannot affect the legal rights or change the legal status of anyone. The obligation to appeal is not imposed when the judgment is void for want of jurisdiction. It may be likened to a judgment rendered by a court which has no jurisdiction of the subject matter or of the person. No appeal or writ of error is necessary to get rid of such a judgment. It is void in all courts and places, and the duty of an expelled member to exhaust, by appeals or otherwise, all the remedies within the organization, arises only where the association is acting strictly within the scope of its powers": *Bacon on Benefit Societies*, 3d ed., sec. 107; *Hall v. Supreme Lodge* (D. C.), 24 Fed. 450; *Mulroy v. Supreme Lodge*, 28 Mo. App. 463; *Blumenfeldt v. Korschuck*, 43 Ill. App. 434; *Hoeffner v. Grand Lodge*, 41 Mo. App. 359; *Karcher v. Supreme Lodge*, 137 Mass. 368.

3. The plaintiff's right to recover damages sustained by wrongful expulsion by an action at law has been frequently recognized: *Lahiff v. St. Joseph etc. Soc.*, 76 Conn. 648, 100 Am. St. Rep. 1012, 57 Atl. 692, 65 L. R. A. 92; *Lamphere v. Grand Lodge*, 47 Mich. 429, 11 N. W. 268; *Washington B.*

Soc. v. Bacher, 20 Pa. 425; People v. Musical N. P. Union, 118 N. Y. 101, 23 N. E. 129; People v. German etc. Church, 53 N. Y. 103; Ludowski ¹²³ v. Polish, 29 Mo. App. 337; State v. Lipa, 28 Ohio St. 665; Fraternal M. Circle v. State, 61 Ohio St. 628, 76 Am. St. Rep. 446, 48 N. E. 940; Bacon on Benevolent Societies, 3d ed., sec. 442; Fisher v. Board of Trade, 80 Ill. 85. The trial court very properly regarded the damages as necessarily limited in extent, and properly reduced the verdict of the jury. But however restricted the right of recovery may be, the injury to plaintiff's feelings in an action of this character is a proper element of damage: Lahiff v. St. Joseph etc. Soc., 76 Conn. 648, 100 Am. St. Rep. 1012, 57 Atl. 692, 65 L. R. A. 92; People v. German etc. Church, 53 N. Y. 103.

4. The remaining question is whether plaintiff can recover from either or both the Grand Aerie or the local aerie, or from the individual officers only who acted in the matter. It is quite clear that the individuals who acted in expelling plaintiff did so in their official capacities and in the course of the performance of their imposed duties. Their tort was not an independent tort. The officers of the grand and local lodges acted on behalf of each lodge. Both lodges took part. Both lodges were joint tort-feasors. Plaintiff is entitled to recover from them both.

It follows that the general conclusion of the trial court that neither the grand nor local lodges had interposed a sufficient defense was correct, and that the court properly reduced the amount of the verdict and granted a new trial in the event of plaintiff's refusal to accept the amount as reduced.

Order affirmed.

The Jurisdiction of Courts Over Voluntary Unincorporated Associations is discussed in the notes to Otto v. Journeyman Tailors' P. & B. U., 7 Am. St. Rep. 160; Kearns v. Howley, 68 Am. St. Rep. 856; Morris St. Baptist Church v. Dart, 100 Am. St. Rep. 734.

As to Whether a Member Expelled from a Beneficial Association must first seek his remedies within the tribunals of the order before resorting to the courts for relief, see Langnecker v. Trustees etc. A. O. U. W., 111 Wis. 279, 87 Am. St. Rep. 860; Myers v. Jenkins, 63 Ohio St. 101, 81 Am. St. Rep. 613; Byram v. Sovereign Camp etc., 108 Iowa, 430, 75 Am. St. Rep. 265; Grimbley v. Harrold, 125 Cal. 24, 73 Am. St. Rep. 19.

The Expulsion of a Member of a Voluntary or Beneficial Association, without notice or opportunity for hearing, is without jurisdiction and void: Byram v. Sovereign Camp etc., 108 Iowa, 430, 75 Am. St. Rep. 265; Grand Grove etc. v. Garibaldi Grove, 130 Cal. 116, 80 Am. St. Rep. 80. As to the damages recoverable for wrongful expulsion, see Strauss v. Mutual Reserve etc. Assn., 126 N. C. 971, 83 Am. St. Rep. 699.

COLE v. MILLSPAUGH.

[111 Minn. 159, 126 N. W. 626.]

LIBEL—Words Libelous Per Se.—A Discommendatory Statement, general in its terms, which charges neither the commission of crime nor the possession of specific offensive characteristics, may or may not be libelous per se, depending upon the circumstances and conditions under which the statement is made. (By the editor.) (p. 547.)

LIBEL—Clergyman.—It is Libelous Per Se to write of a clergyman, an applicant for a pulpit, "I would not have anything to do with him or touch him with a ten foot pole," if under all the circumstances the words used would expose the person written of to hatred or contempt, or injury in his business or occupation. (pp. 547, 548.)

LIBEL — Sufficiency of Complaint Against Demurrer.—Complaint held to state a cause of action, and presenting the question of fact whether the words used were intended to and might be understood to charge conduct or characteristics inconsistent with good character or plaintiff's profession. (p. 548.)

(Syllabi by the court except when stated to be by the editor.)

Thomas D. Schall and Thomas Kneeland, for the appellant.

Savage & Purdy, for the respondent.

100 O'BRIEN, J. Action for libel. According to the complaint, a demurrer to which was sustained upon the ground of no cause of action, the Universalist Church in Minnesota has what is known as a "fellowship committee," to which applications for pastorates are addressed. The recommendation of the committee is necessary to the obtaining of any such pastorate. Plaintiff, a duly ordained minister of the gospel, had applied to the committee for a position, and, while his application was pending, "defendant falsely and maliciously, for the purpose of preventing plaintiff from securing the pastorate of any such vacant churches, and of injuring plaintiff in his profession as a minister, wrote and published of and concerning plaintiff, and of and concerning him in his profession as a minister, to said Rev. Thomas S. Robjont and others of said fellowship committee, the following false, malicious, defamatory and libelous words and language, to wit: 'I [meaning defendant] would not have anything to do with him or touch him [meaning plaintiff] with a ten foot pole' [thereby meaning to charge, and intending to mean and charge, that plaintiff was unfit and unqualified morally and intellectually to fill the pastorate of any church, and particularly of any of said vacant pastorships of the Universalist Church aforesaid, and unfit and unsafe to fill any position of employment or place of trust, and that he was a man of bad character and poor intellectual qualifications, and untrustworthy in any place or position].'"

Defendant insists that the words, "I would not have anything to do with him or touch him with a ten foot pole," are not libelous per se, for the reason that they neither assert nor imply anything against the plaintiff, but merely state what the defendant himself would not do. Libel, as defined by section 4916, Revised Laws of 1905, is a malicious writing which exposes one "to hatred, contempt, ridicule, or obloquy, or which shall cause or tend to cause any person to be shunned or avoided or which shall have a tendency to injure any person, corporation, or association of persons in his or their business or occupation." If a written statement is intended to, and may, as the words used are ordinarily understood, produce that result, the ¹⁶¹ statute is violated, and a cause of action for general damages exists in favor of the person as to whom the statement is made.

This case is not free from difficulty. In themselves the words used do not charge the plaintiff with the commission of any crime, nor the possession by him of any characteristic which would necessarily expose him to hatred, contempt, or ridicule upon the part of any person other than the defendant, who is, of course, free to enjoy his own likes and dislikes and select his own company. Upon the other hand, the statement is one which might, under certain circumstances, imply and be understood as charging the possession by the plaintiff of habits and qualities which would render him entirely unfit to be the pastor of a church congregation.

The considerations governing such a case are fully discussed in *McDermott v. Union Credit Co.*, 76 Minn. 84, 78 N. W. 967, 79 N. W. 673. On the reargument of that case it was held that to charge one with being "slow" in the payment of his debts was not libelous per se; but that was only because of the particular circumstances there existing and the connection in which the statement was made. That decision was to the effect that a discommendatory statement, general in its terms, and which charges neither the commission of crime nor the possession of specific offensive characteristics, may or may not be libelous per se, depending upon the circumstances and conditions under which the statement is made. It seems clear that such is the correct conclusion; otherwise, a skillful writer may destroy the reputation of another, and yet avoid all legal responsibility for his conduct. It is not necessary to descend to vulgar abuse, or to make specific charges of crime, in order to expose one to hatred, contempt or ridicule, or to injure him in his business or occupation.

The plaintiff is a clergyman, and must, if he is to be successful in the practice of his profession, maintain a spotless reputation. He had submitted his application to be placed in charge of a church to the committee, whose recommendation was necessary, and who, before making it, were required

to determine his qualifications for the position, which necessarily included not only his integrity and education, but those refined and personal qualifications so necessary to ¹⁶² a successful performance of the many and complex duties falling to the lot of a clergyman. While it is true that the plain meaning of the words cannot be changed by any allegations of the complaint, it is also true that the circumstances under which the statement was made and the motive of the person making it may determine the meaning with which the words were used and how they were intended to be and were understood.

The complaint alleges that the words quoted were written by the defendant maliciously to the members of the committee for the purpose of preventing the committee from giving its recommendation to the plaintiff. We cannot avoid the conclusion that such a statement so made, and emanating from a responsible source, might tend to expose a clergyman, situated as was the plaintiff, to contempt and injury in his profession. Therefore, under the allegations of the complaint, evidence might properly be received which would justify a jury in so finding. In the absence of any denial, explanation or justification upon the part of the defendant, it must be held that the statement was libelous and actionable per se, and the demurrer improperly sustained.

Order reversed.

As to What Words are Libelous Per Se, see the note to *Nichols v. Daily Reporter Co.*, 116 Am. St. Rep. 802. A telegraphic message directed and sent to a clergyman, stating that "the citizens of Wisconsin demonstrated you are an unscrupulous liar," is libelous per se: *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. Rep. 54. And an article in a Polish newspaper, calling a physician a blockhead or fool, and appealing to the Poles of the community not to intrust themselves to his professional care, when he so hated them that he would not help them if he could, is libelous per se: *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317. To say of a school teacher that he is "noted," though in an invidious sense, and, referring to a particular district, "has done more damage and less good than any other teacher," and, referring to his application for a position as teacher of its school, "this district knows when it has had enough, so it turned the gentleman down," does not impeach him in any of those qualities which are essentials of an accomplished teacher, and to falsely assail which is libelous per se: *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416. But an article published in a newspaper regarding a college professor and author, representing him as egotistical, conceited, illiterate, uncultivated, coarse, and vulgar, and his ideas as foolish and sensational, creating the impression that he makes himself ridiculous, both in his method of instruction and his public lectures, and ridiculing his private life by charging that he was unable to select a name for his baby until after a year's solemn deliberation, and generally holding him up as a presumptuous literary freak, is libelous per se: *Triggs v. Sun Printing etc. Assn.*, 179 N. Y. 144, 103 Am. St. Rep. 841.

GIBSON v. NELSON.

[111 Minn. 183, 126 N. W. 731.]

ATTORNEY—Authority Compared With That of Agent.—The law of principal and agent controls the relation of attorney and client, and though the authority of the attorney may in many respects exceed that of an ordinary agent, yet his employment to conduct litigation should not, as a matter of legal inference, wholly divest the client of his case. (By the editor.) (p. 553.)

ATTORNEY.—The Authority of an Attorney Employed in a Case must be limited to the management of litigation and the control of all proceedings therein. It does not include the right to compromise the suit. (By the editor.) (p. 553.)

ATTORNEY—Authority to Compromise and Settle Suit.—An attorney, under his general retainer, has no implied power to settle and compromise his client's cause of action, except when confronted with an emergency, and prompt action is necessary to protect the interests of the client, and there is no opportunity for consultation with him. (p. 553.)

ATTORNEY—Authority to Dismiss Action.—While an attorney may bind his client by a stipulation dismissing an action or waiving a particular defense, yet where he goes beyond this and compromises the action and stipulates for a dismissal pursuant thereto, he exceeds his authority. (By the editor.) (p. 553.)

ATTORNEY—Compromise of Action—Repudiation by Client.—An attorney, without authority, compromised his client's cause of action after action was brought thereon, and stipulated for a dismissal upon the merits. Thereafter the client, through another attorney, brought a new action upon the same cause, and defendant pleaded in bar the compromise and settlement, to which plaintiff replied that the settlement was unauthorized, and fraudulently entered into by the attorney. Held, that the validity of the compromise and settlement, the stipulation evidencing the same not having been followed by judgment, was a proper issue in the case, and that the rule against collateral attack does not apply. (pp. 554, 555.)

ATTORNEY—Dismissal of Action by Client.—Plaintiff in an action may, without the consent of his attorney, dismiss his action by proceeding in the manner pointed out by section 4195, Revised Laws of 1905. (p. 555.)

NOTICES—Service on Attorney or Client.—Although the statute provides that all notices shall be served upon the attorney, not upon the party, the service of notice of the dismissal of an action by the plaintiff personally upon the defendant is not a nullity. (By the editor.) (p. 555.)

ATTORNEY—Notice of Limits on Authority.—Plaintiff dismissed the action referred to in the second paragraph hereof, but the settlement of the action as therein mentioned was made before the dismissal was completed. Held, that the rules of law applicable to principal and agent control the relation between attorney and client, and persons dealing with the attorney are bound to take notice of the extent of his authority, and of his lack of authority to compromise the action. (pp. 553, 554, 556.)

(Syllabi by the court except when stated to be by the editor.)

Knox & Faber, for the appellant.

Wilson Borst and J. G. Redding, for the respondent.

¹⁸⁴ BROWN, J. This action was brought to recover damages for an assault and battery alleged to have been willfully and wrongfully committed upon plaintiff by defendant. A verdict was returned for plaintiff for the sum of eighteen hundred and seventy-five dollars, and defendant appealed from an order denying his motion for a new trial.

The merits of plaintiff's cause of action are not involved on this appeal, as all questions presented have reference to rulings of the trial court respecting one of the principal defenses interposed. In addition to a general denial of all the allegations of the complaint, defendant specially pleaded the commencement of a former action for the same cause, and that on November 26, 1908, the cause of action was compromised and settled, and a stipulation entered into ¹⁸⁵ between the parties dismissing the action upon its merits. Plaintiff by reply alleged that the settlement was made and entered into by plaintiff's attorney without authority, and was fraudulent and collusive.

The facts with reference to this defense are as follows: There is no dispute about the commencement of the former action. It was brought by an attorney retained for the purpose, other than the plaintiff's present attorney. For some reason, not necessary to inquire into, plaintiff became dissatisfied with that attorney and his conduct of the litigation, and had determined to dispense with his further services. While there appears to have been no formal discharge of the attorney, he knew of the dissatisfaction of his client before the settlement of the action relied upon by defendant in bar of this action. Plaintiff had proceeded to Windom, in Cottonwood county, in November, 1908, for the purpose of attending, as he supposed, the trial of his action at the term of court then in session. Upon his arrival, his attorney informed him that his action would not come on for trial that term. Plaintiff expressed his dissatisfaction, and in an informal way stated to the attorney that he did not desire his services longer. He then employed his present counsel to conduct his case. On November 24, 1908, his new counsel prepared, and plaintiff properly signed, a dismissal of the former action, and filed the same with the clerk of court on November 26th. Formal written notice of the dismissal was not served upon the defendant until November 28th, when a copy thereof was delivered to him by the sheriff. Having filed the dismissal with the clerk, the new attorney brought the present action. There is evidence in the record to the effect that defendant's attorney was informed on November 24th of the purpose of plaintiff to dismiss the former action, and plaintiff's former attorney so understood the situation.

After the filing of the dismissal just mentioned with the clerk, but before the service of the same upon defendant,

plaintiff's former attorney and defendant's attorney had a conference, and, without consulting plaintiff, settled and compromised the action, defendant paying plaintiff's attorney the sum of two hundred dollars in full settlement of the cause of action. This settlement was evidenced by a written stipulation ¹⁸⁶ in the following language: "This cause having been settled by and between the parties hereto, it is stipulated and agreed that the same be and it is hereby dismissed on the merits, without costs or disbursements to either party"; and was signed by the attorneys. As already stated, plaintiff's former attorney knew that his client was not satisfied with his conduct of the case; but, on the theory that he had some rights of his own in the premises for the protection of his fees and compensation, he undertook to settle the action, and accepted and still retains the proceeds. Though his client was in town and near at hand, he did not consult or inform him of his purpose to settle the action, and he had no express authority to make the same. The court submitted to the jury the question whether the settlement was fraudulent, and their verdict for plaintiff answered the question in the affirmative.

Of the several questions presented by the record and discussed by counsel two only require consideration at our hands: (1) Whether an attorney has implied authority to compromise his client's cause of action; and (2) whether a compromise in the form of a stipulation, providing, in addition to the settlement, for a dismissal of the action upon its merits, though invalid, may be set aside in a subsequent action upon the same cause, or whether it should be attacked directly in the action in which it was made; in other words, whether the rule against collateral attack applies to such a settlement and stipulation.

1. There is no claim in the case at bar that plaintiff's former attorney had express authority to settle the action, and unless by his general retainer the law clothed him with that authority by implication, he did not possess it, and the settlement made by him was not binding upon his client, and not a bar to the present action. Section 2283 of Revised Laws of 1905 provides that an attorney may bind his client at any stage of the action or proceeding by an agreement made in open court, or in the presence of the clerk and entered in the minutes of the court, or by a writing signed by him. This has been construed to include all power and authority incident to the prosecution of an action or defense and the control of all proceedings therein. In *Bray v. Doheny*, 39 Minn. 355, 40 N. W. 262, a stipulation by ¹⁸⁷ the attorney, without the consent of his client, dismissing the demand for a second trial of an ejectment case, was sustained. It has been construed as authorizing the waiver of

specific defenses (*Bingham v. Board of Supervisors of Winona County*, 6 Minn. 82 [136]), as authorizing the dismissal of an action (*Wells v. Penfield*, 70 Minn. 76, 72 N. W. 816; *Rogers v. Greenwood*, 14 Minn. 256 [333]), and to sustain a stipulation that the action shall abide the event of another action involving the same issues (*Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507). It has been construed to apply, also, to various other acts or stipulations of an attorney without the consent of his client, subject in all cases to the power of the court to set the same aside, if fraudulent or improvidently made.

But no case in this court sustains the contention that an attorney has implied authority to compromise his client's cause of action. The converse of the proposition would seem to be supported by *Davis v. Severance*, 49 Minn. 528, 52 N. W. 140, and *Burgraf v. Byrnes*, 94 Minn. 418, 103 N. W. 215. The case of *Bates v. Bates*, 66 Minn. 131, 60 N. W. 845, sustains the authority in case of an emergency, and where it appears that there was no opportunity for consultation with the client, and the protection of his interests demanded immediate action. And though the language of Chief Justice Gilfillan in the case of *Bray v. Doheny*, 35 Minn. 355, 40 N. W. 262, is broad and comprehensive, and construes the statute to vest an attorney with general authority in the action in which he is engaged, manifestly this must be limited, in the light of the rules and principles of the law of principal and agent, which apply to the relation of attorney and client, to such steps and proceedings in the action as are usual, necessary, or proper in the conduct or prosecution of the same; for the authorities are uniform that the acts of an attorney, outside and beyond the ordinary course of procedure in the action, are not binding upon his client.

The general trend of authority in other states, where the question has been presented and passed upon, sustains the proposition that an attorney has not by implication the right to compromise his client's cause of action, and, though the courts are not in full ¹⁸⁸ harmony upon the subject, the great preponderance of the adjudicated cases agree in so declaring the law: 7 *Current Law*, 342; *Weeks' Attorneys*, 471; 4 *Cyc.* 945, and cases cited; *Holker v. Parker*, 7 *Cranch*, 436, 3 *L. ed.* 396; *Lewis v. Gamage*, 1 *Pick. (Mass.)* 347; *Lewis v. Duane*, 141 *N. Y.* 302, 36 *N. E.* 322; *Barrett v. Third Avenue R. Co.*, 45 *N. Y.* 628; *Mandeville v. Reynolds*, 68 *N. Y.* 528; *Dickerson v. Hodges*, 43 *N. J. Eq.* 45, 10 *Atl.* 111; *Crotty v. Eagle's Admr.*, 35 *W. Va.* 143, 13 *S. E.* 59; *Union N. L. Ins. Co. v. Buchanan*, 100 *Ind.* 63; *Repp v. Wiles*, 3 *Ind. App.* 167, 29 *N. E.* 441; *McClintock v. Helberg*, 168 *Ill.* 384, 48 *N. E.* 145; *Trope v. Kerns*, 83 *Cal.* 553, 23 *Pac.* 691; *Eaton v. Knowles*, 61 *Mich.* 625, 28 *N. W.* 740;

Kelly v. Wright, 65 Wis. 236, 26 N. W. 610; Martin v. Capital Ins. Co., 85 Iowa, 643, 52 N. W. 534.

The rules and principles of the law of principal and agent control the relation of attorney and client (4 Cyc. 932), and though the authority of the attorney may in many respects exceed that of an ordinary agent, yet his employment to conduct litigation ought not, as a matter of legal inference, wholly to divest the client of the control of his case. The attorney's authority, on principle as well as on authority, must be limited to the management of the litigation and the control of all proceedings therein; but this does not necessarily include the right to compromise the suit, and there is no reason why it should. It is not a usual, necessary, or ordinary step in the action, but rather one of an opposite nature, a surrendering of the right to further proceed with the action; and before this step is taken the client should not only be consulted, but his express authority received.

And, in harmony with the great majority of the courts of this country, we affirm the rule that an attorney has no implied authority to compromise his client's cause of action, except when confronted with an emergency, illustrated by the case of Bates v. Bates, 66 Minn. 131, 60 N. W. 845. This is a well-defined exception to the rule stated, and extends to an attorney authority to compromise his client's cause when prompt action is necessary, and there is no opportunity for consultation with him, and delay would jeopardize his rights. But the exception requires the settlement to be made, not for the protection of asserted ¹⁸⁹ rights of the attorney to compensation, but for the protection of the best interests of the client: Union M. L. Ins. Co. v. Buchanan, 100 Ind. 63, and Holker v. Parker, 7 Cranch, 436, 3 L. ed. 396.

The exception, however, has no application to the case at bar. There is here no claim of an emergency, or that the client was inaccessible at the time of the settlement, or that his interests demanded immediate attention. On the contrary, he was within a stone's throw of his attorney's office when the settlement was made, and it was made, not in his interests, but to protect the rights of the attorney. There was clearly no occasion for hurried action.

While it is true that we have held in the cases already cited that an attorney may bind his client by a stipulation dismissing an action, or waiving a particular defense, it is clear that where he goes beyond a dismissal, and attempts, without consultation with his client, to compromise his action, he exceeds the authority possessed by him. Those cases are clearly distinguishable. The stipulation for a dismissal of an action, or the waiver of a particular defense, represents, *prima facie*, at least, the professional judgment or opinion of the attorney that the client has in fact no cause of action or

defense, an opinion he has the right to form and act upon without consulting his client. The stipulation for a dismissal in such a case is a usual proceeding in the action, within the rule announced in *Bray v. Doheny*, 35 Minn. 355, 40 N. W. 262; but a dismissal pursuant to a compromise is clearly not of that character.

2. This conclusion renders unnecessary the consideration of several assignments of error challenging rulings of the court upon the admission and exclusion of evidence and certain of its instructions to the jury. The only question submitted to the jury upon this branch of the case was whether the settlement and compromise was fraudulent, and the evidence complained of as having been erroneously admitted had reference solely to that issue, which, in view of the conclusion that the attorney had no authority to compromise the action, becomes wholly immaterial. The same suggestion disposes of the assignments challenging the instructions of the court.

3. We come, then, to the question whether the stipulation of ¹⁹⁰ settlement and dismissal may be set aside in this action, or whether proceedings in the former action should have been taken for that purpose. Counsel for defendant presented this feature of the case with much earnestness, and we have given the question serious and careful consideration, with the result that we are unable to concur in his view of the rules of law pertinent to the subject. The doctrine against collateral attack applies almost exclusively to judgments of duly constituted courts, or the proceedings and decisions of judicial or quasi-judicial officers in matters within their jurisdiction. It has no application to contracts, or to stipulations or agreements in actions or proceedings not followed by judicial confirmation. All private writings, contracts and agreements are open to attack for fraud, or for want of authority in an agent to enter into the same, whenever or wherever rights are asserted thereunder. It is unnecessary to assail them by direct proceeding.

The stipulation in question was a compromise of the action, a contract not followed by judgment, and comes within the rule stated. It cannot be differentiated from an ordinary settlement and release before action is brought. In cases of that kind we have, in line with the authorities generally, uniformly held that the injured party may ignore the release, bring his action on the released cause, and, upon the coming in of an answer setting up the settlement and release, reply that it was obtained by fraud, or was otherwise unauthorized and not of binding force: *Christianson v. Chicago etc. Ry. Co.*, 61 Minn. 249, 63 N. W. 639, 67 Minn. 94, 69 N. W. 640; *Peterson v. Chicago etc. Ry. Co.*, 36 Minn. 399, 31 N. W. 515.

The stipulation, being founded upon a compromise of the action and a contract of release and discharge of defendant's

liability, was, within the rule, subject to attack in this action precisely as though no provision for a dismissal of the action had been included therein. If judgment had been formally entered, it is probable that direct proceeding to set it aside would have been necessary; but no such judgment was entered until the action was out of court on plaintiff's personal dismissal. We therefore hold that it was not necessary to attack the stipulation by motion or otherwise in the former action.

¹⁹¹ The authorities cited by defendant in support of the contention that the stipulation is of the same force and effect as a judgment do not sustain the position, and our research has brought to light no case in which the rule contended for has been applied to a stipulation upon which no judgment was entered.

It is urged by defendant in this connection that plaintiff's dismissal of the action was ineffectual, because not authorized by his attorney, and the further reason that notice thereof was served upon defendant, instead of his attorney. These contentions are not sound. An attorney has no exclusive control over litigation committed to his charge. Absolute control thereof rests with his client. Of course, an attorney may do many things in the course of the action without consulting, and which bind, his client; but the latter's directions and orders, when given, are supreme. Any other rule would elevate the agent above the principal, and in fact reverse the relation between them, the agent becoming the principal, and the principal the agent. So that it is clear that plaintiff was not required to obtain the consent of his attorney before dismissing the action. This view is sustained by the decision in *Anderson v. Itasca Lumber Co.*, 86 Minn. 480, 91 N. W. 12, 291, where it was expressly held that a plaintiff might, without consultation with his attorney, dismiss his action. The dismissal there upheld was substantially like that in the case at bar.

The further point that the notice of dismissal should have been served upon defendant's attorney, and, not having been so served, was a nullity, is not well taken. Though our statutes provide that all notices shall be served upon the attorney, and not upon the party, that provision has reference more particularly to notices of motion and other proceedings served during the pendency of the action, and does not exclude the right of the plaintiff personally to serve a notice of the dismissal of the action upon the defendant, instead of defendant's attorney. At any rate, such service was not a nullity. The notice was served upon defendant in November, 1908, and long before the entry of judgment under the stipulation between the attorneys the clerk had noted the dismissal upon his records in the ¹⁹² manner required by statute, and the judgment caused to be entered by defendant was unauthor-

ized, and a nullity upon the face of the record. There was no action pending at that time. The court, therefore, did not err in excluding the judgment when offered in evidence: 1 Black on Judgments, 278.

Though the former action was not dismissed in fact until after the commencement of the present action, its subsequent dismissal and proof thereof were proper: Page v. Mitchell, 37 Minn. 368, 34 N. W. 896. The real issue in this case did not so much involve the dismissal of the action as it did the alleged fact that it had been compromised and settled, and that was the principal issue litigated on the trial. That the action was in fact dismissed there can be no question. While plaintiff's dismissal did not take effect until after the alleged settlement, defendant was chargeable with notice of the want of authority in plaintiff's counsel to enter into the same, and cannot now be heard to say that he settled and compromised the action with the attorney in good faith and before notice that plaintiff had dismissed the same: 4 Current Law, 315.

This covers all questions requiring special mention. For the reasons stated, the validity of the settlement and compromise was a proper issue in the case, and, though the court submitted the same to the jury upon the question of fraud and collusion, a verdict that it was unauthorized as a matter of law could properly have been directed, and it is not important whether there were or were not errors in the admission of evidence or in the submission of the question to the jury on the issue of fraud.

The rights of the former attorney are not involved in the case, and the suggestion that he should have an opportunity to be heard before setting aside the stipulation is without force. If the application to set aside had been made in the former action, he would not have been a necessary party. Whatever rights the attorney may have in the premises may be presented by him in proceedings for their protection. Nor is the question before us whether the former attorney was rightly discharged by plaintiff. That plaintiff had the right to dismiss him there can be no question. Of course, this could not be done to defraud the attorney. But, as already stated, his ¹⁹³ rights are in no way involved in the action. He asserts none, by intervention or otherwise, and defendant cannot urge them for him.

Order affirmed.

An Attorney has No Implied Power to Compromise a case which he has been employed to conduct: See the note to Tobler v. Nevitt, 132 Am. St. Rep. 163-168.

A Plaintiff Ordinarily may Dismiss His Suit at pleasure, without the intervention of his attorney: Tompkins v. Railroad, 110 Tenn. 157, 100 Am. St. Rep. 795; Boogren v. St. Paul City Ry. Co., 96 Minn. 51, 114 Am. St. Rep. 691; note to Cameron v. Boeger, 93 Am. St. Rep. 172.

STATE v. ROSENFELD.

[111 Minn. 301, 126 N. W. 1068.]

DANCE-HOUSE—Offense of Permitting Attendance of Minors. The Minnesota statute makes it a misdemeanor for the keeper of dance-houses or concert saloons to permit any person under twenty-one years of age to be there, whether or not in fact such places are conducted in a manner injurious to morals. (By the editor.) (p. 558.)

A DANCE-HOUSE is a Place Maintained for Promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation. (By the editor.) (p. 558.)

DANCE-HOUSE.—A Complaint Charging the Offense, in the language of the statute, of permitting a person under twenty-one years of age to be or remain in a dance-house, is sufficient. (By the editor.) (p. 559.)

DANCE-HOUSE.—A Statute is Constitutional which makes it a misdemeanor for the keeper of a dance-house to permit any person under twenty-one years of age to be there. (By the editor.) (p. 559.)

DANCE-HOUSE.—A Statute Making It a Misdemeanor for the keeper of a dance-house to permit any person under twenty-one years of age to be there is not unconstitutional as class legislation because not fixing the age limit of females at eighteen years, the statutory limit of their minority. (p. 559.)

DANCE-HOUSE—Constitutional Law—Attendance of Minors. The defendants were convicted of the offense of permitting, contrary to Revised Laws of 1905, section 4936, a person under the age of twenty-one years to be and remain in a dance-house conducted by them. Held, that the statute is a proper exercise of the police power; that it is not class legislation; that a dance-house, as the term is used in the statute, is a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation; that the complaint states a cause of action; that the trial court did not err in its instructions to the jury; and that the verdict is sustained by the evidence. (pp. 558-560.)

DANCE-HOUSE—Offense of Permitting Attendance of Minors. The Minnesota statute, making it a misdemeanor for the keeper of a dance-house to permit any person under twenty-one years of age to be there, does not make knowledge on the part of the person accused an essential element of the offense. (p. 560.)

(Syllabi by the court except when stated to be by the editor.)

Geo. W. Caldwell, for the appellants.

Frank Healy and John A. Dahl, for the state.

301 START, C. J. The defendants were charged by complaint in the municipal court of the city of Minneapolis with the offense of permitting, on March 20, 1909, a person under the age of twenty-one years to be and to remain in a dance-house owned and managed by them. The prosecution was based upon Revised Laws of 1905, section 4936, which is as follows: "Whoever permits any person under the age of twenty-one years to be or remain in any dance-house, concert saloon, place where intoxicating liquors are sold or given away, or in any place of entertainment injurious to the morals,

owned, kept or managed by him ³⁰² in whole or in part, . . . shall be guilty of a misdemeanor."

There was a trial by jury, and a verdict of guilty against each of the defendants, and they appealed from an order denying their motion for a new trial.

1. The first contention of the appellants is that the complaint does not charge a public offense. The here material allegations of the complaint are these: On March 20, 1909, within the corporate limits of the city of Minneapolis the defendants did unlawfully permit Marie O'Connors to be and to remain in the premises known as No. 401 Washington Avenue South, then being a dance-hall owned, kept, and managed by them, and Marie O'Connors then being a person under the age of twenty-one years, to wit, of the age of sixteen years, contrary to the form of the statute in such case made and provided.

It is urged that the complaint does not in any way describe the character of the dance-house, nor does it allege that it was a place injurious to morals; hence it does not charge a public offense, for the reason that the statute applies only to dance-houses in which intoxicating liquors are sold and to those which are injurious to morals. The statute cannot be so construed, for its express language makes it an offense to permit persons under the age of twenty-one years to be or remain in any one of the four specified places, namely, a dance-house, a concert saloon, a place where intoxicating liquors are sold or given away, and any place of entertainment injurious to morals. If the offense be for permitting a minor to remain in a place other than a dance-house or concert saloon, it is clear that the complaint must charge, either that intoxicating liquors were sold or given away at such place, or that the place was one injurious to morals. But it is clear from the language of the statute that dance-houses and concert saloons are within its prohibition, whether or not in fact they are conducted in a manner injurious to morals.

It is evident that the legislature, in enacting the statute, was satisfied that the tendency of dance-houses and concert saloons as ordinarily conducted was the corruption of youth, and in the exercise of the police power of the state it decided that, without reference ³⁰³ to the manner in which they might be conducted, young persons should not be permitted to be or remain therein. It is true, as claimed by defendants' counsel in this connection, that the statute does not define a dance-house; but in the absence of such a definition the term must be construed in accordance with its ordinary usage. So construing it, a dance-house is a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation.

The gist of the offense as defined by the statute is the permitting of persons under twenty-one years of age to be or

remain in a dance-house. This is a sufficient definition of the offense. The complaint charges the offense in the language of the statute, and thereby sets forth all the essential elements necessary to constitute the offense; hence the complaint states a cause of action if the statute is a valid one: *State v. Abrisch*, 41 Minn. 41, 42 N. W. 543; *State v. Howard*, 66 Minn. 309, 61 Am. St. Rep. 403, 68 N. W. 1096, 34 L. R. A. 178.

The defendants, however, contend that the statute is unconstitutional, because it is not a proper exercise of the police power. It clearly is. "Public dance-halls easily become centers of vice, are sometimes made the subject of special provisions, . . . [and] may be entirely forbidden": Freund on Police Power, sec. 250.

Again, it is urged that the statute is class legislation, and unconstitutional, in that it "discriminates between women who have arrived at the age of majority, under the age of twenty-one, and those over the age of twenty-one." The purpose of the statute is to protect the youth of the state from corrupting influences, and it was necessary for the legislature to fix an age limit. It was a matter of legislative discretion whether such limit should be the common-law limit of minority, and apply alike to the youth of both sexes or whether a distinction should be made of females by fixing the age limit of females at eighteen years, the statutory limit of minority of females. The fact that the legislature did not make such distinction affords no ground for inferring that the statute is an arbitrary exercise of the police power, or an improper classification, for it applies alike to all persons, male and female, under the age of twenty-one years. ³⁰⁴ It follows that the statute is constitutional, and that the complaint charges a public offense.

2. It is also contended that the evidence was not sufficient to sustain the verdict of guilty. There was evidence tending to show that public dances were conducted, at the place named in the complaint, by the defendants personally as proprietors and managers, for several months; that promiscuous crowds gathered at such dances, sometimes as many as two hundred; that the dances were open to all women, without admission fee or escort, and they came and went without inquiry or restraint during the hours for dancing, which were between 8:30 o'clock P. M. and midnight; that Marie O'Connors, the person named in the complaint, who was less than seventeen years of age, attended the dances regularly for some three months, to the personal knowledge of both defendants, and usually remained until closing time; that she was present at the dance on the evening named in the complaint, to the personal knowledge of the defendant Brooks, but it does not appear from the evidence that the defendant Rosenfield was present at the dance on this particular night;

that there were no restrictions as to who should be admitted to the dances, except the men alone were charged an admission fee; and further, that the associations of this particular dance-house were vile. It is insisted that the evidence is wholly insufficient to warrant the conviction of the defendant Rosenfield, because he was not present at the dance on the night alleged in the complaint. He was, however, one of the proprietors and managers of the dance-house, and had been frequently in charge of the dances when Marie O'Connors was present. The evidence is sufficient to sustain the verdict as to each of the defendants.

3. The last alleged error to be considered is that the trial court erred in refusing certain requested instructions and in its charge as given. The defendants requested the court to give, with other similar requests, the following:

"In order that you may find both of the defendants guilty, it will be necessary that you find that both of them knew that the minor, Marie O'Connors, was present in the dance-hall on the night of March 20, 1909; that they were both present themselves, and permitted her to be or remain therein.

305 "In order that you may find either of the defendants guilty, it will be necessary for you to find that such guilty party knew, or ought to have known, from the appearance of [the witness] Marie O'Connors, that she was a minor.

"If you do not find that the defendants, or either of them, intended to violate the law, you cannot find them, or either of them, guilty."

These requests were properly refused, for it was not, under the evidence, necessary as a matter of law, in order to convict both defendants, that both should have been physically present and have known that Marie O'Connors was present at the dance on the night of March 20, 1909. The other two requests did not state the law of the case, for the statute does not make the knowledge of the defendants an essential element of the offense: *State v. Heck*, 23 Minn. 549; *State v. O'Connor*, 58 Minn. 193, 59 N. W. 999; *State v. Sodini*, 84 Minn. 444, 87 N. W. 1130; *State v. Edwards*, 94 Minn. 225, 102 N. W. 697, 69 L. R. A. 667; *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953.

The instructions given, to which exception was taken by the defendants, were not erroneous.

Order affirmed.

For Authorities Bearing upon the Principal Case, see *Gastenan v. Commonwealth*, 108 Ky. 473, 94 Am. St. Rep. 386; *State v. Nelson*, 10 Idaho, 522, 109 Am. St. Rep. 226; *Mossman v. City of Fort Collins*, 40 Colo. 270, 122 Am. St. Rep. 1060; *City of St. Louis v. Gloner*, 210 Mo. 502, 124 Am. St. Rep. 750; *Ex parte Morgan*, 57 Tex. Cr. 551, 136 Am. St. Rep. 996.

VAN VALKENBURG v. ALLEN.

[111 Minn. 333, 126 N. W. 1092.]

DEED—Sending to Bank for Delivery to Vendee.—Deeds were sent by the vendor in a contract for sale of land to a bank for delivery to the vendee on payment of a named sum. The vendee tendered a less amount, and offered to pay what balance should be found due to the vendor on an accounting. The bank was not named in the contract as a repository in escrow. It is held that the bank was merely an agent of the vendor, and that under these circumstances an action did not lie against it to compel the delivery of the deed. (pp. 561, 562.)

DEED.—An "Escrow" is a Deed Delivered to Some Third Person to be by him delivered to the grantee on the performance of some precedent condition by the grantee or another or the happening of some event. If the instrument remains in the dominion of the maker, it is not an escrow. To constitute an escrow the deed must be delivered to a third person, and not to the agent of the grantor. (p. 562.)

(Syllabi by the court.)

J. Van Valkenburg, pro se.

Ell Torrance, for the respondent Hennepin County Savings Bank.

³³⁴ JAGGARD, J. Plaintiff and appellant, the executor of one Lund, deceased, brought this action against the defendant and respondent Allen and a corporation hereinafter referred to as the bank. The complaint set forth in effect that in 1906 Lund and Allen executed a written contract for the sale of land by Allen to Lund; that during his life Lund paid twenty-seven thousand one hundred and eighty dollars on this contract; that Allen placed in escrow in possession of the bank, within the jurisdiction of the court, deeds to the said land, to be delivered on the payment of five thousand and forty-five dollars and two cents; that plaintiff tendered to said defendants the sum of fifteen hundred and thirteen dollars and fifty-eight cents in full payment of the deeds, after deducting pro rata for premises agreed to be withdrawn from the contract, and was willing to pay such other and further sum as on accounting should be found due. Plaintiff demanded judgment for an accounting, and for a decree directing the bank to deliver the conveyance to this plaintiff upon the receipt of the amount found to be due. The other allegations are not material here. On application of the plaintiff, the court restrained the bank from parting with the deeds of conveyance until the final determination of the action.

Defendant bank moved to dissolve the temporary injunction and to dismiss the action, on the grounds that the summons therein had not been served on defendant Allen,

a nonresident, who had not appeared in said action, and who had had no property within the jurisdiction of the court since the commencement of the action; that the complaint did not show that any judgment for money or damages could be entered against Allen; that the property in dispute was situated in North Dakota; that the deed sought to be delivered to plaintiff ran to grantees other than the plaintiff; that, if defendant delivered the deeds contrary to the terms authorized, it would be subject to an action for damages by Allen; and that an action was pending in the courts of North Dakota by plaintiff against Allen to enforce specific ³³⁵ performance of the contract. The court granted the motion, dissolved the injunction, and dismissed the action. This appeal was taken from that order.

The present controversy is within narrow limits. Plaintiff insists that neither Allen or anyone else had any right to impose terms, to be enforced by the depository to whom the deeds had been sent for collection, differing from the agreements of the parties in the contract for deed, and that if the attempt were made, the conditions thus prescribed did not supersede the original terms set forth in the contract. This specific proposition is sound enough: 11 Current Law, 1274. And see *Naylor v. Stene*, 96 Minn. 57, 104 N. W. 685. But it is not applicable to the case at bar. A brief inquiry into the nature of an escrow will demonstrate this.

"An escrow is a deed delivered to some third person, to be by him delivered to the grantee upon performance of some precedent condition by the grantee or another, or the happening of some event": *Duncan v. Pope*, 47 Ga. 445; 3 Words and Phrases, 2464. If the instrument remains under the dominion of the maker, it is not in escrow: *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679; *Rendlen v. Edwards*, 116 Mo. App. 390, 92 S. W. 731; *Devlin on Deeds*, secs. 282, 283, 324. The deed must be delivered "to a third person, and not to the grantee himself": 3 Words and Phrases, 2466. Nor "to the agent or attorney of the grantor, because the possession of the grantor's agent or attorney is the grantor's possession, and revocable by him: *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22; *Raymond v. Smith*, 5 Conn. 555. Nor to the agent or attorney of the grantee, for then it is equivalent to a delivery to the grantee himself: *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511"; *Foster, J.*, in *Day v. La Casse*, 85 Me. 242, 27 Atl. 124. The depository must be the agent of both parties: *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563.

The case did not involve an escrow in the technical sense. There was no delivery to a custodian in pursuance to an agreement of the parties to the transaction, either express or implied. The bank was not a party to the agreement, and was

in no wise agreed upon by the parties as the custodian. It was merely Allen's agent; its possession ³³⁶ was Allen's possession; the deed it received was under Allen's control and dominion. The principle to which defendant refers us does not apply: *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22; *Day v. La Casse*, 85 Me. 242, 27 Atl. 124; *Fitch v. Bunch*, 30 Cal. 208; *Miller v. Sears*, 91 Cal. 282, 25 Am. St. Rep. 176, 27 Pac. 589; *Shults v. Shults*, 159 Ill. 654, 50 Am. St. Rep. 188, 43 N. E. 800.

In this view of the case it is unnecessary to consider the further question raised by respondent.

Affirmed.

The Delivery of Deeds in Escrow is the subject of a note to *Wilkins v. Somerville*, 130 Am. St. Rep. 910.

O'BRIEN v. CURRY & WHYTE.

[111 Minn. 533, 127 N. W. 411.]

REPLEVIN—Nature of Action.—Replevin is an Action for the wrongful detention of possession, and the primary object is to recover the thing and not its value. (By the editor.) (p. 565.)

REPLEVIN.—A Redelivery Bond is a Substitute for the property only in those cases where a delivery of the property cannot be had on final judgment. (By the editor.) (p. 565.)

REPLEVIN.—The Rebonding of the Property, in Replevin actions, does not vest absolute title in the defendant, but he holds it subject to the final determination of the action, and a purchaser of the property from such rebonding defendant acquires no better title than the defendant had. *Katz v. Hlavac*, 88 Minn. 56, distinguished. (pp. 565, 536.)

(Syllabi by the court except when stated to be by the editor.)

Baldwin, Baldwin & Dancer, for the appellant.

McMahon & Rock, for the respondent.

⁵³⁴ LEWIS, J. This action was brought to recover the purchase price of certain cedar posts, alleged to have been sold to appellant according to the terms of a written contract, executed May 19, 1909. The answer admitted the execution of the contract and delivery of the posts, but justified refusal of payment upon the ground that the posts were cut from land which belonged to another party; that respondent was a trespasser in cutting and removing the same, and had not title thereto; that respondent knew he was a trespasser, and that an action in replevin had been commenced against him by the true owner; that he had represented to appellant that he had settled the replevin action and had a clear title to

the timber, which representations constituted the inducement for appellant to enter into the contract; that after the timber had been delivered to appellant, and after it had loaded and shipped the same to various points, the owner, one Lord, demanded payment therefor, and threatened to bring suit in case it was not made, and thereupon appellant paid him for the timber according to the contract price. Respondent replied by alleging that he had in good faith purchased the timber from a third party, who claimed to be the owner thereof, and that the cutting, removing, shipping and preparation of the posts for market was done with the knowledge and consent of those who subsequently claimed to be the owners. The reply also states that the stumpage was worth not to exceed two hundred dollars, and that the person with whom appellant made settlement did not become the owner of the land until after the timber was removed.

At the trial the following facts were conclusively established: In October, 1908, the land from which the timber was taken belonged to one Warner, who during that month gave an option to Mr. Lord for the purchase of the land. On February 15, 1909, Lord exercised his option and received a deed of the land from Warner. On February 16, 1909, Lord entered into a contract for the sale of the land to Stewart. At this time both Lord and Stewart knew that O'Brien was cutting and removing the timber from the premises. On March 5, 1909, Lord obtained an assignment from Warner of all claims arising out of respondent's trespass in cutting and removing the timber. On April 24, 1909, after all the posts had been delivered at ⁵³⁵ the railway siding, Lord commenced an action in replevin against respondent for possession of the posts. The sheriff took possession thereof, and respondent immediately executed and filed a redelivery bond, and the posts were redelivered to him. Issue was joined in the replevin action, and it stood for trial at the June, 1909, term of court. Appellant shipped the posts from the siding at some time between May 19th and the 1st of June. On June 1st appellant paid Lord about eight hundred and fifty dollars for the posts, and on June 2d Lord dismissed the replevin suit, or made an attempt to do so.

At the trial, when respondent's case was closed, the court, on authority of *Katz v. Hlavac*, 88 Minn. 56, 92 N. W. 506, instructed the jury to return a verdict for respondent for the full amount claimed to be due under the contract, upon the ground that title to the timber became vested in him at the time of the execution and filing of the replevin bond. The validity of that order is the question now before this court.

The learned trial court misapprehended the decision cited. In that case *Hlavac* had brought an action in replevin against *Katz* to recover possession of a stock of boots and shoes. The

usual bond was executed by Hlavac, and the sheriff took possession of the property; but Katz rebonded and retained possession of the goods, and then brought suit against Hlavac and his sureties to recover damages caused by the depreciation in the value of the property from the time it had been rebonded until final determination of the action. It was held that he could not recover, and the gist of the case is correctly stated in the closing part of the opinion, as follows: "Damages recoverable in actions of this kind are those that the successful party has suffered by reason of the wrongful detention of the property from him. If he have the possession and the right to control the property as his own, precisely as though no action had ever been brought against him, it is not very clear upon what he can predicate a claim for depreciation in its value against his opponent in the action, who is in no way responsible for it, being in no position and having no right to take any action in reference to the care of the property, or to preserve it from damage and injury. From this it necessarily follows that, after a redelivery of the property involved in claim and ⁵³⁶ delivery proceedings to the defendant, he is not entitled, on being successful in the action, to recover on plaintiff's bond any damage to or depreciation in the value of the property subsequent to that time."

From an examination of that case, it is apparent that the question of title was not involved. True, there are some unguarded statements in the syllabus, and in the body of the opinion, which, upon a cursory examination, without reference to the real issue before the court, might convey the impression that the mere act of rebonding the property by the defendant in a replevin action had the effect of vesting absolute title in the defendant. The general statement in the syllabus and opinion that the bond is a substitute for the property, and that the party rebonding may treat the property as his own, and sell and dispose of it, must be understood to have reference to a cause of action which the defendant so rebonding might have against the plaintiff for damages to the property while in his possession. While not so expressly stated, it is necessarily implied that whatever authority the rebonding defendant had to sell was subject to the final determination of the action. Replevin, under our statute, is an action for the wrongful detention of possession, and the primary object is to recover the thing, and not its value. The redelivery bond is a substitute for the property only in those cases where a delivery of the property cannot be had on final judgment. It then stands in place of the property, and as security for the payment of the value thereof to plaintiff. The provisions of the statute have been strictly construed, as noticed in *Katz v. Hlavac*, 88 Minn. 56, 92 N. W. 506. It follows that one who purchases from a defendant who has rebonded buys subject

to the determination of the replevin action, and gets no better title than the seller had.

For these reasons the order appealed from must be reversed. Several very interesting questions raised by the pleadings are referred to in the memorandum of the trial court, and were argued to same extent at the hearing; but we do not feel called upon at this time to consider them, since they were not involved in the decision appealed from.

Reversed and new trial granted.

When Replevin is Maintainable is the subject of a note to *Sinnott v. Feiock*, 80 Am. St. Rep. 741.

One Who Gives a Forthcoming Bond in an Action of Claim and Delivery is estopped from denying that the property was in his possession at the commencement of the action: *Benesch v. Wagner*, 12 Colo. 534, 13 Am. St. Rep. 254. An alternative judgment against the defendant in replevin does not give him an election to pay the assessed value of the property, and retain it as his own, against the will of the plaintiff, although he has given a bond for the performance of the judgment, and has had the property restored to him by the sheriff: *Swantz v. Pillow*, 50 Ark. 300, 7 Am. St. Rep. 98.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

CHAMBERS v. CHAMBERS.

[227 Mo. 262, 127 S. W. 86.]

APPEAL—Review of Finding.—In a Suit in Equity to cancel a deed, the finding of the chancellor that the deed was never delivered is not equivalent to a verdict of a jury in a law case, and is not binding on the appellate court. (p. 570.)

ADVERSE POSSESSION—Limitations Against Infant Grantee. Where the grantee in a deed which the grantor seeks to have canceled was an infant when it was executed, the grantor cannot claim title by operation of the statute of limitations during the grantee's minority. (p. 571.)

APPEAL—Abandonment of Defense in Open Court.—Where a father sues to cancel his deed to his daughter, a count in her answer, in which by way of cross-petition she brings ejectment, may be abandoned and waived by leave of court in open court on appeal, on the ground that she does not want possession during his lifetime. (p. 571.)

DEEDS — Necessity of Delivery.—Delivery is the Life of a deed. Without delivery an instrument purporting to convey real estate, "though it be never so well sealed and written," and acknowledged under the due guard of the formalities of the law, yet it is a mere dead scroll and hath no life in it. (p. 577.)

DEEDS.—The Delivery of a Deed is Consummated when the grantor by act, word, or both parts with his domination over the instrument with the intention to make it operative, and it is accepted by the grantee. Such intent, however elusive and difficult to seek out, is of the essence of delivery. (p. 577.)

DEEDS.—Whether There has Been a Delivery of a Deed is usually a mixed question of law and fact, and is to be determined by all the facts and circumstances of the concrete case. Delivery is not controlled by any fixed and arbitrary rule, but must be worked out with reference to all the facts in judgment. (p. 578.)

DEEDS — Delivery — Personnel of Parties.—In determining whether there has been a delivery of a deed, the personnel of the parties is of some weight. Facts tending to show delivery to an infant child may not be held so conclusive as if the grantee were an adult. (p. 578.)

DEED—Delivery—Secret Intention of Grantor.—In a suit by the grantor to cancel a voluntary deed to his child on the ground that it was not delivered or accepted, he may testify to a secret intention in making the conveyance, if it is not so weighed down by his acts as to mislead other persons to their injury and thereby estop him. But such testimony, many years after the event, only goes for what it is worth. It may inform but cannot bind a court of conscience. It is to be weighed and interpreted in the light of his admissions and declarations off the stand, and in the light of what he did and his whole course of conduct in relation to the subject matter. (p. 578.)

DEEDS.—The Effect of the Registry Act is to make the record of a deed take the place of the common-law ceremony of livery of seisin. It is a solemn proclamation to the world, of which the world must take notice, that there has been a transfer of title from the grantor to the grantee, precisely as in olden times there was a symbolical public transfer by delivery of a twig, a clod or a key. (p. 578.)

DEEDS—Delivery.—The Record of a Deed by the grantor is presumptive evidence of delivery. (p. 579.)

DEEDS—Delivery.—The Record of a Deed by the Grantor is Evidence of a most cogent character tending to show delivery. (p. 579.)

DEEDS—Delivery.—Acceptance by the Grantee is an essential element of delivery, but acceptance will be presumed if the grant is beneficial. (p. 579.)

DEEDS—Delivery—Acceptance by Infant Grantee.—In case the grantee in a deed is the infant child of the grantor, and the grant is beneficial, courts are fond of resting on a presumptive acceptance to give operative effect to the conveyance. (p. 579.)

DEED — Evidence of Delivery in a Case of Grant to Child.—Where a father records a deed to his infant child, and the grant is beneficial, the grantor has the burden of rebutting the presumption of delivery in his suit in equity to cancel the deed; and the evidence must not be loose or inconclusive, but clear and convincing. (p. 579.)

EVIDENCE. — Statements Against Interest are presumptively true. (p. 580.)

FRAUDULENT CONVEYANCE—Relief to Grantor.—Courts of Equity are chary of reaching out a helping hand to litigants who voluntarily put themselves in a predicament by a voluntary conveyance to hinder, delay or defraud creditors. (p. 580.)

FRAUDULENT CONVEYANCE—Delivery of Deed.—A Bad Intent on the part of a grantor does not take the place of delivery. Although he intends a fraud, yet unless he delivers the deed, it remains inoperative. But if he starts out to permit a fraud, and nothing is in the way to hinder the working of his will, he is likely to consummate the act by delivery. Where will and opportunity embrace, results are bred. (p. 580.)

DEED.—The Fact That No Consideration was Paid for a Deed from a father to his infant child is of no importance in his suit to cancel the deed. (p. 581.)

DEED.—The Consideration of a Deed is open to investigation. (p. 581.)

DEED.—The Clause in a Deed Acknowledging Payment of the purchase money is somewhat in the nature of a receipt, and is subject to parol explanation for some purposes. But such explanation, in the

absence of fraud or mistake of fact, should not be so pressed as to defeat the operative words of the instrument as a grant. (p. 581.)

Flansburg & Williams and Hall & Hall, for the appellant.

Hubbell Bros., for the respondent.

²⁶⁹ LAMM, P. J. Plaintiff claiming to own the west half of the southwest quarter of section 9, township 62, range 24, in Grundy county, sues to cancel his deed conveying the same to Lillian, his daughter, and to remove the cloud on his title arising from its record.

In one view of it the suit is under section 650 to determine title, but there are allegations involving equity jurisdiction and equitable relief is asked. The deed bore date July 28, 1891, and was recorded promptly in the office of the recorder of deeds of said county. The grounds in the petition on which relief is predicated are that it was neither delivered nor accepted; that it (quoting) "was signed and acknowledged and recorded only for the prospective purpose of putting ²⁷⁰ the plaintiff in the position to temporarily provide for his family, and it never at any time became expedient for the plaintiff or anyone else to make use of said deed for any purpose and no exigency for which said deed was signed and acknowledged had ever arisen"; and that (quoting) "said deed, so signed and acknowledged, was wholly without consideration and totally ineffective as a conveyance of title and is void, and was signed and acknowledged and recorded without the knowledge of defendant, and without any agreement or contract between any parties with respect to signing, acknowledging or recording of said deed."

The petition also counts on adverse possession under a claim of ownership as against defendant for more than ten years.

The answer is in two counts. The second is a cross-action in ejectment with conventional averments. The first states a defense, in substance, that the deed was executed and recorded by plaintiff to make provision for defendant, at the time an infant of tender years, and conveyed an absolute and unconditional title.

The reply averred, by inference at least, that at the time of making the deed, plaintiff through mental derangement was incapable of transacting ordinary business. On motion this allegation was struck out. Other allegations in the reply are that his wife had died some time before, that his dwelling-house had been consumed by fire, that he had a family of children of which defendant was the youngest, that house-keeping was abandoned and a return to Illinois undertaken as a result of this combination of misfortunes. Plaintiff puts himself on that journey and while en route what hap-

pened is described in the replication as follows: "Anxiety for the welfare of his family, and especially for the welfare of this defendant, so oppressed plaintiff that he decided to so arrange his affairs that he could promptly and effectively protect ²⁷¹ and provide for defendant, should his own life be endangered by the condition of his health or accident of any kind. Plaintiff accordingly signed, acknowledged and caused to be recorded the deed in question, with the intention, understanding and belief that the instrument would become effective as a conveyance when, and only when, he had delivered it or caused it to be delivered to defendant or to someone for her. Plaintiff did not intend for any delivery to take place, or for said deed to be delivered to defendant, unless the aforesaid contingency or emergency should arise in such a way as to make it expedient for him to make such disposition of his property. No such emergency or contingency ever arose and no delivery of the said deed was ever made to the defendant, or to anyone for her. From the date of said deed until now plaintiff has continuously, notoriously and adversely occupied said land, claiming it as his own, paying taxes thereon, making improvements thereon, and taking rents and profits thereof for his own exclusive use and benefit."

On hearing, the chancellor took much time to consider, presently entering a decree for plaintiff on the theory of no delivery of the deed. From that decree defendant appeals.

1. Certain subordinate questions will be disposed of at the outset to clear the way for the main controversy.

(a) It is argued here by plaintiff's counsel (as we gather it) that it was their intention to ask formal declarations of law below, but that the court throughout the trial so satisfactorily ruled as to indicate a correct understanding of the law of the case; therefore, no such declarations were asked. And that, as the court found the facts relating to delivery of the deed against defendant, such finding is equivalent to a verdict ²⁷² of a jury in a law case on the facts, and therefore binding on the appellate court.

But, if we outline the contention fairly, learned counsel are in error in their premise. This is not a law case. It is clearly in equity, and counsel say so. In their brief is this: "The ground on which equity jurisdiction is invoked is that the deed, being on record, clouds the title of the plaintiff." In that view of it, instructions had no place in the case and on appeal the evidence comes here for our consideration as a court of conscience. True, we may defer to the trial court in weighing and applying that evidence, but we are not bound by his view of it, nor, though his finding of facts is persuasive and advisory, are we bound by such finding. In this regard

the rule in equity differs essentially from that applicable to law cases on appeal.

(b) One of plaintiff's grounds for relief is that he has title by grace of the statute of limitations; but no facts warrant the application of that rule of written law. Defendant, at the time the deed was made and recorded (1891), was a little girl six or seven years old. At the time of bringing the suit (1905) the statute had not run against her, even if we should conclude there was evidence (on which we say nothing) tending to show it ever began to run through an adverse possession and claim of right in plaintiff. That feature of the case is therefore put aside.

(c) Defendant, in the second count of her answer, by way of a cross-petition, brought ejectment. As we read her testimony, she repudiates such form of relief. Supplementing that repudiation her learned counsel, ore tenus and by brief, plant themselves on the same platform. In effect they disavow any complaint of the disposition below of the issue raised by the court in ejectment. They proclaim at this bar that their client does not want possession of the land in the lifetime of her father. Surely they may make such abandonment and waiver in open court by leave of the ²⁷³ court itself. And, as to leave of court, we say this: The atmosphere of the plane on which a court moves is not so frosty that no buds of sentiment may swell and bloom there. No court is so high and cold that it may not be generous; therefore, far be it from us to refuse judicial aid and judicial commendation to the gentle flow of filial affection, whether that flow be early or late, weak or strong. The premises considered, we deem the action in ejectment out of the case on appeal and practically at rest. In this view of it, if we finally conclude the decree should be reversed on the issue of delivery of the deed, it will not be necessary to remand the case for further determination of the cross-action brought by defendant. And in this view of the matter it will not be necessary for us to determine a novel question of practice, viz., whether a strictly legal action of ejectment may be grafted by defendant on the stock of plaintiff's suit in equity looking to the cancellation of a deed and the removal of a cloud upon plaintiff's title.

2. With the foregoing disposition of subordinate questions, we come to the main bone of contention, viz., the delivery of the deed. This issue seeks the facts.

The material undisputed facts follow: In 1887 Chambers, then fifty-four years old and twice married, came from Illinois and bought the land from one Proctor for twelve hundred dollars, assuming as part of the purchase price a mortgage for three hundred and fifty dollars due the Darrow Investment Company of Corning, Iowa. He gave Proctor a

second mortgage for two hundred and fifty dollars, paying down half the price. He brought to his new home his wife and six children, leaving a married daughter, Mrs. Briggs, in Illinois. In 1889 his wife died. A year or so later his dwelling-house burned. One of the daughters tarried in the neighborhood and taught school. Four of the children, including Lillian, the youngest, went to ²⁷⁴ Illinois to their sister, Mrs. Briggs, shortly after the house burned, and, as we grasp it, the children (except Lillian) were of an age to look after themselves—at least Lillian was the father's chief solicitude. Plaintiff and one son remained in Missouri and rebuilt the house. In 1890 while stacking wheat he suffered a sunstroke, the evil effects thereof continuing for several years at odd spells. Now and then it caused dizziness, headache and a falling sickness. In 1891 he made a wagon journey to Illinois, renting out the land. On the road there, while at Quincy, Illinois, he went to a notary and had him write a plain and unconditional warranty deed conveying the land to Lillian. This deed, expressing a consideration of two thousand dollars (none of which was paid), he signed, acknowledged and inclosed with a one dollar bill in an envelope addressed to the recorder of deeds of Grundy county, at Trenton, Missouri, without any letter of instructions, and sent it by mail on the 28th of July, 1891. On the next day it was received and put of record. It remained in the recorder's office. Defendant knew nothing about it at that time and never heard of it until in 1905, after she reached majority. It is not clear when the deed was taken from the recorder's office. Plaintiff produced it at the trial and presumably took it from the office at some time undisclosed.

Going back a little. After plaintiff sent the deed to the recorder with the record fee, he went on to Tazewell county, Illinois, where his daughter, Mrs. Briggs, resided and sojourned there the rise of a year, working in the neighborhood. In 1892 he returned to Grundy county. Shortly thereafter he was followed to Missouri by the Briggs people and they, during the year 1893, lived on the land. They brought back with them the defendant and one or two other children left in charge of Mrs. Briggs. We may as well say here that, while Lillian was in Illinois, plaintiff seems to have assisted in her support, but Mrs. Briggs assumed, with ²⁷⁵ plaintiff's consent, a relation in loco parentis to her, and the chief burden of her support, care and education from thenceforward devolved upon her. In 1893 plaintiff married a widow with six children who owned and lived upon a farm close by the locus in quo. It is plain that at this time the relation between plaintiff and the Briggses became strained. The merits of the quarrel are not here, and if they were they would obscure, rather than throw light on, the deciding issue.

Shortly thereafter they moved to Nebraska and took with them Lillian and her sister next older. Plaintiff continued to reside on the land from that time to this. He paid off the second mortgage to Proctor, but seems to have left it unreleased of record. He was a man brittle in temper, testy, a hard-working man, a farmer and by trade a plasterer and stone mason—a man of will power and action, somewhat illiterate, but the record is devoid of any evidence that he was not thoroughly competent to transact his own business as sense and discretion prompted him. At this point it is not amiss to state that the following statement in open court was made during the trial by plaintiff's counsel: "The plaintiff expressly denies of record any intimation that this deed was signed and acknowledged or anything else done when he was mentally irresponsible or mentally incapacitated, but expressly alleges that at the time this deed was signed and acknowledged and recorded the plaintiff was mentally sound and responsible."

Plaintiff paid the taxes on the land, improved it somewhat, and by renewals extended the mortgage of the Darrow Investment Company. At a certain time that investment company, in connection with an extension of their mortgage, discovered the title was in Lillian Chambers. As the papers in prior renewals had been signed alone by the plaintiff, this discovery provoked inquiry, and a correspondence sprang up between the investment company and plaintiff anent ²⁷⁶ the matter. The company took the position that Lillian Chambers should sign the renewal papers with plaintiff, and it naturally wanted to know how it came that plaintiff assumed to make former renewals without any apparent consent from her. She was at this time a sophomore in the University of Nebraska and in straitened circumstances. The vicissitudes of life had broken the fortune of the Briggs people, but Mrs. Briggs was doing what she could to give her sister an education and was assisted by another sister, Mrs. Ward. Spurred to it by the company, plaintiff, so he says, wrote defendant to make the title over to him. She testifies his letter was a request to sign the renewal papers. Be that one way or the other, she did neither in her present state of information. The information she presently obtained from other sources was to the effect that the record showed two mortgages unreleased, one for three hundred and fifty dollars and one for two hundred and fifty dollars, and that there was danger of foreclosure. It seems she then undertook on her own initiative to borrow enough money from the Darrow Investment Company to pay off both these mortgages and leave a margin of one hundred and fifty dollars or two hundred dollars for present needs. The papers relating to this loan were sent by the company to plaintiff's postoffice in Missouri, addressed

to defendant, and were taken from that office and opened by plaintiff. Based on the information thus received, viz., that his daughter had made application for this loan, plaintiff at once sued.

We now come to a set of facts in dispute, some of which are material and some not. For instance, something is made of the contention by respondent that defendant was "kidnaped" or taken from her father against his will in Missouri and carried to Nebraska and raised there a stranger to his hearth. A mass of testimony was introduced pro and con more or less bearing on that issue, but it throws no light on the issue of delivery; for if the deed was delivered, it was delivered before any misunderstanding arose between ²⁷⁷ plaintiff and the Briggs people in 1894. So the child was in no wise to blame in the controversy. She naturally turned to her sister as a second mother and "clave unto her," as Ruth to Naomi. Especially so when to remain in Missouri was but to share her father's love with a family of six stepchildren alien to her blood. But if she be held derelict in going and remaining with her sister against her father's protest, yet any change in his feelings resulting from such dereliction could in nowise avoid the operative force and effect of a deed once delivered. Therefore, we put this phase of the case away from us.

As bearing on the delivery of the deed a mass of evidence, showing the acts, words and conduct of the plaintiff, was introduced to elucidate and establish plaintiff's intent at the time he made and recorded the conveyance. There was evidence that about thirteen years before the institution of the suit plaintiff told his daughter, Mrs. Ward, in substance, that the place was to go to Lillian at his death and that he asked her, Mrs. Ward, to say nothing about it. Mrs. Ward so wrote to defendant in 1905, but on being introduced as a witness on behalf of plaintiff she undertook to explain away that statement, and testified that she knew nothing about the deed until she heard of it through her brother Andrew, about a year before the trial. Andrew testified he told Mrs. Ward about that time that his father about a year before first told him the place was in Lillian's name but that the deed "was no account." The plaintiff testified he told no one but his son, Andrew, and had kept it to himself because he considered the deed "of no account." Mrs. Briggs testified she had heard her father say at different times that "what he had should go to Lillian," and this was so early as the year he returned from Missouri to Illinois and so late as three years ago; that "Lillian would get what he had." Mr. Briggs testified that when plaintiff was living with him he heard him ²⁷⁸ say that the particular property in controversy "should go to Lillian"; that it "should be hers," and this was said so many

as twelve years ago in Illinois and in Missouri. In none of the conversations with Mr. and Mrs. Briggs did he use the word "deed." At a certain time in 1896 plaintiff insured the house on the land in a local mutual farmers' insurance company. Some two years later a dispute arose between the secretary of the company, Mr. Frey, and plaintiff, in regard to an assessment to pay losses. Plaintiff seemed to think there had been a double assessment. It came to the ears of the secretary that plaintiff was telling his neighbors the farm was not his and they could collect nothing on the assessment. Mr. Frey, on the stand, said he taxed plaintiff with making this statement, and was informed by him "that the property had been deeded to the children." Plaintiff said to him that it was "in the children's name and he didn't think the insurance was worth much." It seems the insurance company treated this information lightly. It afterward collected the assessment and held onto the insurance under the theory that he could insure the property in his own name if the children were minors, but if they were adults, the insurance would be void. One Brokaw, a very fair witness and friendly to plaintiff, testified that plaintiff told him he "had made a deed to one of the girls." "I made a deed of my farm to my girl." He told this at witness' blacksmith-shop when they were talking about men making deeds or deeding away their places before they were done with them. At that time plaintiff owed Brokaw a blacksmithing bill and he said to plaintiff in a joking way, "Well, if you have deeded your farm away, what am I going to do?" And plaintiff replied: "Don't fret; you will get yours." To a witness, James Naples, who was living on his place, he said he had made a deed to his youngest daughter to the land. In complaining about a double ²⁷⁹ assessment of the insurance company he told Harry Hall, another witness, that he would not pay it and they could not make him, for he was not worth anything; that "he didn't own anything." He told Ira Smith, a neighbor, also a witness, that his "farm was not in his name," and "I have got nothing in my hands." Judge Burkeholder testified that Mrs. Ward told him in relation to the making of the deed that she always knew it from the time it was done and that her father told her about it—this in contradiction of the explanation made by Mrs. Ward on the witness-stand of the statement in her letter that she had known it for thirteen years. Mrs. Clemens, one of plaintiff's daughters, testified that she never had heard the deed mentioned by her father.

A correspondence between plaintiff and the Darrow Investment Company has been referred to and is of much significance. In that correspondence the investment company spoke of the fact that plaintiff had been signing the extension

agreements after he had parted with his title, and suggested that he either procure a reconveyance from his daughter or obtain her signature to the extension agreement. In reply plaintiff intimated that he could get the money to take up the loan in the following September from a neighbor who had money to let out at five per cent, and that the investment company could have its money if it could wait till then, winding up his letter as follows (omitting bad spelling): "And if you think it will do any good for my daughter to sign the papers she will do it. She is in Lincoln, Nebraska, at the University finishing education. You seem 'to think that is something terrible because I have signed those papers. Now she was about three years old when they were made and I would like to know who had any better right to attend to her affairs than her father. Now I want to hear from you." Later in the correspondence he wrote a letter of date August 23, 1905, explanatory ²⁸⁰ of why the deed was made to his daughter Lillian. A clause in that letter reads as follows: "When I deeded this land away I was fifteen hundred dollars in debt and they were crowding so I had to do it to save my home. I have paid it all off but your claim, would have paid your claim before now if it had not been for high water." On the witness-stand plaintiff undertook to explain away the damaging admissions in that letter by saying that he was so troubled he did not know what he wrote. He then testified that he had owed fifteen hundred dollars, but had paid it down to seven hundred dollars before the deed was made; that no one was crowding him for any debt and that the statements in the letter as to his object in deeding the land away were false. This letter was written but three days before he brought his suit to set the deed aside.

We shall have something to say later on in relation to the fact that the guarded generality of the language in the petition, explaining why the deed was made, is well susceptible of a construction in harmony with the explanation given in the aforesaid letter, to wit, that it was made to save the land from creditors.

The reply was filed on the twenty-second day of January, 1906, when, for the first time, plaintiff hazards putting himself on record in a full and clear explanation of his reasons for making and recording the deed. When on the stand his testimony followed the lines of the reply, running in brief, so far as material to his lack of intent to deliver, as follows:

"I went to a notary public, he filled out the deed. . . . I ordered him to. . . . Well, he filled it out and I signed it and then after I got it I didn't know hardly what to do with it. I had no place to put it unless I carried it in my pocket. It was rather unhandy and I thought once I would tear it up. . . . Then I concluded I could send it back

to Trenton by mail to the recorder's office and leave it there until I should want ²⁸¹ to call for it." Having testified that he inclosed it with a dollar bill and sent it to the recorder by mail, he stated that his health was not good at that time on account of having been overheated and being afflicted with dizzy spells. The court permitted the witness to give in evidence his intent in doing what he did in making the deed and sending it to the recorder, and his answer was: "Well, I intended if I got sick and was likely to die, or something in that case, I would have it turned over to Lilly Chambers, and if not I didn't calculate it was any account if it wasn't turned over." Recurring to the matter, the witness said: "I didn't calculate it was any account the way it stood until the thing was turned over. . . . Well, if I got sick and was likely to die I thought then I would have it turned over to her, have someone get it and turn it over to her."

On cross-examination plaintiff admitted that he inclosed the dollar for the purpose of having the deed spread of record. On being inquired of further as to his intent in making the deed, he was asked this question: "I believe you said that the reason you made this deed to your daughter was in case you got sick and died she should have the property?" His reply was: "Well, provided I had the title turned over to her, not without it." He was then asked: "You wanted her to have it?" And replied: "Not unless I got sick and was about to die."

The record next disclosed the following questions and answers:

"Q. That was your purpose, it was for her protection, and you wanted to provide for her? A. Well, it would have been if I had got sick and was about to die at that time.

"Q. That was the reason also that you sent it over to Trenton and had it recorded? A. I didn't have any place to put it. I was amongst strangers ²⁸² there, pretty nigh. There was a fellow in Quincy I had raised and I was stopping with him."

Can the decree stand on such a record? In our opinion, no. This because:

Delivery is the life of a deed. Without delivery an instrument purporting to convey real estate, "though it be never so well sealed and written," and acknowledged under the due-guard of the formalities of the law, yet it is a mere dead scroll and hath no life in it. A delivery of a deed is consummated when the grantor by act, word or both, parts with his domination over the instrument with the intention to make it operative, and it is accepted by the grantee. Such intent, therefore, however elusive and difficult to seek out, is of the essence of delivery. Whether there is delivery is usually a mixed question of law and fact, and is to be determined by

all the facts and circumstances of the concrete case. Delivery is not controlled by any fixed and arbitrary rule, but must be worked out with reference to all the facts in judgment. In this regard the personnel of the parties is of some weight. For instance, facts tending to show delivery to an infant child might not be held so conclusive were the grantee an adult. The case at bar is free from the controlling effect of any conversation between the grantor and grantee or any controlling contract entering into it at the time, such as appear in many adjudicated cases. The case stands alone, then, on the writing, signing, acknowledging and recording of the deed as illuminated by the intention of the grantor at at the very time those acts sprang into existence. It may be conceded that when the intention, a state of mind, is to be determined as an issue in a case, the actor or doer knows more about the processes of his own mind than does anyone else. And so long as his secret intention is not so weighted down and drowned by his acts as to mislead other persons to their injury and thereby estop him, he may testify to ²⁸³ his secret intention when called as a witness. But when he does so testify, as here, at long range and many years after the event, to his secret intendment at the time, his testimony only goes for what it is worth. His saying that this intendment was this, that or other thing may inform, but cannot bind, a court of conscience. It is somewhat otherwise where the intendment of the party is clearly disclosed by spoken word at the very time of the act itself; for such spoken word becomes a verbal act, is part of the *res gestae* and molds and stamps the character of the act itself. Absent such declared intendment as part of the *res gestae*, the intention of the party must be ascertained as best the court can from all the evidence. The party's declarations of his intentions, made in his own interest, under the stress of a lawsuit on the witness-stand, must be brayed in the mortar of reason with the pestle of common sense—that is, they are to be weighed and interpreted in the light of his admissions and declarations off the stand, and in the light of what he did and his whole course of conduct in relation to the subject matter.

In this case it stands conceded that plaintiff made, acknowledged and recorded the deed. The presence of the recording fee in the letter with the deed was a silent but unmistakable request or sign to the recorder to spread the instrument of record, and was so intended. The effect of our registry act is to make the record of a deed take the place of the significant common-law ceremony of livery of seisin. It is a solemn proclamation to the world, of which the world must take notice, that there has been a transfer of title from the grantor to the grantee, precisely as in olden times there was a symbolical public transfer by delivery of a twig, a clod

or a key. Such was the early holding in this state: *Perry v. Price*, 1 Mo. 553. Says Chief Justice McGirk in that case: "But delivery of seisin is to be supplied by registry. . . . Here [referring ²⁸⁴ to the registry act] the object of livery of seisin is more largely and completely effected than could be done by livery itself. The law goes for substance," etc. To the same effect is *Burke v. Adams*, 80 Mo. 504, 50 Am. St. Rep. 510.

Accordingly, it is steadily held that the record of a deed by the grantor is presumptive evidence of the delivery. Indeed, it is evidence of a most cogent character tending to show delivery, for it is tantamount to a public proclamation by the grantor at a public place, intended for the world to act upon, that the grantor had in apt and due form transferred his title (and thereby his land) to another: *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997; *Whitaker v. Whitaker*, 175 Mo. 1, 74 S. W. 1029.

To consummate a delivery, acceptance by the grantee is also an essential element; but it is a rule of law that acceptance will be presumed where the grant is beneficial, and, in case the grantee is the infant child of the grantor and the grant is beneficial, courts of justice are fond of resting on a presumptive acceptance in order to give operative effect to the conveyance: *Hall v. Hall*, 107 Mo. 101, 17 S. W. 811; *Standiford v. Standiford*, 97 Mo. 231, 10 S. W. 836, 3 L. R. A. 299; *Tobin v. Bass*, 85 Mo. 645, 55 Am. Rep. 392; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 726, 16 S. W. 497.

So that in this case we have the presumptive delivery of an unconditional deed and the acceptance of that deed. Such presumption of delivery is rebuttable, and plaintiff could escape the operative effect of his conveyance in only one way, viz., by successfully carrying the burden of rebutting the presumption. We do not think he carried that burden successfully. The rule in this behalf in equity is that to divest title, declare a trust or cancel a deed, the testimony must not be loose or inconclusive, but so clear and convincing as to remove all reasonable doubts; and the same character of evidence is called for to overturn a deed, put ²⁸⁵ of record by the grantor, by showing nondelivery. Deeds of record are much too solemn and stable instruments to be blown away with a mere breath of testimony, or overturned by evidence falling short of the stringent character indicated: See authorities, *supra*; *Derry v. Fielder*, 216 Mo. 176, 115 S. W. 412.

To our minds the damaging admission of the letter written by plaintiff to the investment company just before the institution of this suit, to the effect that he deeded the property to his daughter because of pressure from creditors, is more believable than his theory on the witness-stand. The state-

ments in that letter were against his interests, and, since men usually do not make statements against their interests unless they are true, they are presumptively true. His admissions from time to time that he owned no real estate; that he deeded it to his child or children, which statements were in connection with discussing the payment of debts, or his ability to pay debts, comport better with that theory than with any other. So his admission of his concealment of the act of the conveyance from his other children and from the grantee herself does not well comport with the theory of no delivery. It should not be forgotten that at the time this deed was made the grantor had left the state of Missouri and debts behind. He was about to become a nonresident and may well have feared attachments. We draw an unfavorable inference on this score from the carefully guarded and general language of the petition. That language used by him three days after he wrote the letter to the Darrow Investment Company, in which he asserted boldly that he had made the conveyance to be effective for a certain purpose, to wit, to protect his land from his creditors, is susceptible of a veiled intimation of the same purpose. When six months later he gave his counsel the information upon which the reply was drafted, he found no trouble ²⁸⁶ to state in plain language another theory which he eventually vouched for on the witness-stand.

Courts of equity are chary of reaching out a helping hand to those litigants who voluntarily put themselves in the predicament of this plaintiff by a voluntary conveyance of land to hinder, delay or defraud creditors: *Creamer v. Bivert*, 214 Mo. 473, 113 S. W. 1118, and cases cited; *McNear v. Williamson*, 166 Mo. 358, 66 S. W. 160.

It is argued that a bad intent on plaintiff's part does not take the place of delivery. In other words, although grantor intends a fraud, yet unless he delivers the deed, as that term is defined in the law, it remains inoperative between the parties: *Koppelman v. Koppelman*, 94 Tex. 40, 57 S. W. 570. This is sound doctrine, but it goes hand-in-hand with another proposition ruled in the *Creamer* case (214 Mo. 473, 113 S. W. 1118), to wit, that when a party starts out on the road to commit a fraud and nothing is in the way to hinder working his will, he is likely to go on and consummate the act so within his desire and power—in this case, by delivering the deed. Where Will and Opportunity embrace results are bred.

But there is another view of the case, viz., that plaintiff, solicitous of his health, and the welfare of his youngest child, determined to convey the land to her. There is testimony that he intended to prefer her, that he deemed it his right as a parent to attend to her affairs, and that he recognized he had actually made such preference. We are asked to believe that plaintiff thought himself in the presence of impending death

and in its shadow hit upon the plan of making and recording a deed, intending no delivery but expecting to consummate a delivery if he should be stricken down. But we hesitate to adopt that theory. The record of the deed seems in the way. He was at Quincy, a stranger except to one man, but he was going to a neighborhood where he was well acquainted. In this fix, he puts and leaves the physical custody of ²⁸⁷ the deed with the recorder hundreds of miles away. How could he expect such a deed to be delivered if he was suddenly called to face death? If that was his object, he would naturally take the deed with him to his journey's end and have it at hand for use in such emergency. It is not clear to us either how he could have contemplated the rational act of delivery when stricken down by a falling sickness and temporarily unconscious.

The learned trial court took a long time to consider before deciding. That is evidence to our minds that the credibility of plaintiff as a witness was not the only factor in the decision. The tokens of that credibility were evanescent, and were exhibited at the trial. They consist in what the court saw and heard there—the many signs there shown of truthfulness, or the lack of it. Conclusions on that score by the chancellor would, therefore, spring spontaneously and instantaneously. So that, if the case broke on the point of credibility, it called for a decision *instanter*. We are inclined to the view that the chancellor was constrained to decide the case on the legal effect and probative force of all the testimony, much of which was by deposition. And we have come to the conclusion that he reached a wrong result.

Referring to the theory of the case just discussed, it is obvious that what has been said about delivery on other phases of the case applies to this theory as well.

There was no consideration paid for the land, but that amounts to nothing as between the parties to the deed in this form of action. The consideration of a deed is open to investigation. The clause acknowledging the payment of the purchase money is somewhat in the nature of a receipt, and is subject to parol explanation for some purposes, but such explanation (and in the absence of fraud or mistake of fact) should not be pressed so far and hard as to defeat the operative ²⁸⁸ words of the deed as a grant: *Bobb v. Bobb*, 89 Mo. 411, 4 S. W. 511; *Weiss v. Heitkamp*, 127 Mo. 23, 29 S. W. 709.

In any view of the matter we can take the deed was delivered and became operative as a conveyance. The decree, therefore, was for the wrong party. Accordingly, it is reversed and judgment is entered here for defendant.

All concur.

Delivery is Essential to the Operation of a Deed as a conveyance: Seibel v. Higham, 216 Mo. 120, 129 Am. St. Rep. 502; Napier v. Elliott, 146 Ala. 213, 119 Am. St. Rep. 17. As to what constitutes a delivery, see the note to Brown v. Westerfield, 53 Am. St. Rep. 537. Actual manual delivery is not always necessary: Fryer v. Fryer, 77 Neb. 298, 124 Am. St. Rep. 850; Atkins v. Atkins, 195 Mass. 124, 122 Am. St. Rep. 221.

The Recording of a Deed is Prima Facie Evidence of Its Delivery: Napier v. Elliott, 146 Ala. 213, 119 Am. St. Rep. 17, and cases cited in the cross-reference note thereto. The placing of a deed on record by the grantor, with intent and for the purpose of passing title to the grantee, renders evidence of the actual manual delivery and formal acceptance unnecessary: Fryer v. Fryer, 77 Neb. 298, 124 Am. St. Rep. 850. As to the effect of a deed recorded without the grantee's knowledge, see Cravens v. Rossiter, 116 Mo. 338, 38 Am. St. Rep. 606; Weber v. Christen, 121 Ill. 91, 2 Am. St. Rep. 68.

The Acceptance of a Deed by the Grantee is essential to the passage of title: Ames v. Ames, 80 Ark. 8, 117 Am. St. Rep. 68; Brady v. Huber, 197 Ill. 291, 90 Am. St. Rep. 161. But when the grantee is an infant, the law presumes assent on his part to a beneficial conveyance, and knowledge thereof and of its delivery are not essential: Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 326.

The Execution by a Parent and the Placing on Record of a voluntary conveyance to one not sui juris, although possibly it would not be effectual as a delivery and acceptance between adults, is deemed to evince an unmistakable intention on the part of the grantor to give the deed effect, and to pass the title to the grantee. The assent of the latter, if nothing further appeals, is presumed from the beneficial character of the transaction: Colee v. Colee, 122 Ind. 109, 17 Am. St. Rep. 345. See, also, Hayes v. Boylan, 141 Ill. 400, 33 Am. St. Rep. 326; Cazassa v. Cazassa, 92 Tenn. 573, 36 Am. St. Rep. 112; Abbott v. Abbott, 189 Ill. 488, 82 Am. St. Rep. 470; Weber v. Christen, 121 Ill. 91, 2 Am. St. Rep. 68.

In Deeds for the Benefit of Infants the Presumption is in Favor of their delivery. The delivery may be shown by facts and circumstances indicating an intention on the part of the grantor to part with his title and vest it in the grantee; and the act of recording alone is prima facie evidence of delivery: Blankenship v. Hall, 233 Ill. 116, 122 Am. St. Rep. 149.

PHELAN v. GRANITE BITUMINOUS PAVING COMPANY.

[227 Mo. 666, 127 S. W. 318.]

DAMAGES—Whether Excessive Because for Full Amount Prayed.—That the verdict of a jury responds fully to the relief asked in the petition is not evidence of passion, prejudice, or a welter of mere sentimental emotion and effervescence. (p. 602.)

DAMAGES—Measure of Recovery for Loss of Eye.—A verdict of seven thousand five hundred dollars for the loss of one eye and the impairment of the other is not so excessive as to bespeak passion or prejudice, although the injured man lost little time and at the

trial had resumed his work as driver of a laundry wagon at the wages before received. (p. 602.)

TRIAL.—In Disposing of a Demurrer to the Evidence it is an unbending rule that the defendant's evidence contradicting the plaintiff's, fills no office; that the plaintiff is entitled to have his evidence taken as true and the contradictory evidence of defendant as untrue; and is allowed every reasonable and favorable inference of fact naturally deducible from his own or the uncontradicted testimony of the defendant. Measured by this rule, if there is found any substantial evidence sustaining the essential averments of the petition, the demurrer will be overruled. (p. 603.)

PUBLIC STREETS—Liability of Town for Defects.—A town is charged with the duty of keeping its streets in order, and is liable to travelers for street defects negligently permitted. (p. 603.)

PUBLIC STREETS—Reconstruction—Interruption of Travel.—A town has the inherent right to reconstruct and repair its streets, and for the purposes of repair or reconstruction may totally or partially interrupt their present use by the public. And it may do this through a contractor. (p. 603.)

PUBLIC STREETS—Reconstruction.—A Contractor, With His Men, Material, Steam Roller and other appliances, with usual, non-negligent noises, engaged in reconstructing a street, is there for a lawful purpose. (p. 604.)

PUBLIC STREET—Closing One-half for Reconstruction.—It is proper to close one-half of a street while it is being reconstructed, and throw open the other half for use. But when this is done, the public is not thereby invited to use the open half as in all respects entirely safe and convenient—that is, as free from dangers as an ordinary public street. (p. 604.)

PUBLIC STREETS—Reconstruction of One-half—Use of Other Half.—Where one-half of a street is closed for reconstruction but the other half is left open for use, the work of reconstruction, with its ordinary attendant noises, need not be stopped every time a traveler drives along the open half of the street. The invitation for him to use the street has its limitations and warnings of danger based on physical facts apparent to him. (p. 604.)

PUBLIC STREETS—Reconstruction of One-half—Use of Other Half.—Where one-half of a street is closed for reconstruction but the other half is left open for use, one who drives along the open half with a horse having impaired eyesight must bear the burden not only incident to the street reconstruction and chance of the usual attendant noises and dangers of a steam roller used therein, but also of knowing that the horse is more likely to be disturbed than if he had good sight. (p. 605.)

PUBLIC STREETS—Steam Roller Frightening Horses.—Where one-half of a street is closed for reconstruction but the other half is left open for use, a person who drives on the open side of the street with a horse having impaired eyesight assumes the risk of the horse becoming frightened at the sight of, or at a necessary and ordinary noise from operating, a steam roller in the reconstruction work. (p. 605.)

PUBLIC STREETS — Reconstruction — Duty of Contractor to Travelers.—Simply because a contractor reconstructing one-half of a street is lawfully therein and rightly using a steam roller with its attendant noises does not exempt him from liability for injuries suffered, as a result of his negligent performance of his work, by travelers on the other side of the street left open for use. (p. 605.)

PUBLIC STREETS — Reconstruction — Duty of Contractor to Travelers.—Where one-half of a street is closed for reconstruction but

the other half is left open for use, a traveler on the latter half assumes certain risks, but he is still a traveler on a public street, and the contractor doing the reconstruction, though rightfully at work there, owes him due care. (p. 605.)

PUBLIC STREETS—Steam Roller Frightening Horses.—Where one-half of a street is closed for reconstruction and the other half is left open for use, the contractors are not required to stop work when they see a person first drive upon the open side of the street, but when their engineer in charge of a steam roller notices that the usual noises thereof cause the traveler's horse to act as if becoming unmanageable, he must not voluntarily continue the noises, and thereby cause the horse to run away and injure the driver. (p. 606.)

PUBLIC STREETS.—The Unnecessary Use of a Steam Whistle in running a steam roller in a street in doing reconstruction work, whereby horses are frightened and human beings injured, is actionable negligence. (p. 606.)

PUBLIC STREETS.—The Use of a Steam Roller in a Street in doing reconstruction work, if it makes extraordinary puffing noises, is negligence, when travelers in vehicles are journeying hard by on the other half of the highway. (p. 606.)

PUBLIC STREETS—Noises of Steam Roller—Evidence.—When witnesses for the plaintiff, in an action for injuries sustained from his horse running away, testify that the noises made by a steam roller used in reconstructing the street were unusual and extraordinary, and the defendant does not object to the testimony or attempt to break its force by cross-examination, the testimony is in for what it is worth, and a court of review will not rule that there is no evidence at all. (p. 607.)

PUBLIC STREETS—Steam Roller Frightening Horse.—If an engineer in charge of a steam roller used in reconstructing one side of a street notices that the usual noises thereof are frightening a horse on the other side of the street, which is open for use, and nevertheless continues such noises until the horse breaks away from the driver's control, the contractor is liable for the driver's injuries. (p. 607.)

WITNESS—Contradicting One's Own Witness.—The fact that a plaintiff reads to the jury testimony of one of the defendant's witnesses, an engineer, taken at a former trial, does not bind him to the witness' judgment and conclusions or all his statements of fact. But having used the testimony as his own, the plaintiff is precluded from impeaching the witness. Yet a plaintiff may show the facts by other witnesses, although such facts contradict his own witness and incidentally or indirectly hurt his credibility. (p. 608.)

PUBLIC STREETS—Driver Violating Ordinance.—The fact that a person in driving on a street in course of reconstruction violates the law does not bar his action against the contractor for causing his horse to run away, since the violation of the law is not the proximate cause of the injury. (p. 608.)

PUBLIC STREETS—Choice of Dangerous Way by Driver.—A person who drives on a street in which reconstruction work is being done, when there is another street, safe and convenient, which he might take, nevertheless has a cause of action against the contractor in charge if he negligently frightens the horse after it enters the street. (p. 609.)

TRIAL — Instructions — Precision in Drawing.—An instruction intended to outline the plaintiff's whole case should be drawn with precision, simplicity and circumspection, keeping in mind the several and varying phases of the case and grounds of recovery. (p. 610.)

PUBLIC STREETS—Steam Roller Frightening Horse.—Where one-half of a street is closed for reconstruction but the other half is left open for use, and the contractor negligently operates therein a steam roller by emitting unusually loud and frightening noises, not necessary or incidental to the operation of the roller, which frighten a horse on the other side of the street, the driver, in the absence of contributory negligence, may recover from the contractor. (p. 610.)

PUBLIC STREETS—Steam Roller Frightening Horse.—Where one-half of a street is closed for reconstruction but the other half is left open for use, and the contractor's engineer operating therein a steam roller sees that the usual puffing noise thereof is causing a horse on the other side of the street to become unmanageable, it is his duty to stop the roller and cease the noises. If he does not and the horse runs away, the driver, in the absence of contributory negligence, may recover from the contractor. (p. 610.)

TRIAL—Confusing and Complicated Instruction.—It is reversible error to give an instruction in an unfair, complicated and confusing form. (p. 611.)

Percy Werner and Wm. C. Marshall, for the appellant.

Claud D. Hall, for the respondent.

⁶⁷⁸ **LAMM, J.** Negligence—damages, seven thousand five hundred dollars. Defendant appeals. Assigned to division 2, the cause comes into bank on its order on a motion for rehearing.

Error is assigned mainly on overruling a demurrer to the evidence (offered twice and twice refused) and on instructions—the breadth of the assignments seeking a close and full review of testimony and pleadings.

The negligence charged is in operating a steam street-roller on Laclede avenue in St. Louis. The petition states that as plaintiff was lawfully driving a one-horse wagon to the west on the north side of said avenue, a public street, the defendant, through its servants in charge of said roller at said point, “so carelessly, negligently and recklessly managed and conducted” the roller “that the same scared” his horse, “and the said horse was caused to shy and run away.” (The accident is here described, viz., the runaway, the wagon colliding with the curb and a box of street-paving material, throwing plaintiff out and injuring him.)

Recurring again to the charge of negligence the petition particularizes thus: “Defendant’s said agents and servants in charge of said steam street-roller knew and saw, or by the exercise of reasonable care, could have known and seen, that the plaintiff’s horse was being scared by the running and unusual puffing and frightening noises of the steam street-roller, and that plaintiff’s horse was about to run away, and that plaintiff was being placed in a position of peril, in time ⁶⁷⁹ for defendant’s said agents and servants to stop or check the running of said steam street-roller and check its unusual puffing and frightening noises, and thereby prevent the plain-

tiff's horse from frightening and running away, and the injuries to the plaintiff. But that defendant's said agents and servants in charge of said steam street-roller did, nevertheless, carelessly, negligently and recklessly run and operate said steam street-roller at an unusual speed and with unusual and frightening noises, whereby plaintiff's horse was scared and ran away, and plaintiff was injured as aforesaid."

Following these allegations, his injury is alleged (the loss of an eye), with his outlay, pain, loss of earnings, etc., praying damages for seven thousand five hundred dollars.

By answer defendant denies generally and, for an affirmative defense, alleges that if the defendant was injured, as his petition states, his injuries were caused by his "own want of ordinary care in driving a blind horse with defective harnessing and in a careless manner upon said street in question, with full knowledge of and in full view of said steam roller, which was then and there being operated in said street in pursuance of contract entered into by and between this defendant and the city of St. Louis."

The answer next alleges that Laclede avenue, at the region in hand, was closed by authority of the street commissioner, and was marked as closed in accordance with a city ordinance, "the northern half thereof being left open for the passage of street-cars and the entrance of persons having business upon said street." Next, that by entering upon said Laclede avenue at that point and driving west the plaintiff "was guilty of want of ordinary care for his own safety and of a violation of section 912 of the general ordinance provisions of the city of St. Louis."

There is a further specification of contributory negligence, viz., that plaintiff had no business at that ⁶⁸⁰ time on that part of Laclede avenue, that he had a perfectly safe route to his destination by using other streets in the vicinity, that to drive on Laclede avenue at that point "while the work of reconstructing was in progress and a large steam roller in operation, with the material and appliances for reconstruction on said street, was obviously dangerous, and that plaintiff voluntarily and without any necessity therefor chose the most dangerous of the routes open to him, and in so doing was guilty of ordinary care for his own safety."

The reply was conventional.

It will serve a useful end to sift the undisputed from the disputed facts. Accordingly, in paragraph "A" of this statement those undisputed will be assembled, viz.:

(A) Laclede avenue runs east and west in St. Louis, with double street railway tracks in the center. From these tracks to either side of the street the curb is fifteen feet away. Laclede in that region is crossed by three north and south avenues, viz., east of the accident by Grand, next west of

Grand (and still east of the accident) is Spring and west (a long block away) is Vandeventer. Between Grand and Vandeventer, Laclede was in progress of reconstruction by defendant under the supervision of the city authorities and a contract between defendant and the city. The north half of the street had been completed. While in actual use for travel by wheeled vehicles, it was also in use to store material and implements used in the reconstruction of the south half, then and for some time (with plaintiff's knowledge) actively in progress. At the point of the accident, viz., between Spring and Vandeventer, there was a heap of granite screenings, or crushed granite, on the north side of Laclede. The size of the heap is dark, one witness referring to it as a "load"—we infer a wagon-load—another witness said it extended into the street about six feet. A very few ⁶⁸¹ feet from the curb, and west of but hard by this heap, was a two-wheeled hand-cart equipped with handles, bed and funnel, its wheels three and one-half feet high. Its use was to take loads of screenings from this heap and wheel them by hand to the south half of the avenue where the screenings were scattered and used as a top dressing and pressed and smoothed down by the rollers passing to and fro. Commencing not far from Grand and going west, the grade of Laclede is down hill to Vandeventer. At a certain time, say 8 o'clock in the morning of October 3, 1904, after street work had commenced, plaintiff drove on Grand to Laclede and turned west toward Vandeventer in plain view of the street reconstruction and the appliances and material in use. Across the south side of Laclede, i. e., from the car tracks to the curb, at Grand avenue, there was a barricade of some sort. This he also saw. On this barricade was a notice as follows:

"STREET CLOSED.

"THIS STREET IS

"TEMPORARILY WITHDRAWN FROM PUBLIC USE.

"By Authority of the

"Municipal Code of St. Louis.

"Section 912. The street commissioner is authorized, with the approval of the mayor, to close any street, alley, public place or highway, and withdraw the same from public use temporarily, and during such period as public work thereon shall make such action necessary. Any person using or attempting to use said street, alley or public place or highway, so withdrawn from public use, or driving or attempting to drive any animal or vehicle thereon, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than ten dollars nor more than fifty dollars for each offense.

⁶⁸² "Section 913. It shall be the duty of the police within their respective districts to watch for and arrest persons violating the provisions of the above next preceding section.

"Approved:

"ROLLA WELLS,
"Mayor.

"By order of

"F. W. VALLIANT,
"Street Commissioner."

In addition to this notice the visible signs of street reconstruction were plain and plentiful from the junction of Grand and Laclede west to the junction of Vandeventer and Laclede, but, as said, the north half of Laclede was open and in use by those choosing to go along there. At this immediate time not far from the heap of screenings and the cart mentioned, and on the south side of Laclede, was a heavy ten or fifteen ton street-roller with steam up and in use—a necessary contrivance in constructing the street of bituminous macadam in accordance with the contract between the defendant and the city. This roller was run by one of defendant's employes as engineer—Peter F. Murray, then at his post of duty. When running the roller made noises more noise uphill than down. When it stopped the noises stopped and it could be stopped in "an instant." Scattered along the street was a gang of men at work, some on the south and some on the north side of Laclede. One or two of them were filling said cart from the heap of screenings.

Plaintiff was thirty-one years old and in the employ of a laundry, and had good eyes. He was driving a big bay horse to a covered wagon, intending to collect or deliver clothes on that part of Laclede west of Vandeventer. He had no laundry business on Laclede between Grand and Vandeventer. Pine street is parallel to Laclede, a block north. It was asphalt, a residence street, with no impediments and no street railways, and plaintiff admits he could have as "conveniently and readily" driven west on Pine to Vandeventer and then over to Laclede had he so liked, as to drive west ⁶⁸³ on Laclede. Plaintiff had driven the horse about St. Louis for years. The only estimate given of his characteristics is that it was "gentle." One witness described it as "docile as a dog." Plaintiff says he had driven it near the street-car tracks and the street-cars, around steam engines. "When I drove him," said plaintiff, "around street-cars or steam engines, he acted as though there was nothing to it." He was a "slow horse generally" and "was never known to make any bad breaks." He had been driven around the grounds during the construction of the World's Fair and around the engines making streets on the fair grounds. But about a year and a half before the

accident the horse had gone totally blind in one eye. The record does not tell us whether he was blind in that eye while he was being driven around the road engines at the World's Fair, nor whether the sight of the other was then failing, nor does it disclose whether he had ever been driven as close to a steam street-roller in active operation as plaintiff undertook to drive him on October 3, 1904. Plaintiff knew the condition of the horse's eyes and testified that the sight of the eye not totally blind "was failing." We infer that the sight of the failing eye was becoming progressively worse from day to day. At the time of the accident the horse could not, with his failing eye, see an object the size of a man farther away than fifteen or twenty feet.

It is agreed on all hands that at the time and place in question, while being driven toward this roller, the horse took fright and ran away, upsetting the laundry wagon, throwing plaintiff violently against the curb, splitting and putting out one eye and sympathetically impairing the use of the other. Up to the time of the trial there were flashes of pain in the blind eye, as if from fire in it, and the parts had not healed so that a glass eye could be used all the time. From such permanent injuries, paying no attention to temporary ⁶⁸⁴ minor ones, plaintiff has suffered, and will continue to suffer, much pain and disfigurement. He has been put to outlays and loss of time, the details of which we deem immaterial.

Referring to the pleadings, testimony and instructions, it will do to say at this point that plaintiff offered no testimony tending to show any "unusual speed" in the roller as charged in his petition, nor was such an element of negligence put to the jury. On the other hand, defendant did not show that the horse was driven "with defective harnessing" as charged in the answer. The evidence tends to show his harness sound.

The case may proceed on the theory that the foregoing facts were either proved and remained uncontradicted, or are conceded true.

We now come to facts about which there is discussion. They are either contradicted in the main or certain incidents thereof are in dispute and different conclusions are drawn by counsel. They will be grouped under paragraph "B."

(B) Mr. Phelan testified, in substance, that while driving west on Laclede he kept north of the street-car tracks on the completed portion of the street, that the roller was on the south side of Laclede "going back and forth," but at the time he first observed it, "it was practically dead." On his estimate, when he was, say, fifty or seventy-five feet west of Spring avenue and within forty or fifty feet of the roller, it began to move, and (quoting) "it commenced blow-

ing off steam and blew its whistle very loud, extraordinarily loud, and it frightened my horse and he started to run away." At that time he was east of northeasterly from the roller and going toward it. He first noticed the roller when he was at or a little beyond Spring avenue, and he describes it further as "practically still" until he got past the junction of Spring and Laclede, it being then one hundred and fifty or two hundred feet west of ⁶⁸⁵ Spring. Asked how long the whistle and blowing off steam continued to make a noise, his answer was: "Well, he did not stop until I was thrown out of my wagon, he didn't stop this." Plaintiff had his hands on the lines, but did not anticipate the horse becoming frightened at the roller. He says his horse was "rearing and plunging two or three minutes" until the wagon was upset by running into the curb. After the engine began to move it went "back and forth." When the noises began it was next to the curb and then it came back to the track eastward toward plaintiff. At one place in his testimony he said that he saw the engineer in charge of the engine, but did not see which way he was facing. Again he says he, the engineer, was "facing kind of westwardly; you could hardly call it westwardly, kind of southwardly." His horse pulled to the curb, ran along the curb a little bit and hit what plaintiff called a "box of cement"—evidently the hand-cart hereinbefore mentioned. He represents the horse as running fifty or sixty feet before he struck the curb and about fifteen feet along the curb before he struck the box and upset the wagon. Recurring to the noises, he again describes them this way: "Why, there were very rapid and quick puffs, and very loud, louder than I had ever heard before, and I guess five or six sharp and shrill whistles, rapid, right one after the other, and very loud."

On cross-examination he denies having his lines hooked up in front of him, and, on being again inquired of in regard to the noises, reiterated his testimony in chief, calling them "shrill whistles," "the same order as a locomotive whistle," "louder than those given by a locomotive engine." Inquired of as to what direction the roller was going, he said it was traveling northeast as he was driving west. "I saw," said plaintiff, "the engineer, and he was facing southwest, facing in the same general direction as I was; facing sort of ⁶⁸⁶ southwest while I was facing directly west. His back was partly turned toward me." The cart was about opposite or a little west of the engine, across the street-car tracks from it and about three or four feet from the curb.

From William Archer, a city salesman plying his avocation on Laclede at that time and standing twenty-five or thirty-five feet from the accident, plaintiff elicited the following testimony: The engine made a good many puffs,

spurted out a lot of steam and blew the whistle three or four times. Those puffs and spurts of steam were rather loud and shrill; did not count them but should judge it whistled three or four times. "This puffing," said the witness, "and these whistles and these spurts of steam continued right along; I never noticed it ceased working for a minute or two." Plaintiff's horse reared and plunged going west and ran into "a box of tools" and turned the wagon over. He paid no particular attention to the time, but estimated "the rearing and plunging lasted some two or three minutes." He further says: "The puffing and noise was going on during all that time."

(NOTE.—It will be observed that this witness does not testify that he saw the engineer or noticed which way his face was turned, and at this point it will do to say that no other witness, except plaintiff himself and the engineer Murray, who was plaintiff's witness, gives testimony on that point.)

Continuing, witness said that what called his attention to the roller was the "unusual noise"—"the blowing of the steam and the whistle." At the time the noises scared the horse it was about thirty-five feet northeast of the roller. On cross-examination witness stated the whole thing happened very quickly. It may have been a couple of minutes, and could not have happened in less than a minute. Witness was not attempting to measure the time. He did not know what turned the wagon over, whether it was the heap of granite ⁶⁸⁷ screenings or "the tool-box." By tool-box, witness meant the thing that was used for conveying screenings; he knew the wagon hit that.

Mrs. John Henning testified for plaintiff, in substance, that she saw the accident. The first thing she noticed was the "puffing" and "whistling" of the engine, then she saw the laundry-man's wagon coming down, noticed the frightened horse and that plaintiff was trying with all his might to stop it but could not. She was allowed to give the reason for his inability to control the horse, and gave it as follows: "Because the engine kept puffing and blowing its whistle, so that all the time they did not stop it, but kept going and coming east and west with the engine, and he, of course, could not control his horse." She says the noises began when the wagon was fifty or sixty feet east of the roller. She did not know how long they continued, "but they kept on going all the time; they did not stop during the time the horse was plunging; they did not stop at all; they did not stop right away after the accident was over; I think after they had heard the man scream, I think then they stopped. It puffed just as an engine would puff, only very loud, and they kept on blowing the whistle." Inquired of if she observed any whis-

tle on the engine she replied: "O, yes, sir; there was a whistle on the engine, for the little children, boys and girls in the neighborhood, would go up there and blow the whistle; there was a whistle on the engine, I know." The engine had been working there for a considerable time. Witness lived in the second house from the corner of Spring and Laclede and said: "I heard the whistle; I know I heard the whistle; there was a whistle on that engine; those whistles were very much like a railway whistle, very loud. Every time they used that engine that whistle was blowing."

A school girl, Louretta McCoy, witnessed the accident on her road to school. Her description of it is ⁶⁸⁸ in substance that the engine was going back and forth "making a very loud noise, puffing and blowing and whistling noise, very loud, very deafening." She does not know how long the noises continued, but estimates it as "a good while." The horse was "shying and kicking up in the air." Mr. Phelan was pulling on the lines and trying to hold it back, but the horse kept running on for about thirty feet and got right opposite the engine and then the accident happened.

Miss Friedman saw the accident. She heard the whistles and said the horse was scared "after the whistle blew." Referring to the noises she called them "puffing." She did not know how many puffs, but they were very loud and did not continue long.

A Mr. Willard was called for plaintiff. He did not see the accident but had worked for defendant and had run an asphalt roller, a steam street-roller, and was familiar with the construction of such rollers. He testified such a roller can be stopped within a few inches. It is started and stopped by manipulating a throttle. Shut off the throttle and the engine stops practically instantly. That stops the noise. The exhaust is what makes the noise.

On cross-examination the witness said that when he worked for defendant "the year before the fair" they had some engines with whistles and some without whistles. The employés were cautioned not to blow the whistles. Witness admitted he had testified at a former trial that few rollers have whistles, and that he had then said that when he was working for defendant only one or two of them had whistles. He also stated that he did not know "the Universal Steam Rollers which defendant got from Julian Scholl & Co."

(NOTE.—The steam roller in question had been purchased by defendant from Julian Scholl & Co. in the early summer of 1904 and was known as the Universal Steam Roller.)

Testifying as one competent to know from experience, witness said that a puffing noise was an ⁶⁸⁹ incident to working a steam roller, that there was puffing all the time the roller is working. The more upgrade it is, the harder or louder the

puffing. Such rollers have an automatic steam escape. If any excess of steam is made, a pop valve allows the steam to blow off. When the engine is working the steam is generally used and the puffing does not occur. It was not necessary to blow a whistle in operating a steam roller. He further said that it takes more steam to go upgrade and that when the engine had been standing and then starts suddenly it makes a loud puffing, an extraordinary noise, and that if you had the cylinder cocks open it would make a kind of hissing noise, an extra noise.

Alice McCoy, called for plaintiff, did not see the accident, but she had seen the engine many times before in front of her house and had heard it "whistle"—"it sounded to me like a whistle."

Catherine Dulard on plaintiff's behalf testified that she heard a "whistle" on the roller when it would be back and forth on Laclede. She heard it "dozens of times." The neighborhood boys would "jump up and blow it." The whistles were loud and shrill. She heard them at all times of the day. On cross-examination she said: "I heard a sound which was like a whistle . . . that sounded exactly like a steam whistle."

Adam Brehn did not see the accident, but testified that he "heard whistles" on the rollers in use and heard one on the big roller. He had never examined the engines to see whether they had whistles but said: "I know I heard sounds from one or the other that sounded like a whistle. I heard the whistle blown on the large one."

Robert J. Carroll, on behalf of plaintiff, gave evidence tending to show that the roller had a whistle. "I think the roller had a whistle on it; am satisfied it did." His own horse "was scared at the roller ⁶⁹⁰ whistle." On cross-examination he testified that he could not be mistaken on the whistle sound. "I am quite familiar with them; it was a whistle sound." The children in the neighborhood at times would blow the roller whistle.

Another witness, Harry Shobby, a school boy, was buying candy in a drug-store close by. He did not see the accident but before it happened "Heard the whistle blow, one of them steam whistles. . . . I heard the whistle two or three times; it was very loud."

At a former trial Peter F. Murray, the engineer in charge of the roller, had testified on behalf of defendant. At the present trial the plaintiff concluded to use his evidence and thereby make him his witness. Thereat he read the testimony given by Murray at the former trial. It runs in substance as follows: Witness had been continuously rolling the finishing coat of dry granite screenings back and forth for about three-fourths of an hour before the accident. "A roller engineer,"

he said, "is always on the lookout for accidents"—meaning thereby, we infer, to fix his status as an observer. Continuing, he said he saw the accident. Was running the roller east, was facing north as a person with a roller would, "faced to the north and looking east." "As I was running east I saw this laundry wagon in the west-bound track. As the horse approached the roller he pulled out of the track." The horse did not appear "excited" and witness did not notice the driver particularly. As the horse pulled out of the track, "he increased his pace slightly," ran over the screenings, and hit the screening cart. According to the judgment of Murray, "the horse was not running away until he hit the handles of the screening cart and then he gave a couple of plunges," and the witness stopped the roller instantly then. He got off of the roller during this instant and the horse ran down the curb, turned the wagon over ⁶⁹¹ and fell down. Witness went to the wagon and helped the driver out. In answer to a question from the court the witness said: "I saw when it was being frightened. He was about thirty or forty feet away. The horse left the car track and he hit the screening cart and became frightened." The court then inquired as follows: "Q. The horse was not frightened before that?" The witness replied: "It was not noticeable to me." Continuing, he said the horse turned out of the car track and swerved to the pile of screenings and hit the cart and struck the curb. The engine was stopped about the time it hit the cart. The whole affair only lasted about one-half a minute. The roller had no whistle, never had any kind of a whistle. The only noise was the exhaust or the puffing and the rattling of the machinery; "the puffing was just as it always was all day long."

On cross-examination this witness explained his position at the time as follows: "I was facing north, looking east; had been looking in that direction probably a couple of minutes or one minute. My roller was moving east. During that time I moved east. During that time I moved fifty or sixty feet." First saw the horse coming down Laclede avenue about one hundred and fifty or two hundred feet away. When witness first saw the horse was frightened it was about even with him. He had not been frightened until he hit the cart and he fell ten or fifteen feet from the cart. There was no unusual noise made by the roller. "It was a very ordinary puffing," and the horse left the car tracks while the puffing was going on. On being inquired of as to his eyesight witness replied that he was supposed to have normal sight with glasses on. "I have worn glasses since I was twelve years old. The cause of my trouble was typhoid fever. My eyes have been weak ever since."

Such was plaintiff's case on the facts.

On behalf of defendant, Buntin, its general manager, testified that the roller in question was called the Universal Roller and was manufactured by Julian Scholl & Co., New York. Defendant owned two of them; neither of them was equipped with steam whistles. They were bought in 1904. Defendant had two rollers on the work on October 3d, but they were worked with different crews. Witness did not see the accident.

D. F. Hogan was defendant's superintendent. He identified the roller used by Peter Murray as a Universal Roller. There was no whistle on either of the Universal Rollers owned by defendant. The witness was an engineer and had operated engines—stationary and locomotive. He was familiar with the noises the Universal Roller makes when working. It is the familiar sound of the exhaust of a locomotive working under tonnage. You can hear the noise a good distance, a puffing noise made when the engine is working. Upgrade requires more power and the exhaust is louder. Besides the exhaust noise coming from the stack, there is a pop valve, that is, the gauge is set at a lawful amount of steam for the engine to carry and the pop valve is set to balance with that. When the pop valve goes up it makes a sharp noise like steam having suddenly lifted the lid off the pressure. Witness knew nothing about the accident. This engine had no whistle on it. If one had been put on and taken off it would show.

James Cunningham, a superintendent of a machinery company doing defendant's repairing, knew the roller. It had been in the shop and had no whistle on it. It had a pop valve that pops and goes off and relieves the pressure quickly. Witness was not present at the accident.

Mr. Worther, a machinist working for Cunningham's machinery company, testified that the engine had been in the shop. He had thoroughly examined it. It was not equipped with a steam whistle. If one had been on it and been taken off it would leave marks to indicate that fact. There was no such indication on the engine. Witness did not see the accident.

Mr. Paul, another machinist working for Cunningham's company, had seen the engine in the shop and examined it for a whistle attachment. There was no place on it for a steam whistle and it never had a whistle attachment.

The defendant next read the testimony of Mr. Leighton, secretary of Julian Scholl & Co., manufacturers of road-making machinery. He testified to defendant's buying two Universal Rollers and that his firm never supplied whistles with their steam rollers and there were no whistles to them when shipped. Witness was positive as to that. If whistles were put on it would be through an order from his office and no such order was issued. In the Universal Roller the steam

from the cylinders is exhausted in the smoke-stack and makes a puffing sound when the roller is in operation. The only noise that could come from the roller when not in operation would be through the safety valve.

Samuel R. Murray was called for defendant and testified as follows, in substance: He was in charge of the job for defendant, saw the accident, was standing about two hundred and twenty-five feet west of Spring avenue, was looking at plaintiff's horse and the roller at the time. The lines were loose over the horse's back as he approached the roller. When he got about one hundred and fifty feet west of Spring avenue the horse became frightened at the roller and increased his pace but was still trotting. "There was no running away." As the horse increased his pace he was then in the car track, and either swerved or pulled to the right and ran into the screenings cart. That was what frightened him "more than anything else." He began plunging then along the curb about twenty-five feet. "As soon as the horse became frightened and struck the screenings cart the roller engineer ~~694~~ immediately stopped his roller and ran to the man's assistance." Witness was familiar with the roller; had been a roller engineer for twelve years and examined it thoroughly. There was no whistle on it. In its ordinary operation the roller "would make a noise similar to a hoisting machine in pulling up this grade." Downgrade it would not make very much noise, only the rattling of the gear; going up it would make a puffing or exhaust noise. The roller had been in operation at least twenty minutes continually before the accident occurred. It had just run down to the west and was pulling up the hill east when the horse became frightened at the exhaust. The lines were slack when witness first noticed plaintiff, and he either failed to get hold of both lines or only had hold of one. He did not control his horse, and had it been under control the accident would not have happened.

On cross-examination he stated that the lines were loose when the horse began to veer off the track; that the horse was frightened when he hit the screenings cart and was not running away until he struck it; that the puffing noise ceased as soon as the horse began to veer from the car and the engine was running until that time. Witness was sixty feet from the wagon when he first noticed the lines were loose and slack over the horse's hips. Did not see the driver's hands.

Walter Carter testified for defendant. At the time of the accident he was on the street in defendant's employ using the cart to sprinkle screenings on the street. Witness was standing against his cart when Mr. Phelan drove in and struck it. Witness had been facing east and saw the laundry wagon about one hundred yards or less away, and "hollered" at Phelan. Phelan was looking at that time at a little book or

something in his hand. He was not holding the lines but they were fastened up in the top of the wagon. When he "hol-lered" at him he grasped the lines, grasped one, the right-hand line. At that time the ⁶⁹⁵ horse was coming at a moderate rate near the center of the street on the same side witness was on. When Phelan grabbed the right-hand line he hit the car. The horse jumped and slipped on the curb, making about two leaps, ten or fifteen feet to the best of the knowledge of the witness. Prior to striking the cart the horse had not given any indication of being frightened at anything. Witness was familiar with the roller and knew there was no whistle upon it. He was familiar with all four of the rollers used by defendant. The only one that had a whistle was a little asphalt roller used in patching. Phelan took hold of the line after the witness yelled at him and the object of yelling was to keep him from striking the cart. The engine makes a pretty loud puffing noise in going uphill.

(NOTE.—It was going uphill at the time of the accident.)

Murray didn't stop his engine until the horse was down.

Mr. Taussig, an employé of the street department of St. Louis, educated at the Harvard University and at the Missouri School of Mines (presumably in engineering), and who had personal charge of the reconstruction of the street in so far as the interest of the city was concerned in having the contractor live up to his contract, was called for defendant. He testified to many signs put up along Laclede avenue to warn the people of holes and excavations and of the process of reconstruction. There were barriers on the south side of the street but the north side was open for anyone to use. The north side was also being used by the contractor by placing screenings on it. The witness was present at the accident. Peter Murray was using a Universal Roller. Witness was familiar with it. It had no steam whistle he ever saw or heard. On level ground there was an ordinary puffing noise while in ordinary operation, such as a locomotive makes when going along without any big load. If it goes up-grade it is equivalent to being under a heavy load, and ⁶⁹⁶ the effect is to make the noise of the exhaust greater. Houses on either side of the street have a sounding-board effect and make the noise louder than in the open. When there was excess of steam it escaped through the pop valve, and the noise made through that valve might be mistaken for a whistle by people not familiar with an engine. Witness was within eight feet of the roller and between the screenings and cart and the roller at the time. The first thing attracting the witness' attention to Phelan and his horse was the rattling sound of his wagon wheels grinding on the car track and sliding and trying to get off. As witness was standing on the track he didn't "know what was going to happen." He

saw the horse was trotting downhill about thirty or forty feet away and going to the north side of the street. He heard a yell from the colored men at the push-cart, and apparently Phelan was going over these boys and they jumped out of the way. The wagon struck the cart as the horse veered in closer to the curb, and the wagon was sliding along the curb when it upset about twenty-five feet on the other side of the cart. The horse had the appearance of being frightened and running away "just after he hit this cart" and when the cart upset. Before the horse struck the cart he was going at a medium trot. Witness did not notice that he was scared at the roller at that time and was rearing and surging on the street. On cross-examination he was asked: Q. "You don't know whether it had a whistle on it or not?" And replied: "I know as well as I know you have hair."

Such was the substance of oral testimony on behalf of defendant so far as material to any issue here.

Defendant then read in evidence section 912 of chapter 12, article 2, of the general ordinances of the city of St. Louis relating to the construction and repairing of streets. That section appears hitherto ⁶⁹⁷ herein in the copy of the notice posted on the barricade.

Plaintiff asked and, over the objection of defendant and exception saved, was given five instructions, as follows:

"1. The court instructs you that, if you find from the evidence that plaintiff was driving a one-horse wagon at the place on Laclede avenue mentioned in the evidence, and that the agents of the defendant in charge of a certain steam street-roller, mentioned in the evidence, ran and operated the said steam street-roller so that it made puffing or whistling noises, that the horse of the plaintiff as a result of the running, puffing or whistling of said steam street-roller became unmanageable, and placed plaintiff in a position of peril, and said horse ran away and caused the injuries to the plaintiff complained of, and you further find from the evidence that the agent of the defendant, in charge of and operating said steam roller, saw that plaintiff's horse was becoming frightened at said steam roller and noises, and was becoming unmanageable, and running away, and that the plaintiff was being placed in a position of peril, in time to have stopped the running of said steam street-roller, and stopped the puffing or whistling noises of the said steam street-roller and prevented the plaintiff's horse from becoming unmanageable and running away, and the injuries to plaintiff complained of, by the exercise of ordinary care on his said agent's part, and if you further find that he negligently failed to do so, then defendant was guilty of negligence, and if you find that the plaintiff's injuries were caused by the said negligence of the defendant, then your verdict should be for the plaintiff,

unless you further find from the evidence that there was negligence on the plaintiff's part directly contributing to the injuries sustained by him.

"2. But the court further instructs you that if you find from all of the evidence in this case that the ⁶⁹⁸ plaintiff's horse became frightened after and as a result of running into the screenings or crushed granite mentioned in the evidence, and not by reason of the negligence of the defendant's agent and servant, then your verdict should be for the defendant.

"3. The court instructs you that, although you find from the evidence that plaintiff was driving a partially blind horse on the occasion mentioned in the evidence, and that although you find from the evidence that the harness or parts of the harness on plaintiff's horse were insufficient and gave away on the occasion mentioned in the evidence, yet neither of these facts, if you find them to be true, would prevent plaintiff from recovering in this action, unless you further find from the evidence that such fact or facts directly contributed to cause the injuries complained of in this case.

"4. What constitutes 'ordinary care' as mentioned in these instructions depends upon the facts of each particular case. It is such care as a person of ordinary prudence would exercise (according to the usual and general experience of mankind) in the same situation and circumstances as those of the person or persons in this case with reference to whom the term 'ordinary care' is used in these instructions. The omission of such care is negligence in the sense in which that word is used in these instructions.

"5. The court instructs the jury that, with respect to the charge of contributory negligence on part of plaintiff, the burden of proof is on the defendant, and unless the defendant has proven to the satisfaction of the jury by a preponderance of all the evidence that plaintiff was negligent, and that such negligence directly contributed to the injury complained of, they should not find him guilty of contributory negligence."

Defendant was given seven instructions as follows:

699 "1. The court instructs the jury that there is no allegation of negligence in this case based upon the pile of screenings or cart at the place in question, and you will not be at liberty to base any verdict upon the fact that such material was there at the time in question.

"2. The court instructs the jury that if you find from the evidence that the direct and proximate cause of the injury to plaintiff was the fact that the horse he was driving swerved and allowed the wagon he was drawing to strike the push-cart of the defendant, then your verdict should be for the defendant.

"3. If the jury believe from the evidence that plaintiff's horse was practically blind, and that plaintiff's act in driving

a practically blind horse near and by a steam roller in operation was negligent, and that such negligence directly contributed to the accident, then their verdict will be for the defendant.

"4. If the jury believe from the evidence that the injury to the plaintiff was caused by the joint, mutual and concurring negligence of plaintiff and defendant's agent in charge of the roller, and that the negligence of neither, without the concurrence of the negligence of the other, would have caused said injury, then the plaintiff is not entitled to recover, and their verdict must be for the defendant.

"5. If the jury believe from the evidence that plaintiff's horse was defectively or improperly harnessed, and that plaintiff's act in driving a horse that was defectively or improperly harnessed near and by a steam roller in operation was negligent, and that such negligence directly contributed to the accident, then their verdict will be for the defendant.

"6. The court instructs the jury that the defendant had the legal right to operate the steam roller in question at the time and place in question, in the usual and ordinary manner, and that plaintiff, in entering ⁷⁰⁰ and driving along said streets did so subject to said right of the defendant.

"7. The court instructs the jury that the term 'negligence' as used in the instructions means that the party guilty thereof has done something which a reasonably prudent man, under the circumstances, would not have done, or failed to do something which a reasonably prudent man, under the circumstances, would have done."

Defendant asked six instructions, which were refused and timely exceptions saved to the ruling of the court on that behalf, viz.:

"1. The court instructs the jury that there is no evidence before you that the puffing made by the steam roller in question was in any respect unusual, and you are further instructed that if you find from the evidence that the steam roller in question was not equipped with a steam whistle, then your verdict should be for the defendant.

"2. If the jury believe from the evidence that the place to which plaintiff was intending to go at the time of the accident in question was a point on Laclede avenue west of Vandeventer avenue, and that there was a perfectly safe route for plaintiff to go to said destination by using other open streets, and that there was some danger in driving over Laclede avenue between Spring avenue on the east and Vandeventer avenue on the west while the work of reconstruction of said Laclede avenue was in progress, and while a steam roller was in operation, then if plaintiff voluntarily, and without any necessity therefor, chose the route which was attended with danger instead of that which was entirely safe,

he was guilty of contributory negligence directly contributing to his injury, and the verdict must be for the defendant.

“3. If the jury believe from the evidence that plaintiff started on the morning of his accident to drive to a point on Laclede avenue west of Vandeventer ⁷⁰¹ avenue, and that there was a perfectly safe route by which he could have reached his destination as conveniently as by going over Laclede avenue at the point where the steam roller in question was being operated, then if plaintiff chose to go to his said destination by Laclede avenue instead of by some other equally convenient route, your verdict will be for the defendant.

“4. If the jury believe from the evidence that section 912 of the general ordinances of the city of St. Louis which has been read in evidence was in force on the day of plaintiff's accident, and that there was a notice on Laclede avenue at or near Spring avenue that said Laclede avenue had been temporarily withdrawn from public use, then defendant had no right to drive or attempt to drive along Laclede avenue west of Spring avenue, for the purpose of reaching a point west of Vandeventer avenue, and your verdict should be for the defendant.

“5. The court instructs the jury that one who voluntarily, knowingly and consciously incurs a danger which there is no necessity for incurring and which can easily and readily be obviated, takes the risk of such danger upon himself; and if you believe from the evidence in this case that plaintiff voluntarily, knowingly and consciously drove his partially blind horse by the steam roller at the time and place in question, without any necessity therefor, and when he could have easily and readily taken another road and obviated whatever danger, if any, there was in attempting to drive by said steam roller, then he must be held to have assumed the risk of such attempt, and for any injuries directly sustained as the result of such attempt, he cannot recover herein.

“6. The court instructs the jury that when a party to a suit introduces a witness to testify on his behalf, he vouches for the truth of his testimony and is not allowed to impeach such witness.”

⁷⁰² Once before in the court of appeals (115 Mo. App. 423, 91 S. W. 440), on remanding, the second verdict was of a size to give this court jurisdiction. The divergent views on the facts and the insistence of appellant's learned counsel at bar in bank, that the facts were misconceived in division, called for a full statement, even at the expense of brevity. The facts have been set forth whenever practicable (having regard to a summary) in the language of the witnesses.

1. It is assigned for error that the verdict is excessive. We are pointed to the fact that it is for the full amount prayed in the petition, and it is argued that such coincidence indicates passion and prejudice. But before we follow the lead of that argument, we would have to assume that petitions always lay damages so excessively as to indicate passion and prejudice. We might take judicial notice of the pleader's zeal for his client, and that such zeal prompts or provokes allegations to the verge as the facts allow. We might (now and then) even suspect a tendency to inadvertent over-statement, but we can hardly announce as a proposition of law that if the verdict of a jury responds fully to the relief asked it is evidence of passion, prejudice or a welter of mere sentimental emotion and effervescence.

The eye is a main member of the body. Its loss was always a tender point with men and their laws. A man blind of an eye is disfigured, oppressed, humiliated and under a shadow, once for all handicapped. It is argued that plaintiff lost little time, and at the trial was receiving the same wages, as the driver of a laundry wagon, that he earned before his injury. But is plaintiff to be doomed to always drive a laundry wagon? Are those avocations requiring two eyes and a comely countenance to be quite closed to him? Laying no stress on his minor injuries, yet his pain and loss were great, and though his damages be high, we cannot allow them to be so high as to bespeak passion and ⁷⁰³ prejudice and coerce judicial interference: *Shaw v. Chicago etc. R. R. Co.*, 123 Mich. 629, 81 Am. St. Rep. 230, 82 N. W. 618, 49 L. R. A. 308. It was suggested to counsel from the bench that it was not worth while to argue that assignment of error. As we felt then, so we feel now.

The point is ruled against appellant.

2. It is assigned for error that the court admitted improper testimony concerning the public use of the north half of Laclede avenue between Grand and Vandeventer. We deem the position untenable. Defendant's answer admits the north half was open for modified public use, viz., for "the entrance of persons having business upon said street." The south half was alone barricaded and posted. An official of the city was on the ground, and the most favorable view possible to defendant is that the city closed the south half of the avenue and threw the north half open to general travel as a thoroughfare. Certain it is that the general use made by the public at the time and before was under the eye and by the acquiescence of both the city and defendant. There was no such limitation as outlined in the answer put upon the travel. The tide of it flowed free and full. The opening of the north half and the absence of barricades there were tantamount to an invitation to public use (sub

modo, as presently seen), and we cannot blink the fact that neither the defendant nor the city lifted a finger by way of protest to such public use of the north half. Such use and the extent of it bear on plaintiff's contributory negligence precisely as it would have been competent to show, if possible, that no one was permitted to use it, or only used it furtively or by force of numbers over the protest of those in charge.

This point is also ruled against appellant.

With these preliminary matters at rest, we reach the main assignments of error, viz., in overruling the demurrer to the evidence and in giving and refusing instructions.

⁷⁰⁴ 3. Of the demurrers: At the close of plaintiff's evidence defendant demurred and again at the close of the case. The two may be treated as one, to be ruled in the light of the evidence on both sides. This, because when defendant refused to stand on its first demurrer but put in its own case, it took the chance of strengthening plaintiff's. Under this record we deem it a waste of time to consider them separately.

In disposing of a demurrer to the evidence it is an unbending rule that defendant's evidence, contradicting plaintiff's, fills no office; that plaintiff is entitled to have his evidence taken as true and the contradictory evidence of defendant taken as untrue; and is allowed every reasonable and favorable inference of fact naturally deducible from his own or the uncontradicted testimony of defendant: *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89; *Klockenbrink v. St. Louis & M. etc. R. Co.*, 172 Mo. 678, 72 S. W. 900; *Mockowik v. Kansas City etc. R. Co.*, 196 Mo. 550, 94 S. W. 526. Measured by that rule, if there be found any substantial evidence sustaining the essential averments of the petition the demurrers were well ruled.

We have come to the conclusion there was no error in that regard. This, because:

(a) A town in Missouri is charged with the duty of keeping its streets in order and is liable to travelers for street defects negligently permitted. It follows that such town has the inherent right to reconstruct and repair its streets, and (for the purposes of repair or reconstruction) may totally or partially interrupt their present use by the public. In such case the use of the street to rebuild it becomes a use paramount to the public use for travel.

What the city of St. Louis could itself do in reconstructing a street it could do by another, and in this case proceeds on the theory that the city of St. Louis was reconstructing Laclede avenue through defendant as a contractor. Absent testimony to the contrary (as ⁷⁰⁵ here), several presump-

tions flow from that theory and apply to the facts of this record:

First, that such reconstruction was proper.

Second, that defendant with its work, its men, material, steam roller and other appliances with usual, non-negligent noises was in the street for a lawful purpose—said noises not confined to one-half of the street but filling it all from side to side, the houses on either side acting as a sounding board. (So, the frightening physical aspect of the steam roller, the heap of screenings and the push-cart, all lawfully there, were visible from side to side and end to end.)

Third, that the south half of the street was properly closed and the north half properly thrown open for use—that is, absent testimony on who opened the one or closed the other, both acts are presumed to have been rightfully done.

But it would be unreasonable to rule that the public were invited to use the north half of the street as in all respects entirely safe and convenient—that is, as free from dangers as an ordinary public street: *District of Columbia v. Moulton*, 182 U. S. 576, 21 Sup. Ct. Rep. 840, 45 L. ed. 1237; *Township of Crescent v. Anderson*, 114 Pa. 643, 60 Am. Rep. 367, 8 Atl. 379; *Lane v. Lewiston*, 91 Me. 292, 39 Atl. 999; *Cairncross v. Pewaukee*, 78 Wis. 66, 47 N. W. 13, 10 L. R. A. 473; *Haller v. St. Louis*, 176 Mo. 606, 75 S. W. 613. Anyone driving along there in daylight could see that the south half was in process of reconstruction, was barricaded, that steam rollers were in operation, and that the north half was in use to store material and appliances used in reconstructing the other half. Plaintiff saw all these things. He saw, furthermore, that of the fifteen feet between the curb and the street railway tracks six of them were occupied by a heap of screenings with a push-cart adjacent. If we should hold that the work of reconstruction with its ordinary and usual attendant noises should stop every time a traveler headed that way and undertook the ticklish adventure of driving ⁷⁰⁶ down the north half, reconstruction and repair would be out of the question in a great city like St. Louis, for it would be constantly broken by a stream of interruption. Therefore, while plaintiff under the invitation extended by the open half of the street and the permissive use by the public of that half was entitled to go down there, yet his invitation had its limitations and warnings based on physical facts apparent to him, that is, if he preferred to experiment, to test or coquet with the danger, take his chance of reconstruction going on during his passage with all its attendant, usual and non-negligent noises, rather than go round by Pine street, he was at liberty to do so with the horse he was driving.

Speaking of that horse, by a compensatory law of nature if one sense is lost the others become more acute through extra use in supplying the deficiency. So, the ear of a blind man or a blind horse measurably fills the office of both eye and ear and becomes more sensitive to sounds. A horse blind of one eye and seeing but dimly with the other sees all he does see abnormally and out of true proportion; therefore, he is disturbed more easily than one with good eyes. So that this plaintiff (himself with good eyes) must bear the burden not only incident to the street reconstruction and the chance of the usual attendant noises and dangers of the steam roller, but that of knowingly going down Laclede avenue with a horse minus some of those faculties likely to lead up to hard "horse-sense."

If, under circumstances just outlined, plaintiff saw fit to test the danger of traveling on Laclede avenue, and his horse, such as it was, became frightened at the sight of, or at a necessary, usual or ordinary noise in operating, the steam roller, and through such fright ran away and hurt plaintiff, he assumed the risk of such fright and injury. Such dangers were open and obvious to him; if hurt by them he has no one to blame but himself. To allow a plaintiff to recover under ⁷⁰⁷ such circumstances would be to allow a recovery for an injury from known and open danger voluntarily encountered. It would be but levying tribute on the performance of a lawful thing in a lawful way by defendant, viz., the reconstruction of the street. If that were all there is to plaintiff's case, the demurrer should have been sustained. But that is not all, as will presently appear.

(b) No man assumes the risk of another's negligence. Merely because defendant was lawfully in the street and was rightfully using the necessary means to a lawful end, to wit, the movement of a heavy steam roller with its attendant noises to rebuild it, we know of no rule of law that exempts it from liability for injuries received by a traveler on the highway as the result of its negligent performance of its work.

It is argued that there can be no negligence unless there was a duty, and that in this case defendant owed plaintiff no duty. It is axiomatic that a duty and a breach of it are conditions precedent to actionable negligence. If there was no duty there could be no breach, ergo, no negligence (*damnum absque injuria*). But defendant owed plaintiff a duty. Though the latter was handicapped by certain risks he assumed, yet he was still a traveler on a public street, and defendant, though rightfully at work there, owed him due care. We are willing to allow defendant the proposition that it did not have to stop its street work in the first instance when plaintiff entered upon the street, but we are

not willing to allow to it the proposition that it can escape liability if it performed its work so negligently as to injure plaintiff; nor are we willing to allow to it the other proposition that if the usual noises of the street-roller caused plaintiff's horse to become restive and shy off, and to act as if becoming unmanageable, and such condition of things became apparent to defendant's engineer, he could voluntarily continue the noises thereafter and ⁷⁰⁸ thereby put the horse in a panic, beyond control, cause it to run away and injure its driver.

On this phase of the case more than one proposition arises. For instance:

There was testimony tending to show that the horse took fright at a usual noise incident to the operation of the roller and ran away because of that initial fright. On that view of the case, defendant was entitled to an instruction that if the jury found the facts that way, there could be no recovery. It asked no instruction of that sort.

Again, there was testimony tending to show that the horse took fright from the unusual, unnecessary and negligent use of a steam whistle on the roller. There certainly was evidence that the roller had a steam whistle and that it was in operation when plaintiff's horse took fright. Contra, there was evidence there was no steam whistle blown. Indeed, there was cogent testimony in the nature of an alibi, viz., that the roller was not equipped with one and never had been. It may be allowed to defendant that the weight of its testimony on this score preponderates. It is likely that plaintiff's witnesses mistook the puffing noises, the exhaust, incident to running the roller upgrade for the whistling of a steam whistle. Defendant could have put that theory to the jury if it had desired an instruction on it. But there is no evidence and no claim that the use of a steam whistle, as such, was necessary in running the roller at the time. If one was used, its use was negligent. That the unnecessary use of a steam whistle close to travelers on a highway whereby horses are frightened and human beings injured is actionable negligence, is a proposition supported by principles of natural justice and by precedent: *Feeney v. Wabash R. R. Co.*, 123 Mo. App. 420, 99 S. W. 477; *Brown v. Missouri Pac. R. R. Co.*, 89 Mo. App. 192, and authorities cited; *Flynn v. Boston & A. R. R. Co.*, 169 Mass. 305, 47 N. E. 1012. The demurrer should have been overruled on this ground, if no other.

⁷⁰⁹ Again, eliminating the whistle, there was testimony tending to show that the puffing noises were extraordinary in volume and unusual. If this testimony is to be believed, it was negligence to carry on its work in that way when travelers in vehicles were journeying hard by on the other

half of the highway. Such terrifying noises differ only in kind from the unnecessary use of a steam whistle. The same rule of law applies to both.

It is asserted there was no evidence the noises were "unusual." But counsel are inadvertently mistaken. Witnesses were allowed to say without objection more than once that the noises were extraordinary and unusual. It may be if these witnesses had been closely sifted on cross-examination it would have been made apparent that they were not competent to speak of "usual" and "unusual," or "ordinary" and "extraordinary" noises in operating a steam roller of that size and build upgrade; or that they compared the ordinary noises of the roller with ordinary street noises, and thought them extraordinary and unusual from that comparison only; or that they never saw or heard another steam roller of the size and character in question in operation, and therefore had no experience or observation making their judgment worth a rush. But it was for defendant to have developed these facts in cross-examination, if it chose. We shall not assume it so. The testimony was in for what it was worth. A defendant cannot stand by and allow evidence to go in of the character indicated without objection or without attempt to break its force by cross-examination and rest on a court of review ruling there was no testimony at all.

On the record plaintiff was entitled to go to the jury on the proposition that defendant operated its roller with unusual, extraordinary and, therefore, negligent noises, and if the fright and runaway were occasioned ⁷¹⁰ thereby, he might recover. The demurrer was properly overruled on this score.

Again, on the hypothesis the noises were usual. There was testimony that, after the horse gave signs of taking fright at the noises made by the approaching roller, these same noises were continued until he became unmanageable and the catastrophe resulted. If, now, defendant's engineer saw the initial signs of fright and uneasiness in the horse and, giving no heed to them, continued the original cause of the fright until the horse broke entirely away from control, i. e., if the runaway was caused by such continuation of the noises, then defendant was liable though the continued noises were usual. The case in this aspect is the same as if one is in peril and another, seeing his peril, omits to save him when within his power. It is but the humanitarian rule in one of its forms: *Oates v. Metropolitan St. Ry. Co.*, 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447; *O'Donnell v. O'Neill*, 130 Mo. App. 360, 109 S. W. 815.

It is argued for appellant that there was no testimony tending to show the engineer saw the horse was taking

fright and continued the noises after that time. It is true he locates the running away and observable fright of the horse at the time the horse ran into the cart or the screenings. His testimony shows he stopped the noises then, and if his word in that one particular is alone to control, the plaintiff has no case on this phase of it. But the same engineer also testified to some other things of marked significance. Thus: He puts himself facing east. He says it was his duty to look out for people and that he was looking out east as he went in that direction. We have been unable to read his testimony and draw any other conclusion than that he wants it understood that he saw the horse away to the east of him, that he saw it leave the rails and veer off to the curb—keeping it always under his eye; in short, that he saw all there was to see. He must, then, have seen what others saw, and others saw this horse taking fright to the east of the engineer as the ⁷¹¹ roller was heading that way, and fifty, sixty or more feet away.

That plaintiff read to the jury testimony of the engineer as part of his case does not bind him to the engineer's judgment and conclusions or all his statements of fact, as argued by defendant's counsel. Having used the engineer's testimony as his own, plaintiff was precluded from showing he was unworthy of belief, i. e., from impeaching him. A litigant may not blow hot and blow cold that way. It is a sad bird that befouls its own nest, as the adage runs. Having vouched for the character of the witness by the act of offering him, he must abide it. But the object of a lawsuit is to get at justice by eliciting the truth, and plaintiff may show the facts by other witnesses, although such facts contradict his own witness and incidentally or indirectly hurt his credit: Jones on Evidence, 2d ed., secs. 857, 858; State v. Shapiro, 216 Mo. 359, 115 S. W. 1022; Knorpp v. Wagner, 195 Mo. 637, 93 S. W. 961. The demurrer was rightly disallowed, on the theory just discussed.

(c) Counsel argue that plaintiff was violating a law and, therefore (as a matter of law), cannot recover. This argument travels on the theory that plaintiff was violating the ordinance in going down a closed and posted street and that such violation was the direct and proximate cause of the injury. We cannot allow the argument sound. In the first place, plaintiff was not violating the law. The north half of the street was open for use if travelers were willing to take the risk of street reconstruction pursued without negligence. In the second place, if plaintiff was violating the law, such violation was not the proximate and direct cause of the injury. There are cases where a plaintiff is injured while committing a crime *malum in se*. Such cases are not in point here. There are cases where a violation of a com-

mand of the master or of the law is the proximate cause of the injury, and such violation becomes contributory negligence as a matter of law. ⁷¹² For instance, the violation of a speed ordinance by a plaintiff may be the cause of a collision: *Weller v. Chicago etc. R. R. Co.*, 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532. But the case before us (if we allow there was a violation of the law) makes that violation only an "attendant circumstance" or "condition" of the accident, not a causal factor of it. In a broad and loose sense, if plaintiff had not lived in St. Louis, or had not been the driver of a laundry wagon, or had not gone down Laclede avenue, he would not have been hurt. But none of these things, each on a par with the other, were the proximate cause of his injuries. An instructive case illustrating the proposition now up is discussed by counsel on both sides: *Newcomb v. Boston Protective Dept.*, 146 Mas. 596, 4 Am. St. Rep. 345, 16 N. E. 555. There plaintiff, a cabman, instead of ranging his horse and cab lengthwise with the street and along the curb while on his stand, ranged it otherwise, and was injured by a collision.

Our case, on this phase of it, is on principle akin to a man walking on a railroad track in violation of our statute against trespassing on such track. In such cases we have uniformly ruled that a human being committing such trespass in violation of express statute may not be injured with impunity where his peril was seen by those operating the dangerous instrumentality (or, under some circumstances, might have been seen) in time to avert his injury: *Morgan v. Wabash R. R. Co.*, 159 Mo. 262, 60 S. W. 195; *Ahnefeld v. Wabash R. R. Co.*, 212 Mo. 280, 111 S. W. 95; *Frye v. St. Louis etc. R. R. Co.*, 200 Mo. 377, 98 S. W. 566, 8 L. R. A., N. S., 1069; *Cotner v. St. Louis etc. R. R. Co.*, 220 Mo. 284, 119 S. W. 610.

(d) In further discussing the demurrer stress is put on the fact that plaintiff voluntarily chose a dangerous way when Pine street (with no danger) was open and convenient to him. It is sought to apply the principle that when there are two open ways of doing a thing, one dangerous and the other not, and a plaintiff chooses the dangerous way and is injured, no recovery lies—that contributory negligence is predicated ⁷¹³ as a matter of law, of such fact. But that principle only applies where there are two ways of doing the very thing that caused the injury. An application of the doctrine may be found in *Black v. Missouri Pac. R. R. Co.*, 172 Mo. 177, 72 S. W. 559. Here we have already ruled that choosing Laclede avenue instead of Pine street was not the proximate cause of the injury. The actionable injury, if any, was caused by the negligence of defendant after plaintiff entered on the street, and contributory negligence

defeating recovery must also relate to the acts of plaintiff after he entered on the street—they must relate to each other in order to meet and offset each other. But we have pursued the matter far.

Other phases are discussed in this behalf, but we have disposed of material propositions and hold the demurrer bad.

4. Of the giving of instructions for plaintiff: Plaintiff's first instruction was a general one intended to outline the whole case, and should have been drawn with precision, simplicity and circumspection, keeping in mind the several and varying phases of the case and grounds of recovery; this in order to prevent confusion in the minds of the jury. The justness of this observation is reinforced when we consider the closeness of the case on its main features and the fact that the verdict is a good round sum.

Plaintiff was entitled to an instruction properly drawn to the effect that if the jury found and believed from the evidence that defendant negligently blew a steam whistle in its work in reconstructing Laclede avenue, and that said steam whistle, so negligently blown, frightened plaintiff's horse and caused him to run away, etc., then plaintiff could recover in the absence of his contributory negligence.

He was also entitled to one based on the theory that if there was no steam whistle blown, but that defendant then and there negligently operated its steam roller by emitting unusually loud and frightening ⁷¹⁴ noises, strictly limiting them to noises not necessary or incidental to the operation of such steam roller, and thereby frightened plaintiff's horse and caused it to run away, etc., then in the absence of contributory negligence, he could recover.

He was also entitled to an instruction to the effect that if defendant was operating its steam roller with usual puffing noises, and such noises caused plaintiff's horse to shy and to act as if becoming unmanageable, if the noises of the approaching roller be continued, and if such fact became apparent to defendant's engineer, then it was his duty to stop the roller and cease the noises; and if thereafter in violation of that duty he did not stop the roller and cease the noises but continued them, and such continuation of said noises put plaintiff's horse into a panic and caused it to run away, then, in the absence of his contributory negligence, plaintiff was entitled to recover.

Now, the instruction either smacked of, or embodies in whole or in part, all said several phases except possibly that involving the idea of unusual or extraordinary noises. In omitting that phase plaintiff did not follow the lines of his petition which counts on "unusual puffing and frightening noises" and on "unusual and frightening noises." Again,

the instruction is so drawn that puffing and whistling are put on a par in causing the horse to take fright at the outset. We think that unfortunate, as there is a marked distinction between the two—the one might be a necessary and ordinary noise and the other an unnecessary and negligent one. Again, the instruction is so drawn that the jury might be misled into the idea that if the horse became unmanageable at the outset from the puffing (though ordinary and necessary), the defendant was in some way blamable. In the discussion of this case on the demurrer we have pointed out that plaintiff took his chance of his horse taking fright and running away because of an ordinary and necessary noise in puffing ⁷¹⁵ in the running of the roller, and that defendant on that phase of the case would only be liable if, on becoming aware of the fact that the horse was taking fright, its engineer continued the noises and such continuation produced the panic, made the horse unmanageable and caused it to run away. Vaguely that idea is shadowed forth in the latter part of the instruction, but it is not segregated from other matter calculated to mislead the jury; furthermore, it is not put to them plainly and singly, as it should have been, but is interwoven with other phases of the case calculated to give the mind of the jury a twist or bias against defendant. It was reversible error to give that instruction in that unfair, complicated and confusing form. We see no error in any other instructions of plaintiff.

5. Of the refusing of instructions: In refusing instruction 1, declaring there was no evidence that the puffing was in any respect "unusual," the court did not err. There was evidence on the point pro and con. The issue was for the jury. It also ignored other phases of the case; e. g., that involving the humanitarian doctrine and the continuation of usual noises after the appearance of fright and which may have directly caused the panic in the horse and the runaway. Refused instruction 2 declared that the choice of Laclede avenue with its dangers instead of another safe street was contributory negligence as a matter of law; and if the jury found that plaintiff made choice of the dangerous street instead of the safe one, he could not recover. It is not necessary to discuss that instruction. It amounted to a peremptory order to find for defendant under the facts conceded. What we have already said in passing on the demurrer indicates our view of it. It was well refused. The same remarks for like reason apply to instruction 3. By instruction 4 the court was asked to rule that if the ordinance relating to closing streets was in force, and if there was a notice posted (such as shown in evidence), then plaintiff had ⁷¹⁶ no right to drive down Laclede avenue at all, and the jury should find for defendant. That phase of the case is considered and dis-

posed of on the demurrer. Refused instructions 5 and 6 are likewise disposed of by our observations on the demurrer, and it is no use to say more about them. They were not the law of this case.

The premises considered, the judgment is reversed and the cause remanded for a new trial.

Burgess, Fox and Graves, JJ., concur in what is said on plaintiff's first instruction, and in result in separate concurring opinion by Graves, J. Valliant, C. J., Gantt and Woodson, JJ., vote for affirmance; therefore they dissent in separate dissenting opinion by Gantt, J.

GRAVES, J. I fully concur in all that Brother Lamm says as to the instruction condemned by his opinion. However, in my judgment this cause should be reversed outright, but to the end that there may be a disposition of the cause here at this time I consent that it may be reversed and remanded for new trial, reserving the right to pass judgment on the facts and express my views should the case again reach this court and the occasion so demand on the then state of facts.

With the present divided views of the different members of the court, no other course is open to us at this time. As we reverse and remand the cause it is not necessary for me to discuss the facts in the present record.

Burgess and Fox, JJ., concur in these views.

Justice Gantt Dissented, Chief Justice Valliant and Justice Woodson concurring with him, and rendered the following opinion: "I am unable to concur in the opinion of my learned Brother Lamm, that this judgment should be reversed and the cause remanded on account of error in giving instruction numbered one.

"I fully concur with him that the demurrer to the evidence was properly overruled and that it would have been manifest error to have sustained it, as appears from his opinion. The only substantial difference between his opinion and the views expressed by myself in division is that he holds there was error in giving instruction No. 1 by the court, in behalf of plaintiff, and I think that instruction fairly presented the issues to the jury, and hence the judgment should be affirmed. This instruction is copied at length in my brother's opinion herein, and it need not be reproduced here. The court clearly informed the jury what would constitute negligence on the part of the engineer, to wit, a failure on his part to stop the running of said roller and the whistling and puffing noises after he discovered plaintiff's horse was becoming unmanageable, and especially left it to the jury to find whether he negligently failed to do so. I am unable to see how the jury could have misunderstood this instruction. It submitted the case upon the last chance doctrine, and this upon the most favorable view to the defendant. It conceded that defendant had the right to operate its roller in improving the street, but denied it the right after its engineer discovered the

peril in which plaintiff had been placed by the fright of his horse at the whistling and puffing of the roller to continue that noise when it could have been instantly stopped with no appreciable loss of time by defendant, and no inconvenience, since in the very nature of things the horse must have otherwise almost instantly passed by. As all of the testimony is fairly set out and all the other propositions fully covered, and in my opinion correctly decided, I deem it unnecessary to do more than enter my respectful dissent to a reversal on account of the giving of the instruction No. 1 for plaintiff."

The Liability of Municipal Corporations for Defects or want of repair of public streets is the subject of a note to *Dudley v. City of Flemingsburg*, 103 Am. St. Rep. 257. And the liability of property owners to persons injured by the nonrepair of streets is the subject of a note to *Hay v. City of Baraboo*, 115 Am. St. Rep. 993.

A Municipal Corporation is not Liable Under the Common Law for the loss of private property by fire caused by sparks from a steam roller used by the city officers in repairing street pursuant to a duty imposed upon the city by general law: *Alberts v. City of Muskegon*, 146 Mich. 210, 117 Am. St. Rep. 633.

If a Steam Shovel Belonging to a Railway Company and operated upon its right of way near a highway crossing is naturally calculated to frighten horses of ordinary gentleness, it is the duty of the company to exercise ordinary care in the use of the shovel so as not to unnecessarily endanger persons lawfully upon the highway: *Heinmiller v. Winston Brothers*, 131 Iowa, 32, 117 Am. St. Rep. 405.

The Liability of a Railroad Company for Injuries Due to the Frightening of Animals by the Emission of Steam was treated in the note to *Weller v. Lehigh Valley R. R. Co.*, 133 Am. St. Rep. 862.

STATE v. BRODNAX AND ESSEX.

[228 Mo. 25, 128 S. W. 177.]

TAXATION—Sales on Board of Trade—Constitutional Law.—A statute making it unlawful to sell stocks, bonds, grains or other commodities which are not at the time actually paid for and delivered, without the seller keeping a record thereof and furnishing the buyer a memorandum on which is a stamp of the value of twenty-five cents, purchased from the auditor of the state, the proceeds arising therefrom to constitute a road fund, is not a revenue measure whose validity must be tested by the constitutional principles applicable to direct taxes on property, but it imposes an excise or stamp tax on such transfers or on the privilege of making them. (p. 622.)

TAXATION—Sales of Stocks and Commodities on Board of Trade.—A statute making it unlawful for a corporation, association, partnership or person, engaged in selling stocks, bonds, grain or other commodities which are not at the time actually paid for and delivered, without keeping a record thereof furnishing the buyer a memorandum on which is a stamp purchased from the state auditor, embraces the entire class to which it is applicable, and is not objectionable in singling out a part of a legal class and exempting others of the same class. Nor is it unconstitutional in selecting this particular business calling. (pp. 623, 624.)

TAXATION—Classification and Discrimination.—In levying taxes the legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon

others. The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs. (pp. 624, 625.)

TAXATION—Sales of Stocks and Commodities on Board of Trade.—A statute making it unlawful to sell stocks, bonds, grains or other commodities which are not at the time actually paid for and delivered, without the seller keeping a record thereof and furnishing the buyer a memorandum on which is a stamp of the value of twenty-five cents, purchased from the state auditor, is not unconstitutional because of the inequality of the value of the properties sold. The tax is on the transfer, or privilege of making it, and not on the property. (pp. 625, 628.)

TAXATION—Sales on Board of Trade—Interstate Commerce.—A statute making it unlawful to sell stocks, bonds, grains or other commodities which are not at the time actually paid for and delivered, without the seller keeping a record thereof and furnishing the buyer a memorandum on which is a stamp purchased from the state auditor, in no way interferes with interstate commerce. (p. 631.)

STATUTE—Title of Act.—The Purposes of the Constitutional provision that no bill shall contain more than one subject, which shall be clearly expressed in its title, are to prevent incongruous, disconnected matters which have no relation to each other being joined in one bill. (p. 632.)

STATUTE—Title of Act.—Where All the Provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title, the statute is valid. (p. 632.)

STATUTE—Title of Act.—Constitutional Provision that no bill shall contain more than one subject, which shall be clearly expressed in its title, should be reasonably and liberally construed and applied, due regard being had to its object and purpose. (p. 632.)

STATUTE—Title of Act.—All Matters That are Germane to the principal subject and have a natural connection with it may properly be incorporated in the same bill. Hence a title, "An act making it unlawful to buy or sell" certain articles except upon the payment of a stamp tax, is not insufficient because the body of the statute makes it unlawful "to keep or cause to be kept any office, store or other place wherein is permitted the buying or selling" of such articles. (p. 633.)

TAXATION—Sales on Board of Trade—Constitutional Law.—A statute making it unlawful to sell stocks, bonds, grains or other commodities which are not at the time actually paid for and delivered, without the seller keeping a record thereof and furnishing the buyer a memorandum on which is a stamp of the value of twenty-five cents, purchased from the auditor of the state, the proceeds arising therefrom to constitute a road fund, is constitutional. (p. 633.)

R. F. Walker, Percy Werner, Kimbrough Stone and Frank Hagerman, for the appellants.

Elliott W. Major, attorney general, and John M. Atkinson, assistant attorney general, for the state.

³⁰ FOX, C. J. This is a prosecution of the defendants begun in the criminal court of Jackson county, Missouri, for

a violation of an act of the legislature passed in 1907 (Laws 1907, p. 392), and commonly known as the "stamp act." This act was approved March 8, 1907.

The indictment upon which the judgment in this cause rests, omitting formal parts, is as follows:

³¹ "The grand jurors for the county of Jackson, state of Missouri, being duly impaneled, upon their oath present and charge that at the county of Jackson, state of Missouri, on the — day of January, 1908, Thomas J. Brodnax and Frank E. Essex, officers and agents of the Board of Trade of Kansas City, Missouri, a voluntary association, did then and there willfully and unlawfully keep and cause to be kept a place commonly called the trading floor of the Board of Trade of Kansas City, wherein was then and there permitted the buying and selling of grain, provisions and other commodities, on margins and otherwise, and where at the time of such sales, so permitted as aforesaid, the grain, provisions and other commodities, so sold as aforesaid, were not then and there actually paid for and delivered, and at such time and place the sellers, or any of them, whose names are to the grand jury unknown, of the grain, provisions and other commodities, so sold on margins and otherwise, as aforesaid, did not then and there cause to be made a complete record of the grain, provisions and other commodities sold, the purchasers and the time of delivery in a book kept for that purpose, and at said time and place the sellers, or any of them, whose names are to the grand jury unknown, did not then and there deliver to the purchasers of said grain, provisions and other commodities, so sold as aforesaid, a written or printed memoranda of said sales, on which they, the said sellers, or any of them, had placed or caused to be placed a stamp of the value of twenty-five cents, which they, the sellers, had purchased of the state auditor and had on hand before making such sales; contrary to the statutes in such case made and provided, and against the peace and dignity of the state."

To this indictment the defendants interposed a demurrer, in which the constitutionality of the act upon which the indictment is predicated is challenged. Such demurrer, in substance, alleged that said indictment ³² does not state facts which constitute an offense against the state of Missouri, and that the statute, the violation of which is alleged in said indictment, is null and void, being in violation of sections 20 and 30 of article 2, and sections 28 and 53 of article 4, and of sections 3 and 4 of article 10, of the constitution of the state of Missouri, and of the interstate commerce provisions of section 8 of article 1, and of the fourteenth amendment to the constitution of the United States.

The defendants were duly arraigned and entered each for himself a plea of not guilty.

By consent of the parties to this proceeding a jury was waived and the cause was submitted to the court for trial. Before the introduction of any evidence defendants objected to the introduction of any evidence on the following grounds, to wit:

"1. The statute under which this proceeding is instituted is discriminatory, abridges the privileges and immunities of citizens of the United States, deprives defendants of their property without due process of law, and denies to them the equal protection of the law, contrary to the provisions of the fourteenth amendment of the constitution of the United States.

"2. The statute under which the proceeding is instituted is an unwarranted attempt to regulate interstate commerce, and is violative of section 8, article 1, of the constitution of the United States.

"3. The statute under which this proceeding is instituted is invalid as a tax not levied in proportion to value, in violation of section 4 of article 10, constitution of Missouri.

"4. The statute under which the proceeding is instituted is invalid as providing for a tax which is not uniform upon the same class of subjects, in violation of section 3 of article 10, constitution of Missouri.

"5. The statute under which the proceeding is instituted is void, being a special law, in violation of section 53 of article 4, constitution of Missouri.

³³ "6. The statute under which the proceeding is instituted is void, being passed in a bill which contained more than one subject, and which subjects were not clearly expressed in the title thereof, in violation of section 28 of article 4 of the constitution of Missouri.

"7. The statute under which the proceeding is instituted is void as depriving defendants of property without due process of law, in violation of section 30 of article 2, constitution of Missouri.

"8. The statute under which the proceeding is instituted is void as taking private property for private use without compensation, in violation of section 20 of article 2, constitution of Missouri."

The objections thus made were by the court overruled, the defendants properly preserving their exceptions to the action of the court in overruling such objections. The cause was then submitted to the court upon the following agreed statement of facts, subject to the objections as herein indicated. The agreed facts were as follows:

The defendants are citizens of the United States and of Jackson county, Missouri. The title of the act under which the indictment was found is, "An act making it unlawful for any corporation, copartnership or person to buy or sell, for

future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, without at the time delivering or receiving a written memoranda with a stamp purchased of the state auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof." That Thomas J. Brodnax and Frank E. Essex, of Jackson county, Missouri, defendants herein, on the — day of January, 1908, as members, officers and agents of the Board of Trade of Kansas City, Missouri, a voluntary association, did keep and cause to be kept a place commonly known and called "a trading floor" of the Board of Trade of Kansas City, Missouri, wherein was permitted the buying and selling of grain, provisions and other commodities on margins and otherwise, and where, at the time of such sales so permitted as aforesaid, the grain, provisions and other commodities, so sold, as aforesaid, were not actually paid for and delivered, and at the time and place of such sales the sellers or any ³⁴ of them, of the grain, provisions and other commodities as aforesaid, so sold on margins and otherwise, did not deliver to the purchasers of said grain, provisions and other commodities so sold as aforesaid, written or printed memoranda of said sales on which they (the sellers) or any of them had placed or caused to be placed a stamp of the value of twenty-five cents which they (the sellers) had purchased of the state auditor of the state of Missouri and had on hand before the making of such sales.

To all of the above facts the defendants object as incompetent, irrelevant and immaterial, and because the statute the violation of which is alleged in the indictment herein filed is null and void, being in violation of sections 20 and 30 of article 2, sections 28 and 53 of article 4, sections 3 and 4 of article 10, of the constitution of the state of Missouri, and the interstate commerce provisions of section 8 of article 1, and of the fourteenth amendment to the constitution of the United States, which objections are by the court overruled.

To which ruling the defendants then and there excepted.

"A substantial part of the sale aforesaid being of grain, provisions and other commodities which were at the time of sale in course of transportation as articles of interstate commerce."

To the facts immediately preceding, the state objects as incompetent, irrelevant and immaterial, which objection is by the court overruled.

At the conclusion of the evidence the defendants requested the court to give numerous declarations of law. We deem it unnecessary to reproduce in the statement the declarations of law so requested. It is sufficient to say that they were along the lines of the grounds alleged in the demurrer and

the objections urged to the introduction of any evidence at the commencement of the trial. All of the declarations of law, as requested, were by the court refused, to which action of the court in refusing such declarations the defendants duly preserved their exceptions. The cause was then submitted to the court and the defendants were found guilty as charged in the indictment, and their punishment assessed at a fine of fifty dollars each.

Timely motions for new trial and in arrest of judgment were filed, and by the court taken up and overruled. Judgment was entered in accordance with the ³⁵ finding of the court, and from this judgment defendants, in due time and proper form, prosecuted this appeal, and the record is now before us for consideration.

The record before us discloses that the defendants were convicted in the criminal court of Jackson county, Missouri, upon an indictment by the grand jury of said county charging them with a violation of an act of the General Assembly of Missouri passed in 1907, and approved March 8th of that year. The act upon which the indictment in this cause and the judgment of conviction must rest was as follows:

“An act making it unlawful for any corporation, copartnership or person to buy or sell, for future delivery, stocks or bonds of any corporations, or petroleum, cotton, grain, provisions or other commodities, without at the time of delivering or receiving a written memoranda with a stamp purchased of the state auditor and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.

“Be it enacted by the General Assembly of the state of Missouri, as follows:

“Section 1. It shall be unlawful for any corporation, association, copartnership or person to keep, or cause to be kept, in this state, any office, store or other place wherein is permitted the buying or selling the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered, without at the time of the sale the seller shall cause to be made a complete record of the thing sold, the purchaser and the time of delivery in a book kept for that purpose; and at the same time the seller shall deliver to the purchaser a written or printed memoranda of said sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents, which the seller shall purchase of the state auditor, and have on hand before making such sale; and it shall be the duty of the state auditor, upon the passage of this act, to have printed or engraved stamps for this purpose, of such design as he may select; and on application and payment for said stamps, to

immediately furnish the same to the applicants applying therefor: Provided, further, that it shall be unlawful for the purchaser to receive the memoranda aforesaid until it bears the stamp above provided for.

³⁶ "Sec. 2. The fund arising from the sale of the stamps provided for in section one of this act shall, in the hands of the state auditor, constitute a road fund; and it shall be the duty of the said auditor to distribute said fund, annually, to the counties in the state and the city of St. Louis, in the same proportion and in like manner as the state school funds are now distributed by him.

"Sec. 3. Any person, whether acting individually or as a member, or as an officer, agent or employé of any corporation, association or copartnership, who shall be guilty of violating any of the provisions of section one, shall, upon conviction thereof, be fined in any sum not less than fifty, nor more than one thousand dollars, and in addition thereto may be imprisoned in the county or city jail for a period of not less than thirty days, nor to exceed one year.

"Approved March 8, 1907."

The validity of this statute is challenged by learned counsel for appellants upon numerous grounds, which may thus be briefly stated:

First: It is insisted that the statute is purely a revenue measure.

Second: That the tax provided by the statute is not uniform, and hence is violative of the fourteenth amendment of the constitution of the United States, as well as sections 3 and 4 of article 10, and section 53 of article 4, and section 30 of article 2, of the constitution of Missouri.

Third: It is earnestly contended that the statute is an interference with interstate commerce; hence, is violative of section 1 of article 8 of the constitution of the United States.

These are the propositions confronting us, and their solution must be sought by a fair and reasonable application of the rules of law applicable to the questions presented. We will treat the propositions in the order as herein indicated.

1. Directing our attention to the insistence of counsel for appellant that this act is a revenue measure and its validity must be tested by the taxing power, it is ³⁷ sufficient to say, in our opinion, that the test of the validity of this act is not to be applied to the usual taxing power in the imposition of a direct or property tax in any of the forms in which they are ordinarily imposed. Manifestly, the act does not provide a direct or property tax in any form whatever, but simply provides for an excise or stamp tax on the right, privilege and occupation of buying or selling shares of stocks, or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the

same is not at the time actually paid for and delivered. As was said in *Nicol v. Ames*, 173 U. S. 509, 19 Sup. Ct. Rep. 522, 43 L. ed. 786, where a tax of this character was in judgment before that court, "The tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise."

So it may be said of this act that it has no application to sales generally, but it is directed to any corporation, association, copartnership or person that keeps or causes to be kept in this state any office, store or other place for the purpose of transacting certain forms of commercial dealings—that is to say, wherein the buying or selling is permitted of shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, on margins or ³⁸ otherwise, where the same is not at the time actually paid for and delivered. In other words, by the act it is sought to regulate the places of business as designated in the statute where stocks, bonds, etc., are bought and sold on margins or otherwise, where the same are not at the time actually paid for and delivered, by requiring, in the transaction of business of that character, that a complete record be made of the things sold, the name of the purchaser and the time of delivery in a book kept for that purpose, with the further requirement that the seller shall deliver to the purchaser a written or printed memorandum of such sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents.

This act has no application to the ordinary and usual business transaction, such as might be conducted by a merchant or butcher who is engaged in the business of selling goods, wares, merchandise and provisions, and who may sell such goods, wares, merchandise and provisions upon credit, but is directed to a class of business which has made marked advancements along the lines of commercial transactions, particularly in the large cities and towns of this country. It has application to corporations, associations, copartnerships or persons that may keep and furnish meeting places for those engaged in the purchase or sale of commodities or other

things to be sold upon margins or otherwise, and to sales made in such places without at the time any payment being made for the article purchased or any delivery of such article. This act embraces every character of association, whether they be corporations or voluntary associations, or whether they be called boards of exchange or boards of trade, as well as embracing partnerships and individuals who may keep and furnish places of the character designated by this act.

Dealings of the character and the places furnished for such dealings which are sought to be regulated by ³⁹ the imposition of certain conditions and a stamp tax upon sales that are made are not subjects which are unknown, either to the people or to the legislative bodies that may in a legislative way deem it essential to give them consideration. They are places where important transactions occur; in fact, it is at such places that frequently the prices of commodities are fixed, and an enormous amount of business of the country is transacted and takes place, upon boards of trade or exchange and other places of similar character.

In *Nicol v. Ames*, 173 U. S. 509, 19 Sup. Ct. Rep. 522, 43 L. ed. 786, it was fully recognized that dealings in the places of the character designated by the act were subjects of such importance as to demand the consideration and attention of even the taxing power of the government. It was said in that case that the places of the character treated of in the act now under consideration "furnish a meeting place for those engaged in the purchase and sale of commodities or other things to be sold, and in that way they offer facilities for a market for them. Dealings among members so engaged tend to establish the market price of the articles they deal in, and that price is very apt to be the price for the same article when bought or sold outside. The price is arrived at by offers to sell on the one side and to purchase on the other, until, by what has frequently been termed the 'higgling' of the market, a price is agreed upon and the sales are accomplished. In arriving at this price, of course, the great law of the cost of production and also that of supply and demand enter into the problem, and it is upon a consideration of all matters regarded as material that the agreement to buy and sell is made. The prices thus fixed are usually followed when the transaction occurs outside, and the market price means really the exchange price. That an enormous amount of the business of the country which is engaged in the distribution of the commodities grown or produced therein is transacted and takes place through the medium of boards of trade ⁴⁰ or exchanges cannot be doubted. Nor is there any doubt that these exchanges facilitate transactions of purchase and sale, and it would seem that such facilities or privileges, even though not granted by the government or by a state, ought

nevertheless to be recognized as existing facts and to be subject to the judgment of Congress as fit matters for taxation."

Manifestly, if the authority of the taxing power may be invoked and certain taxes imposed upon the dealings and transactions now under consideration, for a much stronger reason the power to regulate and impose a license or stamp tax by the state government should not be seriously questioned under the constitution and laws of this state. The provisions of this act simply impose certain conditions upon the transactions in the places furnished and designated by the statute, that is to say, it imposes a license or stamp tax, which is fully set forth in the statute, and while this tax may furnish a revenue, it falls far short of being a purely revenue measure by the exercise of the taxing power of the state in the imposition of a direct tax upon property or values of property.

In the constitution of the state of California there was a provision absolutely prohibiting sales on margins, and this provision was upheld by the supreme court of the United States in *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 168, 47 L. ed. 323. The court, in discussing the provision, said: "We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he ⁴¹ buys stocks on margins he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay."

So it may be said of the act now under consideration. There is no impropriety (the regulations not being unreasonable) in regulating the dealings at the places to which the statute refers. It simply provides for a record being kept of all the sales and purchases, the names of the sellers and purchasers, and then emphasizes it with the requirements that a memorandum of the sale must be given to the purchaser by the seller, duly stamped with a stamp of the character provided for by the statute.

There are many good reasons for the regulation of business transactions of the character with which we are dealing, and they are so well known to the business public that we will not burden this opinion by enumerating the many good results that will flow from a strict regulation of the transaction of business of the class and character of which the statute now

under consideration treats. It is sufficient to direct attention to the case of *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 168, 47 L. ed. 323, wherein the supreme court of the United States clearly indicated the dangers to which dealing in margins and futures might lead.

We shall not pursue this subject further. We are unable to give our assent to learned counsel's first contention that this is a revenue measure and that its validity must be tested by the constitution and laws applicable to the taxing power in the imposition of taxes directly upon property or the value of property.

2. We are next confronted with the proposition insisted upon by counsel for appellants that the tax is not uniform. It is urged that this tax is not directed and imposed upon the same class of subjects within the territorial limits of the authorities levying the tax, ⁴² and that the classification of subjects is not a true classification. In other words, that the classification of subjects for taxation is unreasonable. It is also insisted that the tax discriminates between members of the class affected thereby.

For these reasons the provisions of the statute now under consideration which provide for a license or stamp tax upon the dealings and transactions in the places designated in the statute are assailed as being violative of the due process of law and equal protection of the laws, provided for in the fourteenth amendment of the constitution of the United States, as well as section 30, article 2, and section 53, article 4, and section 3, article 10, of the state constitution.

It is sufficient to say upon this proposition that we pointed out in the first paragraph of this opinion the class of persons to whom this law is directed, and the character of dealings and transactions to which the law was made applicable. In our opinion, this law clearly embraces every class, whether it be corporation, association, either voluntary or otherwise, partnership or person which furnishes a place for dealing in sales of stocks, bonds, etc., upon margins or otherwise, where the same is not at the time actually paid for and delivered, and embraces all classes who may deal in such places so furnished.

It is clear that the character of business which is treated of by the statute is fully recognized as a separate and distinct business from all other classes. That the statute embraces every class, whether it be corporation, association, partnership or person who may furnish a place or may deal in transactions in such places, there can be, in our opinion, no sort of doubt; therefore, we conclude that so far as the class of persons to whom this law is made applicable, whether natural or artificial, this statute embraces the entire class, and is not subject to the objection that it singles out a part of a legal

class upon which the license or ⁴³ stamp tax is imposed and exempts others of the same class. Manifestly the selection of the business calling and the class pursuing such calling were proper and appropriately selected by the legislature of this state in dealing with that subject.

It is next insisted that the attempted classification of transactions is arbitrary. This same objection (and it was earnestly insisted upon) to the classification of subjects for taxation was in judgment in *People v. Reardon*, 184 N. Y. 431, 112 Am. St. Rep. 628, 77 N. E. 970, 8 L. R. A., N. S., 314, 6 Ann. Cas. 515. In that case the subject was exhaustively treated and the authorities applicable to it were all carefully reviewed and the rulings of the court upon substantially the same propositions involved in the case at bar were adverse to the contentions of learned counsel for appellants. It was insisted in the New York case that the classification made by selecting one kind of property and taxing the transfer of that only was so arbitrary, discriminating and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws. It was said by the court in that case that all taxation is arbitrary, for the reason that it compels the citizen to give up a part of his property. It was also said that it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation. Further discussing this proposition the New York court used this language: "A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings: ⁴⁴ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 26 Sup. Ct. Rep. 431, 50 L. ed. 451. The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation": 1 *Cooley on Taxation*, 3d ed., 255.

The *Hatch* case by the New York court very clearly and, in our opinion, correctly announced this rule thus: "The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons

and property in the same class are treated alike, it has uniformly been sustained both by the state and federal courts. . . . The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs: *Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *Matter of Gould*, 156 N. Y. 423, 51 N. E. 287. The equal protection of the laws 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances': *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. Rep. 57, 29 L. ed. 414. Or, in other words, all persons must 'be treated alike under like circumstances and conditions both in the privilege conferred and the liabilities imposed': *Magoun v. Illinois T. & S. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. ed. 1037; *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. Rep. 350, 30 L. ed. 578; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923. 'Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any⁴⁵ particular locality or are scattered all over the state': *Cooley on Taxation*, 3d ed., 260."

Finally, it was held in that case that the tax in question was not imposed upon property, but on the transfer of a certain class of property, extensively bought and sold throughout the state, and that there was no discrimination in the imposition of the tax involved in that case.

It is next earnestly insisted by counsel for appellants that the act now under consideration makes a discrimination within the class designated by such act. In support of the contention it is insisted by counsel for appellants that the inequality of the value of the property sold in the places designated by the statute is so gross as to render the provisions of the statute imposing the license or stamp tax unreasonable, and that such inequality in value is sufficient to warrant the courts in holding such statute invalid. Again, with all due respect to the ability and learning of counsel for appellants, we are unable to give our assent to the contentions upon this proposition. It must not be overlooked that the question of a tax involved in this proceeding is a mere license or stamp tax for the right or privilege of participating in dealings and transactions in a business calling and at places pointed out by the statute. The imposition of this license or stamp tax does not depend upon any principle of valuation or on any notice to the taxpayer. This was expressly ruled in the New York case, to which reference has heretofore been made. It was further pointed out that even the tax which

was there involved was not a direct tax governed by the rule of appraisement, and was not an indirect tax governed by the rule of uniformity. That it was not like a general tax upon the bulk of property in the state which must be paid in any event; that the payment of the tax was dependent upon a sale. If there was no sale there was no tax. The court said: "Neither notice nor ⁴⁶ grievance day is required, for no valuation is made except by the statute itself, and there is no provision in either constitution requiring such a tax to be laid on an ad valorem basis. There can be no tax without a sale, even if the property is of great value and is owned in every household. When a sale is made the tax follows, and the legislature had the right to measure it in any way that it saw fit." The court then proceeded to direct attention as to what had been done and fully recognized by the court along the line of the imposition of a tax irrespective of value, and pointed out that "a tax of two cents on every check, regardless of the amount for which it was drawn, and of five cents on a written contract, whether it covered a transaction involving hundreds or thousands, may be referred to as examples of what has been done without serious question in the imposition of excise taxes. A poll tax does not depend upon the income or earning capacity of the person subjected to it. A tax on carriages, guns and watches does not rest on the value of the subjects taxed. They are counted, not appraised: *Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556; *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. ed. 892. The same is true of an excise tax on legal process, domestic animals, avocations and the like, of which there have been many instances during the history of the nation and the different states. Such powers of taxation, as was said in the late case, 'have admittedly belonged to state and nation from the foundation of the government': *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. Rep. 747, 44 L. ed. 969. 'Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature fixes its amount and that is the end of the ⁴⁷ matter. . . . No right of his is therefore invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, there is nothing the owner can do which can affect the amount to be collected from him': *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. ed. 569."

The ruling by the New York court of appeals in *People v. Reardon*, 184 N. Y. 431, 112 Am. St. Rep. 628, 77 N. E. 970,

8 L. R. A., N. S., 314, 6 Ann. Cas. 515, was fully upheld by the supreme court of the United States in 204 U. S. 152, 27 Sup. Ct. Rep. 188, 51 L. ed. 415, 9 Ann. Cas. 736. The contentions in the supreme court of the United States in that case were substantially the same as in the case when pending in the New York court of appeals, and in many respects similar to the contentions made in the case at bar. It was there insisted that the classification was arbitrary; that it was a direct tax upon property or its value, and finally that the discrimination between the class selected rendered the statute unreasonable. The rulings of the supreme court upon these propositions were adverse to the contentions so ably and earnestly urged. It appears that in that case the question was involved as to requiring a memorandum in writing, and the court simply said that "a statute requiring a memorandum in writing is quite as clearly a regulation of the business as a tax."

As applicable to the subject of discrimination, which is now under consideration in the case at bar, the inequality of the value of the stocks sold was urged as one of the strong reasons why the owners of the stocks were deprived of their property without due process of law. The court, in reciting the facts, said: "One of the stocks was worth thirty dollars and seventy-five cents a share of the face value of one hundred dollars, the other one hundred and seventy-two dollars." The court discussing these facts, as applicable to inequality in value, used this language: "The inequality of the tax, so far as actual values are concerned, is manifest. But here again equality ⁴⁸ in this sense has to yield to practical considerations and usage. There must be a fixed and indisputable mode of ascertaining a stamp tax. In another sense, moreover, there is equality. When the taxes on two sales are equal, the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. Valuation is not the only thing to be considered. As was pointed out by the court of appeals, the familiar stamp tax of two cents on checks, irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capacity, and many others, illustrate the necessity and practice of sometimes substituting count for weight: See *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. ed. 892; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. Rep. 829, 42 L. ed. 236. Without going further into a discussion, which, perhaps, could have been spared in view of the decision in *Thomas v. United States*, 192 U. S. 363, 24 Sup. Ct. Rep. 305, 48 L. ed. 481, and the constitutional restrictions upon Congress, we are of the opinion that the New York statute is valid, so far as the fourteenth amendment is concerned."

What was said in that case may very appropriately be applied to the case at bar. This statute, in harmony with the rule announced, provided and fixed an indisputable mode of ascertaining the amount of the license or stamp tax, and manifestly there was equality, for the license or stamp tax was required on sales whether large or small, and the same privilege which was awarded to the entire class selected who desired to exercise the privilege in dealing in transactions at the places designated by the statute could be used by each member of the class to the same extent. This same principle was clearly announced in the case of *People v. Metz*, 193 N. Y. 148, 85 N. E. 1070, 24 L. R. A., N. S., 201.

In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. ed. 1037, it was expressly held, in treating of the subject of equality in taxation, that the "rule does not require, as we have seen, exact equality in taxation. ⁴⁹ It only requires that the law imposing it shall operate on all alike under the same circumstances."

This is a sufficient indication of our views upon this proposition. We have pointed out, in the well-considered adjudicated cases by the highest courts in the land, the rules applicable to this subject with which we are now confronted, and our conclusion deduced from a most careful consideration of such authorities to which we have made reference is, that the statute now under consideration is not invalid by reason of any discrimination in the class selected, or by reason of any inequality in the imposition of the requirement that a memorandum shall be made by the seller to the purchaser of the commodities sold, in the manner and at the places provided for by the law, and that a twenty-five cent stamp shall be placed upon each memorandum of sale so made at such places.

In arriving at the conclusion as indicated upon this proposition, we have by no means been unmindful of the authorities cited by learned counsel for appellants. We have carefully considered the case of *People v. Mensching*, 187 N. Y. 8, 79 N. E. 884, 10 L. R. A., N. S., 625, 10 Ann. Cas. 101, as well as the other cases to which our attention was directed, and in our opinion those cases can readily be distinguished from the cases upon which we have predicated our conclusion. In fact, the recitation of the facts upon which those cases were decided furnishes the distinction between them and the cases to which we have made reference.

3. This brings us to the consideration of the insistence on the part of the appellants that the statute now under consideration is illegal and invalid, for the reason that it interferes with interstate commerce, and is therefore violative of the provisions of section 1, article 8, of the constitution of the United States.

It is sufficient to say upon this proposition, after ⁵⁰ a most careful consideration of the subject, that in our opinion the license or stamp tax required by the statute involved in this proceeding upon sales made at the places and in the manner provided by the statute does not, even in the remotest degree, interfere with interstate commerce. This subject was in judgment in the supreme court of the United States in the Hatch case. It was fully discussed by that court and all of the authorities applicable to the subject were fully considered, and the conclusion reached was that there was not a shadow of a ground for calling the transaction between the parties, in which a stamp tax was required upon a memorandum of sales, interstate commerce. The court said in that case, in treating of this subject, that "the communications between the parties were not between different states, as in *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, and the bargain did not contemplate or induce the transport of property from one state to another, as in the drummer cases: *Rearick v. Pennsylvania*, 203 U. S. 507, 27 L. ed. 159, 51 L. ed. 295. The bargain was not affected in any way, legally or practically, by the fact that the parties happened to have come from another state before they made it. It does not appear that the petitioner came into New York to sell his stock. . . . It appears only that he sold after coming into the state. But we are far from implying that it would have made any difference if he had come to New York with the supposed intent before any bargain was made. . . . The facts that the property sold is outside of the state and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several states, and that is all that there is here. On the general question there should be compared with the drummer cases the decisions on the other side of the line: *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 993; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, 29 L. ed. 257; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. Rep. 367, 39 L. ed. 430. A tax is not an unconstitutional regulation in every ⁵¹ case where an absolute prohibition of sales would be one: *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. Rep. 365, 48 L. ed. 538. We think it unnecessary to explain at greater length the reasons for our opinion that the petitioner has suffered no unconstitutional wrong."

It must not be overlooked that the license or stamp tax required by the statute involved in this proceeding is not a tax upon property, but is a requirement to place a twenty-five cent stamp upon the sale of property made in the manner and at the places provided for by such statute. In other words, it is a license or stamp tax upon a particular kind of

contract when made in this state. This proposition confronted the New York court of appeals in the Hatch case (184 N. Y. 431, 112 Am. St. Rep. 628, 77 N. E. 970, 8 L. R. A., N. S., 314, 6 Ann. Cas. 15), and in treating of the subject of a stamp tax upon sales of certificates of stock, that court thus stated the law: "The certificate itself is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property."

In further discussing that question it was said that "jurisdiction over the persons who made the contract does not depend on their residence, but on their presence within the state when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. . . . When two citizens of Connecticut come into this state and make a contract here, to be enforced here, both they⁵² and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state, and is as binding on them as if they resided in the state. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less. The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the state they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or nonresidents, or between a resident and a nonresident, for if it is made within the state it is subject to taxation by the state."

Manifestly the state has power within its territory to regulate all business done, and, as was said in *Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685: "It has never been questioned that the legislature can impose a tax upon all sales of property, upon all incomes, upon all

acquisitions of property,* upon all business and upon all transfers."

The requirements of the statute now under consideration have no bearing or influence whatever upon property sold. It is addressed to those furnishing the places, as well as those who deal in the transaction in such places. In other words, in sales of property in the manner and at the places pointed out by the statute it is required, where a sale is made in the manner contemplated by that statute, that the seller shall make a memorandum of such sale, and place upon such memorandum a twenty-five cent stamp. We repeat that ⁵³ transactions of this character have no influence whatever upon commerce between different states, and, as was in substance said by the supreme court of the United States, sales of this character do not contemplate or have anything to do with the transportation of property from one state to another, as in the drummer cases, and the mere fact that the parties to such sale, or either one of them, happens to be a resident of another state, in no way, legally or practically, affects the transaction, and falls far short of subjecting such transaction to condemnation for the reason that it interferes with interstate commerce. Our conclusion upon this proposition is that this statute in no way interferes with interstate commerce and should not be held invalid for that reason.

4. Finally, it is insisted by counsel for appellants that the title to this act is defective, and therefore is not in harmony with the provisions of section 28, article 4, of the constitution of this state. Our attention upon this insistence is directed to the provisions of section 3.

It is said in the brief of counsel for appellants that "the object of the law as expressed in its title is to make 'it unlawful to buy or sell' certain articles except upon certain conditions, and providing penalties therefor. The act in addition makes it unlawful 'to keep or cause to be kept any office, store or other place wherein is permitted the buying or selling' which is in question. This is a separate and distinct provision, and its violation is a crime separate and distinct from that of the seller or buyer who violates the law."

Directing our attention to this proposition, it may be said that while counsel correctly state that the purpose of the law, as expressed in its title, is to make it "unlawful to buy or sell" certain articles except upon certain conditions, and providing penalties ⁵⁴ therefor, the contention of counsel is predicated upon the provisions in the body of the act—that is, that the act, in addition to making it unlawful to buy or sell, makes it unlawful "to keep or cause to be kept any office, store or other place wherein is permitted the buying or selling, which is in question." It is argued that to keep

or cause to be kept a place for the buying or selling is a separate and distinct provision, and its violation is a crime separate and distinct from that of the seller or buyer who violates the law.

There is no subject that has more frequently had the attention of this court than the one in which acts of the General Assembly have been challenged for failure to conform its legislation to requirements of section 28, article 4, of the constitution of this state, which substantially provides that no bill shall contain more than one subject, which shall be clearly expressed in its title. It is this provision of the constitution that appellants invoke in the case at bar.

The rules applicable to this subject are firmly established in this jurisdiction. It has been uniformly and repeatedly held by this court that the objects and purposes of this constitutional provision were to prevent incongruous, disconnected matters which had no relation to each other, from being joined in one bill; however, it has always been recognized that all matters that are germane to the principal subject and have a natural connection with it, might properly be incorporated in the same bill: *O'Connor v. St. Louis T. Co.*, 198 Mo. 622, 115 Am. St. Rep. 495, 97 S. W. 150, 8 Ann. Cas. 703.

In *Ewing v. Hoblitzelle*, 85 Mo. 64, the rule applicable to this subject was very clearly and correctly announced. It was there said: "Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, . . . and if it is sufficiently expressed in the title, the statute is valid." To the same effect are ⁵⁵ *State v. Miller*, 100 Mo. 439, 13 S. W. 677; *St. Louis v. Tiefel*, 42 Mo. 578; *State v. Mathews*, 44 Mo. 523; *State v. Miller*, 45 Mo. 495; *Hannibal v. County of Marion*, 69 Mo. 571; *State v. Mead*, 71 Mo. 266.

In *State v. Bronson*, 115 Mo. 271, 21 S. W. 1125, it was ruled that this provision of the constitution should be reasonably and liberally construed and applied, due regard being had to its object and purpose. It was also again announced in the case last cited that if all the provisions of the bill have a natural relation and connection, then the subject was single, and this, too, though the bill contains many provisions. See, also, the comparatively recent cases, which are in line with cases heretofore referred to, of *State v. Doerring*, 194 Mo. 398, 92 S. W. 489; *Coffey v. Carthage*, 200 Mo. 616, 98 S. W. 562; *Taylor v. St. Louis T. Co.*, 198 Mo. 715, 97 S. W. 155; *State v. Delmar Jockey Club*, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539.

The object of the law now under consideration is clearly expressed in the title of the act, that is, making it unlawful

to buy or sell certain articles except upon certain conditions, and providing penalties therefor. The provision in the act to which reference is not made in terms in the title of the act, upon which appellants predicate their insistence concerning this subject, is that it shall be unlawful to keep or cause to be kept any office, store or other place wherein is permitted the buying or selling, etc., without a compliance with the conditions imposed by the statute. Applying the rules applicable to this subject announced in the cases heretofore referred to, it is clear that the provision directed to persons furnishing the places wherein articles are bought and sold is germane to the principal subject, and has a natural connection with it. Manifestly, if the penalties imposed will prevent the class of persons designated in the statute, either artificial or natural, from furnishing the places where the buying and selling take place, requiring a compliance with the conditions imposed, in our opinion, would aid very ⁵⁸ materially in carrying out the purposes and objects of the law, as expressed in its title. The provision to which our attention has been directed, which embraces the persons who furnish the places for the buying and selling of the articles, without seeing that the conditions are complied with, in our opinion, is germane to the subject as expressed in the title, and has a very close and natural connection with such subject. Our conclusion upon this proposition is that the title to this act is in harmony with the provisions of article 4, section 28, of the constitution of this state, and that the provisions in the body of the act are in keeping with the subject, as expressed in its title.

We have given expression to our views, as herein indicated, which results in the conclusion that the act upon which this prosecution rests is constitutional and valid, and the judgment of the trial court should be affirmed, and it is so ordered.

The foregoing opinion, heretofore rendered in division No. 2, on the case coming into court in bank, is adopted as the opinion of the court.

Gantt, Burgess, Valliant and Lamm, JJ., concur; Graves, J., dissents; Woodson, J., not sitting.

The Principal Case was Affirmed by the Supreme Court of the United States (Broadnax v. State, 000 U. S. 000, 31 Sup. Ct. Rep. 238, 00 L. ed. 00), Mr. Justice Harlan delivering the opinion of the court as follows: "This is an indictment in the criminal court of Jackson county, Missouri, against the plaintiffs in error, Broadnax and Essex. It is based on a statute of Missouri, approved March 8, 1907 (Mo. Sess. Acts 1907, pp. 392, 393; Mo. Rev. Stats. 1909, secs. 10,228-10,230), which declares it to be 'unlawful for any corporation, association, copartnership, or person to keep, or cause to be kept, in this state, any office, store, or other place wherein is

permitted the buying or selling the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions, or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered, without at the time of the sale the seller shall cause to be made a complete record of the thing sold, the purchaser, and the time of delivery, in a book kept for that purpose; and at the time the seller shall deliver to the purchaser a written or printed memorandum of said sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents, which the seller shall purchase of the state auditor, and have on hand before making such sale; and it shall be the duty of the state auditor, upon the passage of this act, to have printed or engraved stamps for this purpose, of such design as he may select; and on application and payment for said stamps, to immediately furnish the same to the applicants applying therefor: Provided, further, and it shall be unlawful for the purchaser to receive the memoranda aforesaid until it bears the stamp above provided for. Section 1. The fund arising from the sale of the stamps provided for in section 1 of this act shall, in the hands of the state auditor, constitute a road fund; and it shall be the duty of the said auditor to distribute said fund, annually, to the counties in the state and the city of St. Louis, in the same proportion and in like manner as the state school funds are now distributed by him. Section 2. Any person, whether acting individually or as a member, or as an officer, agent, or employé of any corporation, association, or copartnership, who shall be guilty of violating any of the provisions of section 1, shall, upon conviction thereof, be fined in any sum not less than fifty, nor more than one thousand dollars, and in addition thereto may be imprisoned in the county or city jail for a period of not less than thirty days, nor to exceed one year. Section 3.'

"The indictment charges that the defendants, being officers and agents of the board of trade of Kansas City, Missouri, did, at a time specified, willfully and unlawfully keep and caused to be kept a place, commonly called the trading floor of the board of trade of Kansas City, wherein was permitted the buying and selling of grain, provisions, and other commodities, on margins and otherwise, and where, at the time of such sales, so permitted, the grain, provisions, and other commodities so sold, were not actually paid for and delivered, and at such time and place the sellers, or any of them, of the grain, provisions, and other commodities, so sold on margins and otherwise, did not then and there cause to be made a complete record of the commodities sold and the time of delivery in a book kept for that purpose, and at said time and place neither the sellers, nor any of them, delivered to the purchasers a written or printed memoranda of said sales, on which they, the sellers, or any of them, had placed or caused to be placed a stamp of the value of twenty-five cents, which they had purchased of the state auditor, and had on hand before making such sales; contrary to the statutes, etc.

"The defendants demurred to the indictment on the ground, among others, that the statute was in violation of the fourteenth amendment, as well as of the commerce provision of the constitution of the United States. The demurrer was overruled and the defendants excepted. A jury was waived, and the case was tried by the court.

"Before the introduction of evidence, the defendants objected to any proof, resting their objections upon these grounds: 1. That the statute was discriminatory, abridged the privileges and immunities of citizens of the United States, deprived defendants of their property without due process of law, and denied to them the equal protection of the law, contrary to the provisions of the fourteenth amendment of the constitution of the United States. 2. That it was an unwarranted attempt to regulate interstate commerce.

"The objection was also made that the statute was in violation of certain alleged provisions of the constitution of Missouri. But with the latter ground we have, for obvious reasons, no concern on this writ of error from the state court. The above objections to the evidence were overruled, the defendants duly excepting.

"For the purpose of the case, and subject to such objections as might be thereafter stated, facts were admitted which brought the case within the provisions of the statute and the averments of the indictment.

"The defendants objected to these facts as incompetent and inconsistent with the constitutions, both of the United States and of Missouri. The objections were overruled and the defendants excepted. To the above statement of admitted facts this was added: 'A substantial part of the sales aforesaid being of grain, provisions, and other commodities which were, at the time of sale, in course of transportation as articles of interstate commerce.' The state objected to the facts just stated as incompetent and irrelevant. The objection was overruled, and the state excepted.

"The result of the trial was a judgment that the defendants were guilty, and they were fined each fifty dollars. Motions for a new trial and for the arrest of judgment having been severally denied, the case was taken by appeal to the supreme court of Missouri, where the judgment of the trial court was affirmed.

"The assignments of error present the same questions of constitutional law that were raised by the defendants' demurrer and objections to evidence.

"The words of the statute show that the keeping of a place where corporate stocks and bonds, as well as grains, provisions, and other commodities were bought and sold, but not paid for at the time, without a complete record of the transaction (including a minute of the time of delivery) in a book kept for that purpose, and without the purchaser receiving a printed or written memorandum of the sale, needed to be regulated, so as to protect the public against unfair or fraudulent practices that might result to the injury or inconvenience of the general public. We are not prepared to hold that the state in this matter has exceeded the bounds of reason, or has legislated beyond the necessities of the case, or has arbitrarily interfered with the course of ordinary business among its people. While it is the duty of the federal courts, if their jurisdiction be lawfully invoked, to see to it that the constitutional rights of the citizen are not infringed by the state, or by its authorized agents, they should not strike down an enactment or regulation adopted by the state under its police power, unless it be clear that the declaration of public policy contained in the statute is plainly in violation of the federal constitution. Much may be done by a state under its police power which many may regard as an unwise exertion of

governmental authority. But the federal courts have no power to overthrow such local legislation, simply because they do not approve it, or because they deem it unwise or inexpedient. What we have said in *House v. Mayes*, 219 U. S. 000, 31 Sup. Ct. Rep. 234, 00 L. ed. 00, as to the nature and extent of the police power of the state, is applicable to this case, and need not be here repeated.

"Suffice it on this point to adjudge, as we now do, that the federal constitution does not prevent the enforcement by the state of the provision making it unlawful to keep or cause to be kept in the state an office, store, or place, where things are omitted to be done which the statute requires to be done at the time bonds and stocks and commodities are sold and bought in such place. The defendants were indicted and found guilty of keeping and causing to be kept such a place as the statute forbade to be kept or caused to be kept. We do not perceive that any right secured by the fourteenth amendment is or has been thereby violated. We could not adjudge otherwise without declaring that the statute was so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions. We are unwilling to so adjudge. Much was said at bar about the 'liberty of contract.' In a large sense every person has that liberty. It is secured by the provision in the federal constitution forbidding a state to deprive any person of liberty or property without due process of law. But the federal constitution does not confer a liberty to disregard regulations as to the conduct of business which the state lawfully establishes for all within its jurisdiction.

"It is contended that the statute is in violation of the fourteenth amendment, in that the classification of subjects within the limits of the authorities levying the stamp tax is not a true classification. Construing the statute, the state court said: 'In our opinion, this law clearly embraces every class, whether it be corporation, association, either voluntary or otherwise, partnership, or person which furnishes a place for dealing in sales of stocks, bonds, etc., upon margins or otherwise, where the same are not at the time actually paid for and delivered, and embraces all classes who may deal in such places so furnished. It is clear that the character of business which is treated of by the statute is fully recognized as a separate and distinct business from all other classes. That the statute embraces every class, whether it be corporation, association, partnership, or person who may furnish a place or who may deal in transactions in such places, there can be, in our opinion, no sort of doubt; therefore we conclude that, so far as the class of persons to whom this law is made applicable, whether natural or artificial, this statute embraces the entire class, and is not subject to the objection that it singles out a part of a legal class upon which the license or stamp tax is imposed, and exempts others of the same class. Manifestly, the selection of the business calling and the class pursuing such calling were proper and appropriately selected by the legislature of this state in dealing with that subject: *Ante*, p. 623, 128 S. W. 182. Of course, we take the statute as a local law to mean what the court says it means. Nor is there any force in the objection that the classification, as shown by the statute, is arbitrary and unreasonable. The same methods and means are applied equally to all of the same class: *Kentucky R. Tax Cases*, 115 U. S. 321, 6

Sup. Ct. Rep. 57, 29 L. ed. 414; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. ed. 1037; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923.

"Again, it is said that the statute, by its necessary operation, is a regulation of interstate commerce. Not so. It might suffice, in the present case, to say that, under the facts admitted, there is no reason whatever to invoke the commerce clause of the federal constitution. All that the defendants offered to show in this connection was that a substantial part of the sales referred to were of grain, provisions, and other commodities, which were, at the time of sale, in course of transportation as articles of interstate commerce. With this state of facts, and no more before it, the supreme court of the state said: 'The requirements of the statute now under consideration have no bearing or influence whatever upon property sold. It is addressed to those furnishing the places, as well as those who deal in the transaction in such places. In other words, in sales of property in the manner and at the places pointed out by the statute it is required, where a sale is made in the manner contemplated by that statute, that the seller shall make a memorandum of such sale, and place upon such memorandum a twenty-five cent stamp. We repeat that transactions of this character have no influence whatever upon commerce between different states, and, as was in substance said by the supreme court of the United States (*New York v. Reardon*, 204 U. S. 152, 27 Sup. Ct. Rep. 188, 51 L. ed. 415, 9 Ann. Cas. 736), sales of this character do not contemplate or have anything to do with the transportation of property from one state to another, as in the drummer cases, and the mere fact that the parties to such sale, or either one of them, happens to be a resident of another state, in no way, legally or practically, affects the transaction, and falls far short of subjecting such transaction to condemnation for the reason that it interferes with interstate commerce. Our conclusion upon this proposition is that this statute in no way interferes with interstate commerce, and should not be held invalid for that reason.' We add that the indictment deals with the place where sales, such as the statute describes, are made. The offense is complete under the statute, by the keeping of such a place, and that occurs before any question of interstate commerce could arise, so far as this record discloses.

"We do not perceive that any error of law was committed by the state court, and its judgment is affirmed."

PEAK v. PEAK.

[228 Mo. 536, 128 S. W. 981.]

LIFE TENANT—Purchase at Foreclosure—Contribution.—The purchase of land at a foreclosure sale under a mortgage or deed of trust by a life tenant will be deemed to have been made for the benefit of the remaindermen, if they contribute their portion of the purchase money within a reasonable time. (p. 647.)

LIFE TENANT—Purchase at Foreclosure—Contribution.—Where a life tenant, at a sale of the land under a deed of trust, obtains title by having a third person purchase and then convey to him, the remaindermen are entitled to redeem on making contribution within a reasonable time. (p. 649.)

TENDER—Necessity of Actually Making in Equity.—If a bill in equity contains a general offer to do equity in conformity with the decree of the chancellor, this will suffice without making an actual tender. (p. 650.)

LIFE TENANT—Purchase at Foreclosure—Redemption by Remaindermen.—Where a life tenant, at a sale of the land under a deed of trust, obtains title by having a third person purchase and then convey to him, the remaindermen are not barred from redeeming and recovering the land in equity because they do not actually tender to the life tenant the amounts due by them on the notes which the trust deed secured, if their bill contains a general offer to do equity in conformity with the decree of the chancellor. (p. 650.)

Ball & Sparrow and Dempsey & McGinnis, for the appellants.

Jesse B. Jones and J. D. Hostetter, for the respondents.

⁵³⁹ **WOODSON, J.** The legal propositions in this case will be better understood if we set out the pleadings.

The petition filed herein is as follows (formal parts omitted):

“Plaintiff states that George W. Peak departed this life at said county of Pike on the — day of July A. D. 1901, testate, having made a will which was duly admitted to probate by the probate court within and for the county and state aforesaid. That the estate of said deceased was duly administered in and by said probate court, and final settlement thereof made.

“That the said George W. Peak left surviving him his widow, the said Frances Peak, and his children and issue born of a former marriage other than that with the said Frances Peak, viz., the said Scott Grant Peak, Mollie Purnell, wife of George Purnell, and ⁵⁴⁰ Thomas William Peak, all of whom are beneficiaries named and provided for in and by the said will of said deceased.

“That the said Thomas William Peak is a person of unsound mind and incapable of managing his affairs, and, in

consequence thereof, is confined as a patient in the insane asylum at the city of Fulton, in Callaway county, in said state.

“That in and by his said will the said deceased devised to his said wife and widow, for and during her natural life, the following described real estate situate, lying and being in the county of Pike and state of Missouri, to wit: The west half of the northwest quarter and the northwest quarter of the southwest quarter of section 4, in township 54 north, range 4 west of the fifth principal meridian, containing one hundred and twenty-four and eighty-nine one-hundredths acres, more or less, to be held, used and enjoyed by the said Frances Peak for and during her natural life, and her estate therein was limited to that period and subject to such life tenancy; he devised the said lands in remainder in fee to his said children as follows:

“To the said Scott Grant Peak, the south forty-six acres of said lands; to said Mollie Purnell the dwelling-house and premises and thirty-one acres north thereof, and to said Thomas William Peak the north forty-six acres of said lands.

“That in the month of December, A. D. 1883, the said George W. Peak and Ellen Peak, his then wife, executed a deed of trust in the nature of a mortgage upon the above-described lands to William G. McCune as trustee to secure to John McCune the payment of a promissory note for \$840; that divers payments were made on said note, so that the sum of \$250 thereof remained unpaid and due thereon at the time of the death of the said George W. Peak, which said note and deed of trust the said ⁵⁴¹ Frances Peak became the owner and holder of after the death of her said husband George W. Peak and continued thereafter to hold the same; that on or about the twenty-seventh day of November, A. D. 1905, contriving and designing to cheat and defraud the said children of her deceased husband, parties herein, out of their remainder interests in said lands, said Frances Peak caused a pretended sale of said lands to be made, under said deed of trust, and induced and procured one L. S. Sisson to become the purchaser thereof for her at the pretended sale so had, and the said Sisson immediately thereafter conveyed said lands to said Frances Peak, without having paid anything of value for said lands or received anything of value therefor, and with full notice of the rights and interests of the plaintiff and the said Thomas William Peak therein.

“That on the twenty-eighth day of November, A. D. 1905, the said Frances Peak executed a deed of trust in the nature of a mortgage, conveying said lands to said J. D. Layne to secure to said Lem T. Patterson the sum of \$312, expressed in a promissory note in said deed described; that both the said J. D. Layne and Lem T. Patterson had notice of the

rights and interests of these plaintiffs and of the said Thomas William Peak in and to the said lands at the time said \$300 were loaned and said lands taken as security therefor.

“That the said Frances Peak received said conveyance of said lands and now holds the same subject to all of the rights and interests therein of these plaintiffs and the said Thomas William Peak, that existed prior to said pretended sale under said deed of trust so made to said William G. and John McCune.

“Plaintiffs further state that they are ready, willing and here offer to pay their proportion of the balance of the principal sum of said note so made to said John McCune remaining unpaid at the time of the death of said George W. Peak, as soon as the same ⁵⁴² is ascertained, fixed and determined by the court; that the said \$312 so borrowed of said Patterson ought to be charged against the interest in said lands of the said Frances Peak; that said lands are of the reasonable value of \$3,000.

“Plaintiffs therefore pray that the rights and interests of the respective parties be investigated, ascertained and determined; that the plaintiffs Scott Grant Peak and Mollie Purnell be adjudged to be the owners of the respective tracts of land devised to them as aforesaid, subject to the life tenancy therein of the said Frances Peak, and the lien thereon for their proportion of the said debt of \$250, with leave to pay off and discharge the same; that the said money so borrowed of said Patterson, be charged against the interest of said Frances Peak; that said pretended sales of lands be held for naught; that a guardian be appointed for said Thomas William Peak; that his rights and interests in said lands be protected and that plaintiffs have all such orders and decrees as may be deemed meet and proper and costs herein.”

The separate answer of Frances Peak is as follows:

“Now, at this day comes Frances Peak, defendant, and for her separate answer to plaintiff's petition filed in the above-entitled cause, denies each and every allegation therein contained except such as are hereinafter specifically admitted to be true.

“Defendant admits the death of George W. Peak and that he died testate; that his will was admitted to probate and that his estate was administered and finally settled as alleged in plaintiff's petition; that said George W. Peak left surviving him this defendant as his widow, and the said Scott Grant Peak, Mollie Purnell and Thomas W. Peak, his children, all of ⁵⁴³ whom are named in said will as beneficiaries thereunder.

“Defendant further admits the execution of the deed of trust by the said George W. Peak and Ellen Peak, his then wife, under date of December 15, 1883, conveying to William

G. McCune as trustee the lands described in plaintiffs' petition to secure to John McCune the payment of a promissory note therein described for the sum of \$840, with interest from date at the rate of ten per cent per annum, compounding annually.

"Defendant, further answering, says that on March 4, 1895, she loaned to the said George W. Peak the sum of \$300, for which he gave to this defendant his negotiable promissory note of even date therewith, drawing eight per cent interest per annum, compounding annually, and secured said note by a deed of trust on the lands described in plaintiffs' petition, which said deed of trust was duly recorded in volume 104, at page 174, in the recorder's office of Pike county, Missouri, on which said debt the said George W. Peak paid the sum of \$24 on March 4, 1896, and that the remainder of said debt with accrued interest was not paid until the sale of the lands in question under the McCune deed of trust, when the same was paid out of the proceeds of the sale under said deed of trust given to John McCune, after satisfying the amount due on the John McCune note and costs of said sale.

"Defendant, further answering, says that after the death of George W. Peak, she paid out of her own money on the John McCune note the following amounts, viz.: August 1, 1903, \$50; August 10, 1904, \$50, and September 14, 1905, \$220.

"Defendant, further answering, says, that during the lifetime of the said George W. Peak, she loaned to the said George W. Peak divers sums of money, amounting in the aggregate to \$600, which money was used by him, the said George W. ⁵⁴⁴ Peak, in and about the lands in question and for the improvement of same.

"Defendant asks, therefore, that she be subrogated to the rights of the mortgagee under the John McCune deed of trust for the payments so made by her on the indebtedness therein secured and that all sums of money so loaned by her to the said George W. Peak be taken into account by the court in the consideration and determination of the issues involved, and further prays the court for all other and proper relief and for such judgments, orders and decrees as to the court seems just and proper."

The answer of Lem T. Patterson and J. D. Layne reads as follows:

"Now, at this day come Lem T. Patterson and J. D. Layne, and for their separate answer to plaintiffs' petition filed herein deny each and every allegation therein contained, except those hereinafter specifically admitted to be true. Defendants admit that on the twenty-eighth day of November, 1905, Frances Peak borrowed of Lem T. Patterson the sum of \$312, and secured the same by a deed of trust on the

premises described in plaintiffs' petition in which J. D. Layne was named as trustee; that said sum of money was loaned to the said Frances Peak in good faith. Defendants further deny any knowledge of fraud as alleged in plaintiffs' petition, and also deny notice of any alleged rights and interests of the plaintiffs and of Thomas Peak in the lands aforesaid and as stated in plaintiffs' petition.

"And now, having fully answered, defendants ask to be discharged with their costs."

Answer of Joe Tapley, guardian ad litem for Thomas William Peak, reads as follows (caption omitted):

"Now comes Thomas William Peak, by his guardian ad litem, and for his answer to plaintiffs' petition states that he is not in possession of facts as alleged in ⁵⁴⁵ plaintiffs' petition, sufficient to form a belief as to the allegations therein set forth and asks the court to require strict proof of same."

The amended reply is as follows (caption omitted):

"Plaintiffs, in order to conform to the facts proven, for their amended reply to the separate answer of defendant Frances Peak, deny each and every allegation thereof, except such as are hereinafter stated.

"They admit that George W. Peak made a deed of trust on the lands in controversy, to secure to said Frances Peak the payment of a promissory note for \$300, and secured same by deed of trust on said lands, but say that said promissory note was paid off, discharged, delivered up and canceled in the lifetime of said George W. Peak, the consideration for such discharge and cancellation being this: The said George W. Peak and Frances Peak entered into an agreement by the terms of which the said Frances agreed to discharge, cancel and treat as paid off the said note and deed of trust, if the said George W. Peak would by his will devise all of the said lands in controversy to the said Frances for and during her natural life; which said devise was so made, and the said note and deed of trust were by said Frances delivered up to said George W. Peak, canceled, paid off and discharged. And for further reply plaintiffs say that said alleged promissory note hereinbefore mentioned, and defendants' alleged cause of action thereon, did not accrue within ten years before the institution of this suit, and that the same is barred by the statute of limitations."

A trial was had, and at the conclusion of the evidence the court found the facts to be, and rendered judgment, in the cause as follows:

⁵⁴⁶ "The court finds that George W. Peak died in July, 1901, testate, having made a will which was duly admitted to probate by the probate court within and for the county of Pike, in the state of Missouri; that the estate of said deceased was duly administered in and by said probate court and final

settlement thereof made; that said George W. Peak left surviving him his widow, the said Frances Peak, and his children and issue born of a former marriage other than that with the said Frances Peak, viz.: Scott Grant Peak, Mollie Purnell (wife of George Purnell), and Thomas William Peak; that said widow and children were beneficiaries named and provided for in and by said will; that said Thomas William Peak at the date of the institution of this action was a person of unsound mind and incapable of managing his affairs, and in consequence thereof was confined as a patient in the insane asylum, at the city of Fulton, in Callaway county in said state; that in and by said will said George W. Peak devised to his said widow, for and during her natural life, the following described real estate situate in the county aforesaid, to wit:

“The west half of the northwest quarter and the northwest quarter of the southwest quarter of section 4, in township 54 north, range 4 west of the fifth principal meridian, containing one hundred and twenty-four and $89/100$ acres, more or less, to be held, used and enjoyed by the said Frances Peak for and during her natural life, and her estate therein was limited to that period and subject to such life estate. Said lands were devised in remainder in fee to said children as follows: To said Scott Grant Peak, the south forty-six acres of said land; to said Mollie Purnell, the dwelling-house and premises and thirty-one acres north thereof and to said Thomas William Peak, the north forty-six acres of said land.

⁵⁴⁷ “That in the month of December, 1883, the said George W. Peak and Ellen Peak, his then wife, since deceased, executed a deed of trust in the nature of a mortgage upon the above-described lands to William G. McCune as trustee to secure to John M. McCune the payment of a promissory note for \$840, with interest from date thereof at the rate of ten per cent per annum, compounding annually. That on the fourth day of March, 1895, Frances Peak, then the wife of George W. Peak, in order to assist her said husband in the payment of said note, loaned him the sum of \$300, for which he gave her his negotiable promissory note of date March 4, 1895, drawing eight per cent interest per annum, compounding annually, and secured by deed of trust on the lands in controversy, which said deed of trust was duly recorded in volume 104 at page 174 in the recorder's office of Pike county, Missouri. There is no evidence of any payment made by said George W. Peak on said \$300 note, nor is there any evidence of the loan by Frances Peak to her said husband of any money other than said sum of \$300. That George W. Peak made payment on said \$840 note as follows: July 5, 1893, \$125; March 1, 1893, \$300; October 15, 1898, \$175.

That after the death of her husband the said Frances Peak made payments on said \$840 note as follows: October 1, 1903, \$50; August 10, 1904, \$50, and September 14, 1905, \$22. That after the execution of said \$840 note John McCune, the payee therein, died, and Guy McCune, a son of the payee and a distributee of his father's estate, became the owner of said note.

"That there remained due on said \$840 note at the time Guy McCune became the owner thereof, the sum of \$630. None of said respective payments made by Frances Peak exceeded the interest due at the time the payments respectively were made, and as it was the duty of the life tenant, Frances Peak, to pay such interest accruing after she became such life tenant, she ⁵⁴⁸ is not entitled to any contribution from the other heirs, or reimbursement therefor. That Frances Peak, either as a life tenant or as the owner of the junior encumbrance securing the \$300 note, had the right to redeem the land from said \$840 encumbrance. For the purpose of so doing she in the fall of 1905 procured the transfer and assignment of said \$840 note to her by said Guy McCune, and, as the owner and holder of the same, duly caused the deed of trust securing the same to be foreclosed; that in so doing she was represented by Judge R. L. Motley as her agent and attorney; that the date of said foreclosure sale was November 27, 1905, at which time, as averred and admitted in the petition, Frances Peak was the owner and holder of said \$840 note. That the acquisition by said Frances Peak of said \$840 note encumbrance did not, as between her and the owners of said remainder estate, cause any merger of said lien with her life estate.

"That the consideration of said assignment of said note of Frances Peak was the sum of \$236.40 paid by her to said Guy McCune, who accepted said payment as the amount due on said note at the time of its said assignment, although there is much uncertainty in the evidence as to the amount actually then due. That before the foreclosure of said deed of trust securing said \$840 note any or all of said remaindermen had the right to redeem from the same and upon so doing to enforce contribution from the life tenant, but such right was ended by the foreclosure as aforesaid.

"As stated before, the plaintiffs do not seek to redeem from a valid sale under a deed of trust to the assignee of the beneficiary under such deed, but repudiate the sale in toto, and ask that it be set aside on the ground of fraud charged to have been perpetrated against them by Frances Peak, and that upon the same being set aside, they then be permitted to ⁵⁴⁹ redeem. The remaindermen were not tenants in common with Frances Peak, the life tenant, and said life tenant had a perfect right to buy the remainder estate in said lands,

and in so doing acquired such interest, provided the said trustee's sale was not fraudulent or otherwise invalid. That the said acquisition of said lands by said Frances Peak under said sale did not inure to the benefit of said remaindermen to the extent of their said interest as remaindermen. If we concede that the plaintiff had the choice of either of two inconsistent remedies, namely, either to recognize the regularity of and validity of the trustee's sale as made and proceed as assignee of the grantor, George W. Peak, to redeem therefrom as provided by statute, or to repudiate the sale for alleged fraud and ask to redeem from the encumbrance itself after having the sale set aside, the plaintiffs have elected to pursue the former equitable remedy; that at said sale one L. S. Sisson bid in said lands at the price and sum of \$971, which said purchase price was by said Sisson duly paid to and received by said trustee, who thereupon, on December 27, 1905, made and executed to said Sisson his the said trustee's deed conveying to said Sisson the lands in controversy; and the said Sisson, on the twenty-eighth day of December, 1905, by his quitclaim deed of that date, and for the expressed consideration therein of \$971, released and conveyed said premises to said Frances Peak; that said trustee's deed and said quitclaim deed were duly filed for record in said recorder's office on the twenty-eighth day of December, 1905; that the recital in said trustee's deed of the receipt by said trustee of said purchase price constituted prima facie evidence of such fact, and there is no evidence in the case to the contrary; that the greater weight of the evidence tends to show, and the court finds, that in bidding in said lands and accepting a deed to the same the said Sisson was acting for and as the agent of Frances Peak, and that the amount paid to said trustee ⁵⁵⁰ by said Sisson was in fact furnished by Frances Peak, and that said Sisson bought with the knowledge of the rights and equities of the parties interested in said lands; that there is no evidence of any fraud on the part of Frances Peak as charged in the petition, and the court finds such issue in favor of the defendants.

"The court further finds that said promissory note for \$300 executed by George W. Peak to Frances Peak, as aforesaid, and secured by deed of trust as aforesaid, was neither paid off, discharged, delivered up, nor canceled in the lifetime of said George W. Peak. There was no agreement between said George W. Peak and Frances Peak that said Frances Peak would discharge, cancel or treat as paid off the said note and deed of trust if said George W. Peak would by his will devise all of the lands in controversy to said Frances Peak for and during her natural life; that the devise in said will of a life estate to said Frances was not made in consideration of any such agreement or any agreement; that

there is some slight evidence tending to show that the disagreement between said George W. and Frances was over the payment of interest on the note; that at the time of such controversy there was a provision in the will of said George W., as then drawn, devising a life estate to said Frances, and that George W. at one time threatened that if said Frances did not destroy or cancel the note, he would change the provisions of his will.

"All of the parties testifying to such agreement were directly interested in the result of this suit; their evidence full of contradictions, uncertain and vague, disclosing under cross-examination that statements, if any, made by George W. and vital to the issue were not made to or in the presence or hearing of Frances Peak, nor was the agreement so testified to the same agreement pleaded in the petition, and the subsequent recognition by said heirs of Frances Peak's right to satisfaction of her note weakens their testimony ⁵⁵¹ against her. Frances Peak, as a witness in the case, denied, as far as her competency as a witness permitted her to testify, the statements attributed to her by the adverse witness.

"The court further finds that the purchase price received by said trustee was applied by him in payment of the balance then due on said \$840 note and in payment of the balance then due on said \$300 note, leaving a surplus applicable to other purposes; that said Frances Peak, on the twenty-eighth day of November, 1905, executed a deed of trust in the nature of a mortgage conveying said lands to defendant J. D. Layne to secure to defendant Lem T. Patterson the sum of \$312 expressed in a promissory note in said deed described; that each of said two last-named parties had constructive notice of the title to said lands as held by the said widow at the date of the said last-mentioned deed of trust and at the date of said trustee's sale; that subject to the provisions of said last-mentioned deed of trust, the defendant, Frances Peak, is the owner in fee simple of all of the above-described real estate, and it is so adjudged and decreed by the court.

"And it is further ordered, adjudged and decreed by the court that the plaintiffs are not entitled to the equitable relief prayed in the petition, nor has the defendant, Frances Peak, shown herself entitled to any affirmative equitable relief as prayed in her answer.

"And it is further adjudged and decreed by the court that the plaintiffs take nothing by their writ, and that the defendants go hence without day and have and recover of plaintiffs their costs herein incurred or expended and have execution therefor."

After moving unsuccessfully for a new trial, the plaintiffs appealed the cause to this court.

1. After carefully reading all the evidence introduced at the trial of this cause, we are satisfied that the learned trial court correctly found the facts to be as above stated, except we are of the opinion that the ⁵⁵² sale of the land in question under the \$840 note and deed of trust, at the instance and request of Frances Peak, the life tenant and owner of the note, was a fraud upon the rights of the remaindermen, the children and devisees of George W. Peak, her deceased husband.

This question has been before this court frequently, and the uniform ruling has been that the purchase of land at a foreclosure sale under a mortgage or deed of trust by a life tenant will be deemed to have been made for the benefit of the remaindermen if they contribute their portion of the purchase money within a reasonable time: *Cockrill v. Hutchinson*, 135 Mo. 67, 58 Am. St. Rep. 564, 36 S. W. 375; *Stitt v. Stitt*, 205 Mo. 155, 103 S. W. 547; *Rutter v. Carothers*, 223 Mo. 631, 122 S. W. 1056; *Hinters v. Hinters*, 114 Mo. 26, 21 S. W. 456; *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. 494, 1049, 98 Mo. 159, 14 Am. St. Rep. 626, 11 S. W. 240.

Some of the foregoing cases were between cotenants; and even in such cases this court has uniformly held that one cotenant cannot legally buy in an outstanding title or encumbrance, and thereby defeat the rights of another cotenant. For stronger reasons the same rule should and does apply between the life tenant and remaindermen, because the former not only bears the confidential relation to the latter that one cotenant bears to another, but also has the exclusive possession, care, control and enjoyment of the entire estate, which in a large measure excludes the remainderman from protecting his own rights and interest in and to the land; whereas in a case between cotenants all of them stand upon an equal footing.

We are, therefore, of the opinion that the trial court erred in holding that Frances Peak, in good faith and without fraud, purchased the land in controversy at the sale under the deed of trust. In violation of her legal duty she had the land sold for the sole purpose of defeating the remaindermen, and to thereby acquire the absolute title to the property.

⁵⁵³ 2. The next proposition presented for determination is, What is plaintiffs' remedy in the premises?

This identical question came before this court in the case of *Stitt v. Stitt*, 205 Mo. 155, 103 S. W. 547. In that case the husband died, leaving one hundred and twenty acres of land. By will he gave eighty of it to his wife for life and in which she had a homestead. The other forty acres were encumbered with a mortgage for \$500, and as to that forty he died intestate, leaving other debts, amounting to seven or eight hundred dollars, with no personal estate. She was the

executrix under the will, and obtained an order from the probate court to sell this forty, and was offered \$1400 therefor, which she refused and asked sixteen hundred, but made no real effort to sell it. When the mortgage became due she had it foreclosed in order that she might become the purchaser of the land (as was done in the case at bar) and at the sale she bought the land for \$550. In passing upon the right of the plaintiffs in that case to redeem from the foreclosure sale, this court, in speaking through Judge Lamm, said:

“In so far as the decree subrogated defendant to the rights of Knowles under the deed of trust, no fault can be found with it. They who seek equity must do equity. Decedent was seised of tract C, subject to that encumbrance. His estate, therefore, may only retake the title cum onere. Thereby it is made to stand in its cast-off, former shoes, which is well enough. Equity does nothing grudgingly or by halves. Its outstretched arm corrects, but with loving kindness withal. Hence to the extent the widow lifted the burden of that encumbrance from the estate by her bid, to that extent she should be made whole. The rule of substitution is one of pure benevolence, and the facts and circumstances of this case afford a typical opportunity for the application of that rule.

554 “Defendant seeks to bring herself within the doctrine of those cases in which an administrator, owing no duty and having no power to protect the interests of creditors and heirs in the real estate of a decedent and dealing at arm's-length with all concerned, buys at an execution or foreclosure sale. *Dillinger v. Kelley*, 84 Mo. 561, is a sample of such cases; but that case and no well-considered case, carefully read, promulgates any rule inimical to this decree. Here the defendant was a trustee in the most exacting sense; for she had power and she had duty and had assumed the role of using the power in performance of that duty. Not only was she armed under the order of sale with power to do that duty, but in this instance ability to perform lay at her door, ready to her hand. Not only so, but she was placed in a most delicate and anxious position—a position watched by a chancellor with a solicitous eye, to be weighed and considered with a piercing and distinguishing judgment; because duty and power of performance were set over against self-interest. She set one in one eye and the other in the other. The love of money is the root of all evil; and when one is bound in a confidential relation, it is of the very essence of things to see to it that the strident and clamorous voice of self-interest does not drown out the still, small voice of duty and conscience.

“‘No one,’ says Williams, J., in *Tuggles v. Callison*, 143 Mo. 527, 45 S. W. 291, ‘will be permitted to purchase and hold property as his own, where he has a duty to perform in

relation thereto inconsistent with his position as a purchaser on his own account, and so the cases all hold.' Such purchase becomes of a poisonous character. The temptation existing, the correlative duty to remove it exists. In the case at bar the executrix could have sold tract C under the court's order for enough to have paid the mortgage debt, together with all the debts at large of the estate and the cost of administration. With one hand she put away from her ⁵⁵⁵ this duty, with the other she clutched the gain of violating that duty. Defended by the bulwark of a homestead claim to the residue of the real estate, she left the heirs and creditors to help themselves as best they may, with tract C canceled as a debt-paying factor.

"Under the facts uncovered the trustee's sale was conceived and consummated by her for purposes single to herself. To that end she dallied and coquetted with the situation as executrix under the court's order of sale until such time as the evil seed she planted and watered could grow to flower and fruitage in the trustee's deed, thereby doing what she set out to do, viz., appropriate to herself the only debt-paying asset available and making it impossible for her to render a just account of her stewardship. It is needless to cite authority to sustain the self-evident proposition that equity will grant relief by taking away from her a title tainted in that way. That was what the chancellor did below, and what he did meets our approval."

The facts in that case did not make out as strong a case as do the facts in the case at bar, for the reason that the sale there made did not involve the land in which the defendant owned the life estate, while in the case at bar, as before stated, the defendant Peak had the land, in which she owned the life estate, sold under the deed of trust in order that she might become the purchaser thereof, and thereby cut off the remaindermen, who were not in so favorable a position to protect themselves as were the heirs and creditors of Stitt.

So, under this view of the case, the trial court should have ascertained the balances due her, defendant Peak, on the \$840 and \$300 notes mentioned in the finding of the court, and the amounts each of the appellants should be required to pay her in order to redeem their interests in said lands, and should also have fixed a reasonable time in which they might redeem. ⁵⁵⁶ The court should also have charged the \$312 note, payable to Lem T. Patterson, and the deed of trust securing the same against the interest of said Frances Peak in and to said land and not against the interest of appellants.

3. It is finally insisted by counsel for respondent that the bill states no equity, because appellants did not tender to the respondent the amounts due by each of them on said notes.

This insistence is untenable, for the reason that in equity the rule is, if the bill contains a general offer to do equity in conformity to the decree of a chancellor, that will suffice without making an actual tender.

This question has been so recently before this court and so ably discussed by our learned associate, Judge Lamm, in the case of *Haydon v. St. Louis & S. F. R. R. Co.*, 222 Mo. 126, 121 S. W. 15, we deem it unnecessary to say more upon that subject than merely to quote his observations in that regard, which are as follows:

"It is argued the bill is obnoxious to the cardinal equity maxim that he who seeks equity must do equity; that it makes no offer to put defendant in statu quo ante, in that no tender or offer is made to return the \$600 and costs paid under the compromise, but that the only offer is to credit that sum upon an unliquidated amount of damages, guessed off at \$1,500. Changes are rung in defendant's brief on the foregoing contentions, but the pith of it all is as put by us.

"Can the demurrer to the introduction of evidence stand on such fact? If the case were at law, the contention would be sound beyond question; but it is in equity, and the better doctrine seems to be that under a bill (good otherwise) containing a general offer to do equity the chancellor, as the price of his decree, may let conscience have full play in doing her perfect work in disentangling the relations of the parties, and in ⁵⁵⁷ placing them where they were before as nigh as may be. Such is the doctrine of *Whelan v. Reilly*, 61 Mo. 565, and cases cited. That case was followed in *Clark v. Drake*, 63 Mo. 354. In *Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408, the doctrine of the *Whelan* case was somewhat shaken. But in a later case, *Paquin v. Milliken*, 163 Mo. 79, 63 S. W. 417, 1092, the question was again up, our decisions were marshaled, distinguished and applied. The reasoning of the *Whelan* case was greatly corroborated and fortified by the exhaustive consideration given in the *Paquin* case, and the doctrine needs no new exposition.

"In leaving the matter we may refer to *Shuee v. Shuee*, 100 Ind. 477. In that case it was said: 'It is urged that the court below should have sustained a demurrer to the bill, because it failed to show an offer to rescind on the part of the plaintiff before filing the bill, and it is argued that because it appears from the facts as found by the court that no offer to rescind was made, nor to return the money paid as the consideration of the settlement, before the suit was commenced, the court should make no decree in plaintiff's favor setting aside the settlement. It is always within the power of a court of equity, where its decree is invoked, to require, as "the price of its decree," that the person invoking it shall submit to equitable terms, and accordingly a chancellor always in-

quires concerning the equities which the plaintiff must do, in order that he may be entitled to the relief which he seeks. Whenever any benefit has been received under a contract which the court is asked to set aside, the court will fasten a trust on the conscience of the party, in respect to such receipts, and direct an account and repayment.'

"Such, too, was the conclusion reached by all the judges in *Haydon v. St. Louis & S. F. R. R. Co.*, 117 Mo. App. 76, 93 S. W. 833."

⁵⁵⁸ We are, therefore, of the opinion that the judgment should be reversed and the cause remanded; and it is so ordered.

All concur.

THE DUTIES OF THE TENANT FOR LIFE TO THE REMAINDERMAN AND REVERSIONER.

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- VII. The Conditions Under Which the Remainderman or Reversioner may Claim the Benefit of the Purchase by the Tenant for Life of Outstanding Interests, 664.

I. Tenancy for Life as Dealt With in Previous Monographic Notes.

The interest in property, limited as to the time of its enjoyment, furnishes matter for consideration more immediate than the incidents of absolute ownership in fee. In the latter case the property is held unhampered as to the owner's will or acts, he can do and does what he chooses with his own property, but where he has only a specified time for its use—as in the case of enjoyment for the period of his own or another's life—his natural desire to make the best of it, to make the most he possibly can out of it, would work to the detriment of the next in order of title to get the estate, known to the law as the remainderman, or of the person to whom the property was to return after the life tenant's use of it, and who is known to the law as the reversioner. The subject of life estates has received already considerable attention in this series. The right of

the life tenant in moneys and personal property formed the subject of monographic notes to *Braswell v. Morehead*, 57 Am. Dec. 586, and to *German v. German*, 67 Am. Dec. 451; the right to estovers was treated in the note to *Miles v. Miles*, 64 Am. Dec. 362; the right to emblements was treated in the note to *Daniels v. Brown*, 69 Am. Dec. 505; the question of the right to dividends and stock was discussed in *Moss' Appeal*, 24 Am. Rep. 169, and *Gibbons v. Mahon*, 54 Am. Rep. 264; the rule in *Shelley's case* and the creation of the life estate was dealt with in *Carpenter v. Van Olinder*, 11 Am. St. Rep. 92; the rights of the reversioner and remainderman, in the note to *Allen v. De Groodt*, 14 Am. St. Rep. 626; betterments generally, in the note to *Cleland v. Clark*, 81 Am. St. Rep. 161; and the duty of the life tenant to pay taxes in the note to *First Congregational Church v. Terry*, 114 Am. St. Rep. 443.

We purpose considering that aspect of the life tenant's duty to his successor, either the remainderman or the reversioner, in the exhibition of that good faith which the intimacy of the relation should generate, and which the law regards as necessary between parties who stand in the attitude of interested relationship toward each other. The one in present possession in the course of his occupancy acquires a knowledge of the property enjoyed, learns its incidents, and from his knowledge may be able to injure or to hinder the future enjoyment of it by those whose turn it is next. The rights and liabilities of the holder of such an estate have been watched as well as preserved for many centuries, for the estate for life is of feudal origin and was at its inception the highest order of estate that any man could have in a feud, which was not at that time hereditary. Then, there has been the development of the various incidents of the estate for life in its twofold shape, either as created by deed, or by operation of law—estovers and emblements, together with the liability to preserve the estate for his successor without waste. Side by side with these concomitant privileges and obligations came the repression of any sinister design to oust that successor—whether in remainder or reversion—from his expected estate, and the courts, especially those exercising equitable jurisdiction readily found a way to enforce the display on the life tenant's part of that *uberrima fides*—the strictest moral and honorable dealing not only with his successors, but by himself with the world at large in regard to the property which they interpreted was held as a trust. They said he should reap its benefits, but must guard its interests, he could deal with it, but not to the detriment of those to whom it should arrive on the happening of the contingency on which it was limited, the death of the one who gave the limited existence to the estate. These duties, together with the necessary consideration of the proportion in value the life estate bears in relation to the remainder or the reversion, call for a little, but studious, attention, while the acquisition of outstanding claims and encumbrances must be considered, whether acquired *bona fide* or malevolently, as to their absolute retention by the tenant for life, or for participation by those who are entitled to a share if they are ready to pay for it.

We shall not deal in this note with personal property nor with the question of adverse possession by the life tenant nor under nor

against him. As improvements are not part of the duty of the life tenants proper, their consideration has not been entertained herein.

II. The Nature of the Relation of the Tenant for Life to the Remainderman or Reversioner.

From our introductory remarks it is a small step to the proposition that the relation which the life tenant bears to his successors—and by successors, unless the term is qualified, we mean both remainderman and reversioner—is a fiduciary one, or, as it is more often called, a quasi trusteeship. The terms “trustee” and “quasi trustee” are to be found running through the cases, and though it has not passed unquestioned, the greater weight of authority is in favor of so classing it: *Smith v. Van Ostrand*, 64 N. Y. 278; *Smith v. Daniel*, 2 McCord Eq. 143, 16 Am. Dec. 641; *Green v. Green*, 50 S. C. 514, 62 Am. St. Rep. 846, 27 S. E. 952; *Vaden v. Vaden*, 1 Head, 444; *King v. Sharp*, 6 Humph. 55; *Tabb's Curator v. Cabell*, 17 Gratt. 160.

In *Bogle v. North Carolina R. R. Co.*, 51 N. C. 419, Pearson, C. J., says: “The position that a tenant for life is a trustee, or quasi trustee for the remainderman, is not tenable. The estate is divided into two parts, but each holds the legal title of their respective parts in severalty for their own use, and there is no separation of the legal from the beneficial estate in respect to either part, and without this separation, so that one may hold the legal estate for the benefit of another, the idea of a trust is out of the question.” The learned judge endeavored to point the distinction of illustrating that if one procured a stranger to execute a release of right it operates “by way of extinguishment” and inures to the benefit of the other, but that the benefit of a contract made by one in respect to his part, to which the other is not a party and by which he is not bound, there being no confirmation, may be enjoyed exclusively by the party making it without disputing the title of the other, which is not involved. With all respect, the learned judge's illustration is rather in support, at the very least, of the quasi-trusteeship. In *Joyce v. Gunnels*, 2 Rich. Eq. 259, we find: “In several cases it has been held, and may now be considered as settled, that the tenant for life stands in the nature of a trustee for the remainderman. . . . But the tenant for life is a constructive or implied trustee. . . . He is like the purchaser from an executor. He is affected by an equity.” In *Montfort v. Montfort*, 24 Hun, 120, the court, following *Smith v. Van Ostrand*, 64 N. Y. 278, speaks of the legatee for life as a trustee of the fund during the continuance of the life estate. Almost the same language was used in *Horry v. Glover*, 2 Hill Eq. 515, and in that certain duties are attached to the estate which the courts of equity regulate, we think that even in the absence of authority no harm can flow from adopting the name of trustee, and much good may result from attaching to the assertion of the life tenant's rights the doctrines held by the courts with regard to trusts. In *Aubuchon v. Bender*, 44 Mo. 560, it was laid down that the grantor of land, seized to his use for life, cannot while in possession impair the estate in remainder; and, not having reserved the power, he could neither revoke nor declare new uses. In *Wright v. Stice*, 173 Ill. 571, 51 N. E. 71, the curious circumstances were disclosed of a father who was a life tenant and guardian of his son, the remainderman, endeavoring to claim adversely to his own child. The court said that

the presumption arose "that when the owner of the life estate is in possession of the property and pays the taxes thereon, his possession is held by virtue of his right thereto as tenant for life, and his payment of taxes is made in discharge of his duty to pay them growing out of his interest in the property as tenant for life. Prima facie, the possession of the property and the payment of taxes thereon by the appellee were not for the purpose of creating a title in his son, in bar of his own interest as tenant for life, and did not have such effect." In *Calhoun v. Furgeson*, 3 Rich. Eq. 160, in speaking of personal property in the custody of the life tenant, Chancellor Johnston says: "The relation he bears to the remainderman is that of trustee—a relation of confidence—and though he is prima facie bound for the property, and the burden must be upon him to show diligence and integrity in the performance of his duties, yet it is not clear, upon principle, that he is liable if he does show fidelity to his trust. . . . It must be observed, however, that the ground of accountability is the trust character of the life tenant." In *Patterson v. Devlin*, McMull. Eq. 459, Judge Nott said: "Lands are sometimes given to one for life, together with the slaves, stock of horses; . . . the tenant for life must be considered as a trustee for the remainderman, and must preserve the estate with all its appurtenances, in the situation in which he received it." In *Robertson v. Collier*, 1 Hill Ch. 370, Chancellor Harper, after quoting these observations, adds: "These views are so full and explicit that little need be added to them. The principle is the same, though extended in its application, by which a tenant for life in England is forbidden to waste the estate, and is required to make ordinary repairs." Chancellor Johnston continues in *Calhoun v. Furgeson*, 3 Rich. Eq. 160: "I fully assent to so much of these opinions as place the responsibility of the tenant for life upon the footing of a quasi trustee, whose duty it is to preserve the estate for the remainderman; and makes the test of his fidelity the care and attention which a prudent owner would exercise over his own property. This is the true ground; and it applies not only to a tenant for life of an estate, as an entire subject, but to one to whom detached articles of property are given by the same tenure." In *Vaden v. Vaden*, 1 Head, 444, the tenant for life is variously referred to as a trustee or quasi trustee, and in *Moore v. Simonson*, 27 Or. 117, 39 Pac. 1105, which will be found more fully discussed post, p. 656, where the acquisition of outstanding title by the tenant for life for his own benefit is dealt with, two cases are cited, *Bowling's Heirs v. Dobyns' Admr.*, 5 Dana, 434, and *Morgan's Heirs v. Boone's Heirs*, 4 T. B. Mon. 291, 16 Am. Dec. 153, in which references to the tenant for life as a trustee are clearly made. In *Cook v. Collier* (Tenn. Ch. App.), 62 S. W. 658, the trusteeship of the life tenant as to personal property is emphasized. The case of *Ware v. Frank's Admr.*, 18 Ky. Law Rep. 1009, 38 S. W. 1061, is rather a negative recognition of the quasi trusteeship. In that case it was contended that a tenant for life could not purchase the interest of a remainderman from him. The court said: "We know of no principle of law or rule in equity which prevents a life tenant from purchasing the interest of a remainderman. Certainly, no such fiduciary relations exist between them which could make applicable to their transactions the rules of equity which govern trustees and cestuis que trustent. The life tenant has no right to destroy or waste

the estate in remainder, but this obligation to preserve the estate in remainder does not preclude the life tenant from acquiring it by gift or purchase. We can see no good reason why one who has the lesser may not acquire the greater estate." This latter authority will be found to bear out the proper qualification of the term trustee as applied to the tenant for life, and it is not suggested that he is a trustee in the ordinary sense and acceptation of the term. That he is clothed with some fiduciary obligations, which make him, under certain circumstances, amenable to that equitable jurisdiction which the courts fortunately exercise over trusts and trustees will be readily conceded after the perusal of the opinions which have dealt with the somewhat rare transactions by which the tenant for life has acquired some estate to his own benefit and to the detriment of the reversioner or remainderman.

III. The Acquisition by the Tenant for Life of Outstanding Interests Affecting the Remainderman or Reversioner.

It not unfrequently happens that during the currency of the life estate the tenant sees an opportunity for discharging an encumbrance, taking an assignment of it, purchasing a threatening adverse interest and by means of some such transaction clothing himself with such an interest in the land as will efface what was the ultimate interest of the next entitled to be remainderman or reversioner. Without interference he can of course do this, but when his proceeding is challenged in a court of law, he is not allowed the full benefit of his act in thus destroying the intention of the original grant. The rule in such cases is that if a trustee, mortgagee or tenant for life, being in possession, purchases in an outstanding title or encumbrance, he cannot apply it to his own benefit, but it, in general, inures to the benefit of him under whom he entered, or is considered as held in trust for the cestui que trust, mortgagor or him in reversion or remainder: *Bowling's Heirs v. Dobyns' Admrs.*, 5 Dana, 434, following *Morgan's Heirs v. Boone's Heirs*, 4 T. B. Mon. 291, 16 Am. Dec. 153, in which the voice of the equity jurist sounds particularly clear. "A court of equity," says the court, "will lend its aid in reimbursing or securing all reasonable and fit advances by an agent, trustee, or purchaser, to fortify the title, but will never permit or aid an attempt to betray or invalidate the title. These rules have been long settled and well approved. They conduce to good faith, confidence, and fair dealing. They preserve that equality between the vendor and vendee, as to gain and loss, by purchasing in adversary claims, which equity delights in, and has established as a maxim." The opinion then reiterates the general principle, that if a trustee, tenant for life or other such owner of an estate, gets an advantage by being in possession, or behind the back of the party interested, and purchases in an outstanding title, or encumbrance, he shall not use it to his own benefit, and the annoyance of him under whose title he entered, but shall be considered as holding it in trust. This is substantially the opinion also in *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656, 30 N. W. 755. In the principal case, ante, p. 638, Woodson, J., in an opinion as sound as it is eloquent, and from which we forbear making excerpts that the tone of the opinion as a whole may not be marred, utters the latest word on the subject, confirming the opinions we have cited. The case is the more important in that it appears to be of that hard character from which the best law is made.

The widow of a testator was given an estate for life in certain lands subject to a deed of trust. She was a creditor of her deceased husband, having lent him some of her own money to improve the land. She bought the outstanding note secured by the deed of trust and allowed the security to be foreclosed, she being the purchaser, after which she executed a new mortgage. Notwithstanding these counter-equities, the court held the purchase to be for the benefit of herself and the remaindermen in proper proportion, providing they contributed pro rata to the amount lent by her to her husband and the amount due on the deed of trust. The subject of contribution by the tenant for life in this regard is dealt with post, p. 663.

"I find that the law regards the purchase of an encumbrance or outstanding title by the tenant for life as being made for the joint benefit of himself and the remainderman or reversioner, and that he cannot acquire it for his exclusive benefit." So spake the court in *Myers v. Reed* in 9 Saw. 132, 17 Fed. 401, after referring both to *Daviess v. Myers*, 13 B. Mon. 511, *Varney v. Stevens*, 22 Me. 331, and the dictum, post, p. 659, cited from *Coke on Littleton*, sections 453-267b, and the principle is equally emphatically laid down in *Werner v. Dolan*, 106 Iowa, 355, 76 N. W. 724, where the court says: "It needs no citation of authorities to show that she [the life tenant] could acquire no rights as against the remaindermen through her own breach of faith. It is a principle so well established as to have become crystallized into a maxim of the law that one can derive no advantage from his own wrong." In *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656, 30 N. W. 755, and *Moore v. Simonson*, 27 Or. 117, 39 Pac. 1105, equally clear and pronounced conclusions are reached. In the latter case a life tenant in possession of lands in respect to which she was also executrix of the reversioner, who held only an equitable title to the land in question, purchased the outstanding legal estate under the impression it was necessary for the protection of the estate, but paid for it with her own money and in a sum which was disproportionate to the value of the land. Notwithstanding these facts she was held as a trustee for the remaindermen subject to their contribution to her reimbursement. In *Caufman v. Presbyterian Congregation of Cedar Spring*, 6 Binn. 59, the court said: "The defendant purchased from the children of Magill, who came in under their father, who was the tenant of the plaintiff. Under such circumstances shall not the defendant be obliged to restore the possession to the plaintiff? Certainly he shall. Neither the tenant, nor one who claims under him, shall withhold from the landlord that possession, which by the agreement of the parties was to be given up at the end of the term; and whether the term was for life or for years there is no difference." The two Wisconsin cases, *Phelan v. Boylan*, 25 Wis. 679, and *Melms v. Pabst Brewing Co.*, 93 Wis. 140, 66 N. W. 244, support the authorities cited. The rule that a tenant for life, who buys in an outstanding encumbrance, is regarded as holding it for the benefit of the reversioner, as well as for his own benefit, means only that he will not be permitted to acquire by adverse title by or through such purchase, or otherwise cut out the reversioner's right of contribution, without affording the latter an opportunity to redeem. Hence, it will not operate to prevent assignment of the encumbrance to a third person and a foreclosure suit by the latter to require the reversioner to redeem to the extent of his proportion, and to subject the property to satisfaction of the encum-

brance in default thereof: *Downing v. Hartshorn*, 69 Neb. 364, 111 Am. St. Rep. 550, 95 N. W. 801. In the case last named it was put very clearly that if the tenant for life pays a mortgage or other charge upon the entire estate, he is presumed to do so for his own benefit, and may preserve and enforce the lien for reimbursement over and above the proportion of the debt which he is bound to contribute, but his right to preserve and enforce the lien exists for the purpose of reimbursement or contribution only, and so far as his estate or interest is concerned, in the absence of intervening interests or special circumstances making such result inequitable, the lien thereon is extinguished, and a subsequent assignment of the whole charge is, in substance, the creation of a new encumbrance. The rule that a life tenant who buys in an outstanding encumbrance is regarded as holding it for the benefit of the reversioner, as well as for his own benefit, means only that he will not be permitted to acquire by adverse title through such purchase, or otherwise cut out, the reversioner's right of contribution, without affording the latter an opportunity to redeem, and such rule does not prevent the life tenant from assigning the paid off encumbrance to a third person and its enforcement by him against the reversioner, to the extent of his proportion, or the subjection of the property to the satisfaction of such part of the encumbrance in default of its payment otherwise.

It must not be taken that there is any disability in the life tenant from purchasing these outstanding titles. He is at liberty to deal in and with them, but always from the standpoint of the fiduciary relation to remainderman or reversioner when they seek to establish it. If they seek equity in the shape of the benefit of the purchase, they must do equity by way of paying their contribution to reimbursement of the life tenant: *Meads v. Hutchinson*, 111 Mo. 620, 19 S. W. 1111. The case of *German-American Title & Trust Co. v. Fidelity Ins. Trust & Safe Deposit Co. (Pa.)*, 18 Atl. 1090, not only affirms the absence of any disability on the part of the life tenant to purchase, but a useful disquisition on the rights of those who may make title through him. The case is sufficiently important to warrant a republication of the facts. One Jacobina Dietz, the owner in fee of the land, died, leaving surviving her her husband, Bernhardt F. Dietz, and two children of the marriage. At the date of her death there was a mortgage on the property for two thousand dollars. The surviving husband was in possession of the lands as tenant for life. He did not pay the interest on the mortgage and suffered it to be foreclosed, and the premises to be sold by the sheriff, at which sale he (Dietz) became the purchaser, and thereupon borrowed the sum of two thousand dollars from the Fidelity Insurance Trust and Safe Deposit Company, and to secure the repayment executed to that company a mortgage. Thereafter he died. On that mortgage, *scire facias* was issued, to which an affidavit of defense was filed by the German-American Title and Trust Company for the terre-tenants and remaindermen. The last-named company was the guardian of the children of the decedent, Mrs. Dietz and her said husband. It was contended that the husband, being the life tenant, occupying or receiving the rents, issues, and profits of the premises in question, committed a fraud upon the remaindermen in not paying the interest upon the mortgage upon the premises, and in allowing the said premises to be sold; and that the deed which he received as the purchaser

at the sheriff's sale did not enlarge his interest in the property beyond that of life tenant; and that the mortgage which he gave, upon which the suit was based, bound only his interest, which ended when he died. The court adopted the opinion of Finletter, P. J., which said: "It is certainly the duty of a life tenant to pay the charges upon the estate; and in default, if injury arises, he may be responsible in damages. He is, however, under no obligation to prevent a sale upon a mortgage. But, no matter how the sale occurs, or who may be the purchaser under a mortgage, the estate of the life tenant is extinguished. Dietz having purchased the property, had a fee simple, or he had nothing. . . . At such a sale there is nothing to prevent a life tenant or a tenant in common from purchasing and obtaining a good title. All that the authorities show is 'that a community of interest produces a community of duty,' and that a purchase by one inures to the benefit of all who desire an interest and offer contribution." The learned judge then gives his views on the aspect of trusteeship and pronounces against the view we have shown is supported by authority of the fiduciary nature of the relation between the life tenant and his successors. The position of the plaintiff was that of purchaser from the purchaser at a sheriff's sale, and as such might rely upon the record, which showed a sale upon a regular judgment entered upon a mortgage, with nothing to give him notice of any irregularity or fraud on the part of the life tenant or anyone else. The judge could not see how Dietz's title could have been questioned in his lifetime on the facts stated, and concludes: "At most, it was a voidable title, and was good until a competent tribunal had adjudged otherwise. . . . If the father had not bought, the estate would have been lost to them. The position which the defendants take is that the act of their father was a fraud upon them, although no damage has resulted from it, and therefore they should take from the plaintiff two thousand dollars, which he loaned to the father upon the faith of a judicial sale, without notice of any kind of the fraud, or the facts upon which the allegation of fraud is founded. This does not seem to be a just defense." In holding that the judgment was a bar to all inquiry as to antecedent facts, even where the mortgage was given by a married woman, or where the scire facias was not served, and the mortgage money was paid, reference was made to *Hartman v. Ogborn*, 54 Pa. 120, 93 Am. Dec. 679, where Woodward, C. J., said: "Mary Ann Coleman was the mortgagor, and the purchaser had no notice that she was a married woman. . . . As to this record, she is Mary Ann Coleman still, unmarried and sui juris, just as the dead mortgagor in *Warder v. Tainter*, 4 Watts, 270, was made alive for the purposes of that suit."

As we have said, however, the holding of the tenant for life is never adverse to his successors, and his purchases are to be construed for their benefit conditionally on their reimbursing him their share of his expenditure within a reasonable time: *Slusher v. Slusher*, 31 Ky. Law Rep. 570, 102 S. W. 1188; *Lewis v. Wright*, 148 Mich. 290, 111 N. W. 751; *Allen v. De Groodt*, 98 Mo. 159, 14 Am. St. Rep. 626, 11 S. W. 240; *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. 494, 1049; *Meads v. Hutchinson*, 111 Mo. 620, 19 S. W. 1111; *Cockrill v. Hutchinson*, 135 Mo. 67, 58 Am. St. Rep. 564, 36 S. W. 375; *Morrison v. Roehl*, 215 Mo. 545, 114 S. W. 981; *Keller v. Fenske*, 123 Wis. 435, 101 N. W. 378, 1055.

IV. The Duty of the Tenant for Life.

a. To Pay Taxes.—This subject having been fully dealt with in the note to *First Congregational Church v. Terry*, 114 Am. St. Rep. 443, only brief reference to it will be made here. The tenant for life must pay the taxes on the property in his possession. As between him and the reversioner or remainderman, the duty is on him. His neglect to pay them and any acts of bargaining for and obtaining a conveyance of the premises upon their sale for nonpayment cannot, under any circumstances, vest in him a title in fee against the reversioner or remainderman, after the determination of his life estate by forfeiture or otherwise. This salutary rule is founded on the time honored maxim of no man being permitted to take advantage of his own wrong: *Pruitt v. Holly*, 73 Ala. 369; *Oeleman v. Kelgore*, 52 Iowa, 38, 2 N. W. 612; *First Congregational Church v. Terry*, 130 Iowa, 513, 114 Am. St. Rep. 443, 107 N. W. 305; *Menger v. Caruthers*, 57 Kan. 425, 46 Pac. 712; *Wiswell v. Simmons*, 77 Kan. 622, 95 Pac. 407; *Nineteenth and Jefferson St. Presbyterian Church v. Fithian*, 16 Ky. L. Rep. 581, 29 S. W. 143; *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538, 5 South. 387; *Lyman v. Hollister*, 12 Vt. 407; *Boon v. Root*, 137 Wis. 451, 119 N. W. 121; *Patrick v. Sherwood*, 4 Blatchf. 412, Fed. Cas. No. 10,804. The restriction placed upon him is not limited to the actual time he is in possession of his estate, but will be extended by the courts to any attempted anticipation on his part. In *Defreese v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584, 67 N. W. 505, 32 L. R. A. 744, where land was devised to A for life, with remainder to B for life, and after B's death the property to go to his heirs, and B accepted the devise, it was held he could not, by purchasing the property at a tax sale during the life of A, acquire any title which he could assert for the purpose of cutting off the interest of his heirs as remaindermen. It would have been otherwise if he had not accepted the devise. The court in that case gave long consideration to the question, in that they said they could find no authority squarely on all-fours with the circumstances. They said: "While he was under no obligation to preserve the estate, if he chose to do so that he might reap the benefit of the devise, he should be content to look to the occupant, whose duty it was to pay them, for reimbursement, or, if not, he could expect no more than contribution from the other remaindermen, to whose benefit, as well as his own, such payment inured. It would be inequitable to permit him to claim title under such circumstances, where he took under the same will that gave them an estate, thereby recognizing their right. Good faith toward the testator should forbid such an attempt to defeat his purpose." The opinion proceeds to indicate that if the life tenant were allowed to assume the position he claimed, it would be easy for two life tenants, under similar circumstances, to defeat the remaindermen by collusion. A much older case, *Varney v. Stevens*, 22 Me. 331, established the rule against permitting the life tenant to defeat the reversioner or remainderman. Judge Shepley, by whom the opinion of the court was drawn, after stating the facts, which briefly were that the tenant for life had offered certain deeds, showing a sale by the collector of taxes, and a release of that title to himself, in support of his attempted exclusion of his successors, cited *Coke on Littleton*, sections 267b, and 453: "A release of a right, made to a particular tenant for life, or

in taile, shall aid and benefit him or them in the remainder," and the learned judge pointed out that it was the duty of the tenant for life to cause all taxes assessed upon the estate during his tenancy to be paid, and by neglecting it and thereby subjecting the estate to a sale, he committed a wrong against the reversioners; and, therefore, when he received a release of the title, if any were acquired under the tax sale, he would be deemed to be discharging his duty by relieving the estate from the encumbrance. "To neglect to pay the taxes for the purpose of causing a sale of the estate to enable him to destroy the rights of the reversioners would have been to commit a fraud upon their rights. On the contrary, he must be presumed to have intended by procuring that release to extinguish the title under that sale."

The authorities are practically at one that no such acquisition of title by juggling with the taxes will be allowed to stand when brought before the courts. In *Blair v. Johnson*, 215 Ill. 552, 74 N. E. 747, the life tenant failed in his effort to acquire the fee by letting the tax deed stand in the name of his wife. In *Crawford v. Meis*, 123 Iowa, 610, 101 Am. St. Rep. 337, 99 N. W. 186, 66 L. R. A. 154, *First Congregational Church of Cedar Rapids v. Terry*, 130 Iowa, 513, 114 Am. St. Rep. 443, 107 N. W. 305, *Menger v. Carruthers*, 57 Kan. 425, 46 Pac. 712, *Watkins v. Green*, 101 Mich. 493, 60 N. W. 44, *Hunt v. Rabitoay*, 125 Mich. 137, 84 Am. St. Rep. 563, 84 N. W. 59, and *Jeffers v. Sydnam*, 129 Mich. 440, 89 N. W. 42, will be found a line of authorities which are unanimous in the conclusion above set out. The case of *Wilson v. Carrico*, 155 Ind. 570, 58 N. E. 847, must not be regarded as an authority the other way, and although circumstances are somewhat confusing, we think it well to recount them for reference: Bazzle Carrico owned in fee the land in question. On November 18, 1867, he and his wife, in consideration of one hundred and fifty dollars, conveyed the land to Elza Carrico, subject to a life estate reserved to the grantors. On November 5, 1869, they again purported to convey the same lands to Benjamin Carrico, subject to the same life estate reserved in the deed to Elza Carrico. Benjamin Carrico in his deed covenanted to pay the taxes. On March 9, 1870, Elza Carrico and his wife conveyed the land subject to the life estate to one John Wilson, who never had possession of the land, but paid the taxes from 1870 to 1880. He then allowed them to get in arrear and in 1883 the property was sold for the delinquent taxes for thirty-five dollars to one Edgar Wilson, the brother of the purchaser from Elza Carrico, who provided him with the money for the purpose. There was no redemption, and on March 24, 1885, the deed was duly executed to Edgar Wilson, the purchaser. In 1886 Edgar Wilson without his brother's knowledge executed a quitclaim deed for said estate to Benjamin Carrico for sixty dollars, which sum he paid over to John T. Wilson, who now sought to set up that the payment by Benjamin Carrico was for the benefit of him, the remainderman. The court held he had no equities because there was no obligation on Benjamin Carrico to pay taxes. He took originally under a deed which conveyed nothing and could not be brought within the category of life tenants owing the duty of paying taxes. The court, in view of John Wilson holding the purchase price received from his brother, upheld Benjamin Carrico's right and title to the land. In *Solis v. Williams*, 205 Mass. 350, 91 N. E. 148, one of the

last cases on this point, the court held that even in the absence of other statements of actual fraud, the mere neglect of the life tenant to pay taxes, whereby ultimately the property might be lost to the remaindermen, was in itself a fraud upon them.

b. To Pay Interest on Mortgages.

1. The Tenant in Possession.

A. Accruing Interest.—As between the owners of the fee and the life estate in mortgaged property, the owner of the life estate is charged with the duty of paying interest upon the encumbrance, and the life tenant cannot, by neglecting his duty and allowing the mortgage to be foreclosed, acquire title through the foreclosure sale, and cut off the remainderman: *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387, 77 N. W. 942; *McCall v. McCall*, 159 Mich. 144, 123 N. W. 550; *Jefferson v. Bangs*, 197 N. Y. 35, 134 Am. St. Rep. 856, 90 N. E. 109. This case and *Damm v. Damm*, 109 Mich. 619, 63 Am. St. Rep. 601, 67 N. W. 984, form a valuable compendium of the law on this subject and on ancillary topics. The opinion in the last-named case affirms the principle that as between a life tenant in possession and the remainderman, the former is bound to pay the interest and the latter the principal of any encumbrance to which the estate of both is subject.

B. Interest Due Before Tenant for Life in Possession.—The tenant for life is not chargeable with interest accrued due before his possession. Such interest will remain a charge on the estate: *Jones v. Sherrard*, 22 N. C. 179. In the case last named, the court says: "Hence the husband of a mortgagor in fee is not obliged to keep down the interest during their joint lives. How then, is that arrear of interest to be disposed of? It was held by the house of lords in *Ruscombe v. Hare*, 6 Dow. P. C. 1, 19 R. R. 1, upon the opinion of Lord Eldon, that such arrear of interest must, upon the death of the wife, be turned into principal, so as to make the original principal and that interest together the capital, on which the husband, as tenant by the curtesy must keep down the interest. There seems, indeed, to be no other mode of dealing with arrear of interest, although it violates the general rule that interest shall not be paid on interest."

2. The Tenant in Expectancy.—If an encumbrance exists to which the interest of a life tenant in expectancy is subject, and to which the interest of the remainderman is also subject, and the encumbrance does not affect the life tenant in possession, and the encumbrance is discharged by the remainderman, the life tenant in expectancy must contribute his proportion of the amount so paid, to be computed on the basis of the relative value of the estates. The method of making this computation is dealt with post, V, VI.

c. Not to Renew Leases for His Own Benefit.—If the life tenant of renewable leasehold estate renews a lease, the law will not permit him to do so for his own exclusive use, but will make him a trustee for the reversioner or remainderman. But if the life tenant pay out money that he was not required to pay, or more than his proportionate share, he becomes to that extent a creditor of the estate, and will be subrogated to the rights of the persons whose claims he has paid off. He and those claiming under him occupy a position analogous

to that of a mortgagee in possession after condition broken, and cannot be ejected until all sums due him or them from the estate have been repaid: *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656, 30 N. W. 755.

d. To Repair.—The duty of the tenant for life to make repairs sufficient to preserve the property and prevent its waste is well recognized, and he is only excused when the instrument creating his tenancy makes express provision for such purpose: *Griffin v. Fleming*, 72 Ga. 697; but otherwise his duty is paramount: *Stansbury v. Inglehart*, 9 Mackey, 134; *Smith v. Blindbury*, 66 Mich. 319, 33 N. W. 391; *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 60 Am. St. Rep. 444, 67 N. W. 657, 32 L. R. A. 756; *Perrine's Exrs. v. Newell*, 62 N. J. Eq. 14, 49 Atl. 724; *Matter of Very*, 24 Misc. Rep. 139, 53 N. Y. Supp. 389; *Thurston v. Thurston*, 6 R. I. 296; *Ballentine v. Spear*, 2 Baxt. 269. He must keep the premises in reasonable repair, but not in a better state of repair than when he got them: *Murch v. J. O. Smith Mfg. Co.*, 47 N. J. Eq. 193, 20 Atl. 213; especially if they were then untenable: *Sohier v. Eldredge*, 103 Mass. 345. No duty is cast upon him to repair damage caused by accidental fire or the act of God: *Miller v. Shields*, 55 Ind. 71; *Sampson v. Grogan*, 21 R. I. 174, 42 Atl. 712, 44 L. R. A. 711. Repairing sidewalks comes within the circle of his duty: *Hackworth v. Louisville Artificial Stone Co.*, 20 Ky. Law Rep. 1789, 50 S. W. 33; *Brodie v. Parsons*, 23 Ky. Law Rep. 831, 64 S. W. 426; *Hitner v. Ege*, 23 Pa. 305. Plate glass is not necessarily a permanent improvement in a building so as to entitle the life tenant to immunity from paying for it. The court said that it did not constitute a permanent improvement to a building any more than other improvements which do not form a substantial and material part of the structure: *Hancox v. Meeker*, 95 N. Y. 528. The tenant for life is not called upon for extraordinary repairs: *Wilson v. Edmonds*, 24 N. H. 517; and consequently when, as in *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621, the expense of repairing would exceed the value of the house, the tenant is not bound to repair it.

V. The Proportional Value of the Estate for Life and the Reversion or Remainder.

It frequently happens that the present value of an estate for life has to be computed, and the courts and mathematicians for centuries have been engaged in placing such value having regard to the probable duration of life. In a masterly opinion occupying about one hundred pages of the Maryland reports, 3 Bland, 186, *Williams' Case* covers the entire legal and historical ground, and to that case we must refer the reader, since, notwithstanding its voluminous form, there is little or nothing that can be better condensed. The tables of mortality which are in use by the insurance companies are dealt with—their origin and their development, and generally the learning on the subject finds a place in the valuable opinion referred to. We mention it here for reference, only regretting space will not permit its entire reproduction. We must content ourselves with the following excerpt from page 282 of the opinion: "There being no difference between a tenant in dower and any other tenant for life, except that the one is entitled to no more than a third and the other is entitled to the whole for life, and there having been no distinction

made in relation to this matter between particular tenants who are and those who are not punishable for waste; and the rule of this court, in relation to dower, being a much nearer approximation to truth and justice than that of the legislature; and having been approved of by the court of appeals, and directed to be applied, by analogy, to ascertain the present value of a reversionary payment, it has been deemed proper to follow its principles, and to consider it as a general rule in regard to estates for life in land, and life interests of all descriptions, other than dower, or those embraced by any legislative rule, of which this court may be called upon to ascertain the present value; that is to say: The allowance to a healthy person in lieu of his or her life interest in the whole to be as follows: If under thirty years of age, one-half; if above thirty and under thirty-six, nineteen-fortieths; if above thirty-five and under forty, eleven twenty-fifths; if above forty and under forty-five, two-fifths; if above forty-five and under fifty-one, three-eighths; if above fifty-one and under fifty-six, one-third; if above fifty-six and under sixty-one, three-tenths; if above sixty-one and under sixty-seven, one-fourth; if above sixty-seven and under seventy-two, one-fifth; if above seventy-two and under seventy-seven, one-sixth; if above seventy-seven, three-twentieths of the net proceeds."

The leaning of the courts is to take the mortality tables as a basis on which the health of the individual and the circumstances of his particular case will help the court to arrive at a proper valuation: *Steiner v. Berney*, 130 Ala. 289, 30 South. 570; *Williams' Case*, 3 Bland, 186; *Jones v. Sherrard*, 22 N. C. 179; *Carnes v. Polk*, 5 Heisk. 244. The rule in England of valuing the life estate as one-third and the remainder at two-thirds appears to have been adopted in Pennsylvania. In *Appeal of Datesman*, 127 Pa. 348, 17 Atl. 1086, 1100, we find: "The court adopted the latter principle, and followed the old common-law rule in force in England, and recognized in this state in *Dennison's Appeal*, 1 Pa. 201, and in *Shippen's Appeal*, 80 Pa. 391, that one-third of the capital sum is the measure of the life interest."

VI. Contribution on the Discharge of Encumbrances.

As this question may arise where encumbrances are discharged, it will be briefly considered here. In the currency of the life estate, there being encumbrances, it often happens that the payment of such encumbrances is called for, and they may be paid by any of the interested parties. In the case of a mortgage the tenant for life, as we have shown, must pay the interest, but he is not called upon to pay the principal: *Barnum v. Barnum*, 42 Md. 251; *Plympton v. Boston Dispensary*, 106 Mass. 544; *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656, 30 N. W. 755; *Peck v. Glass*, 6 How. (Miss.) 195; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Bourne v. Maybin*, 3 Woods, 724, Fed. Cas. No. 1700.

On the discharge of the mortgage by the remainderman, the strict rule is that the tenant for life should pay the interest during his life, but for convenience the rule is relaxed, the value of the annuity estimated and paid at once in gross: *Van Vronker v. Eastman*, 7 Met. 157; *Plympton v. Boston Dispensary*, 106 Mass. 544; *Swaine v. Perrine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *Bourne v. Maybin*, 3 Woods, 724, Fed. Cas. No. 1700. On the discharge of the mortgage by the tenant

for life, he is entitled to call for contribution from the remainderman, and until payment he becomes a creditor of the estate and will be subrogated to the rights of the persons whose claims he has paid off: *Jones v. Gilbert*, 135 Ill. 27, 25 N. E. 566; *Whitner v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656, 30 N. W. 755; *Callicott v. Parks*, 58 Miss. 528; *Downing v. Hartshorn*, 69 Neb. 364, 11 Am. St. Rep. 550, 95 N. W. 801; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Hunt v. Watkins*, 1 Humph. 498. The rules as to the amounts of such contribution are contained in *Foster v. Hilliard*, 1 Story, 77, Fed. Cas. No. 4972, and *Clyat v. Batteson*, 1 Vern. 404, and were adopted in *Callicott v. Parks*, 58 Miss. 528. When a tenant for life and remaindermen sell the estate consisting of their united interests, the share of each in the proceeds, in the absence of agreement, is to be determined by its value at the time of the sale, as fixed by the common tables of life annuities; in other words, the respective owners of independent interests are entitled to share in the proportion of those interests according to the present value when sold, because they are assumed to have disposed of them on that basis, and the best mode of ascertaining such value is by the tables mentioned. After the termination of the life estate, the court makes the apportionment on the basis of actual enjoyment, and will require the life estate to pay the interest of an encumbrance during the continuance of such estate, because it is not then a matter of uncertainty as to the duration of the life estate. "It does not then depend on expectation, based on life tables, but has become fixed, and the question is, not as to the value at the time of sale—which, in case of a sale by the parties, is the inducement of each, and with reference to which it is assumed to have been made—but the value at the time when the parties are charged with the payment of the money, and that is determined by the facts and not by life tables": *Foster v. Hilliard*, 1 Story, 77, Fed. Cas. No. 4972; *Callicott v. Parks*, 58 Miss. 528. The case of *Clyat v. Batteson*, 1 Vern. 404, illustrates the rule applied when the apportionment is made after the termination of the life estate, not as the result of a sale by the parties, and therefore made conformably to their presumed intention, but by the court upon the facts, as a matter of justice between the independent interests and without regard to any presumed intention: *Callicott v. Parks*, 58 Miss. 528.

VII. The Conditions Under Which the Remainderman or Reversioner may Claim the Benefit of the Purchase by the Tenant for Life of Outstanding Interests.

While the courts of equity have thus plainly pronounced the doctrine, it is founded on certain basic conditions imposed upon such as seek equity. The courts call upon him also to do equity by paying his share of the sum paid. What that sum is we have dealt with earlier in this note. In *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656, 30 N. W. 755, the court, after stating the established doctrine that the tenant for life in such case is regarded as having made the purchase for the joint benefit of himself and the reversioner or remainderman, said that the law will not permit him to hold it for his own exclusive benefit if the reversioner or remainderman will contribute his share of the sum paid. If the life tenant in such case has paid more than his proportionate share, he becomes

a creditor of the estate for that amount: *Davies v. Myers*, 13 B. Mon. 511. So that two questions at once present themselves as conditions upon the one seeking equity: First, he is not allowed to seek the benevolent help of equity without offering to pay his proportion of the amount expended; and, secondly, that he will carry that offer into effect within a reasonable time to be named. In *Peak v. Peak*, 228 Mo. 536, ante, p. 638, 128 S. W. 981, these two conditions are dealt with, and the proposition that the purchase of land at a foreclosure sale under a mortgage or deed of trust by a life tenant will be deemed to have been made for the benefit of the remaindermen only if they contribute their portion of the purchase money within a reasonable time is emphasized in the array of authorities cited. In the application of this first rule the law of reimbursement by cotenants is almost identical, and on that subject Mr. Freeman, in *Cotenancy and Partition*, section 154, says: "A cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or encumbrance and asserting it against his companions in interest. The purchase is, notwithstanding his designs to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others, if they choose, within a reasonable time, to claim the benefit of the purchase by contributing, or offering to contribute, their proportion of the purchase money: *Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Sullivan v. McLennan*, 2 Iowa, 437, 65 Am. Dec. 780; *Jones v. Stanton*, 11 Mo. 433; *Keller v. Auble*, 58 Pa. 410, 98 Am. Dec. 297; *Rothwell v. Dewees*, 2 Black, 613, 17 L. ed. 309."

KAHN v. MERCANTILE TOWN MUTUAL INSURANCE COMPANY.

[228 Mo. 585, 128 S. W. 995.]

CONSTITUTIONAL QUESTION—Waiver by Delay in Raising. The right of a defendant to raise a constitutional or federal question is waived if, his motion to quash the return of service being overruled, he makes no attempt to exercise his right until the next term and after judgment by default has been taken. (p. 670.)

SHERIFF'S RETURN.—Courts Will Permit Amendments to be made to a sheriff's return of a writ to correspond with the facts, even at a subsequent term, and the return will relate to the proper return day. (p. 671.)

PROCESS.—It is the Service of a Writ and Petition upon the defendant, not the return, that gives the court jurisdiction over his person. The return is merely evidence by which the court is informed that the defendant has been served. (p. 671.)

SHERIFF'S RETURN—Time Within Which Amendment may be Made.—There is no specific limitation of time within which an amendment to a sheriff's return of service of a writ of summons must be made. (p. 671.)

SHERIFF'S RETURN—Discretion in Allowing Amendment.—The allowing of an amendment to a sheriff's return of service of a

writ of summons is within the jurisdiction of the court. (pp. 672, 678.)

SHERIFF'S RETURN—Amendment—Notice to Defendant.—

The defendant is not entitled to notice before the court permits the sheriff to amend his return of service of a writ of summons. (pp. 677-679.)

Barclay, Shields & Fauntleroy, for the appellant.

Lee W. Grant and P. B. Kennedy, for the respondent.

587 WOODSON, J. The plaintiff instituted this suit July 14, 1905, against the defendant, in the circuit court of the city of St. Louis, based upon a judgment of the United States court within and for the southern district of the Indian Territory, for the sum of one thousand and ten dollars and thirty cents.

Upon the same day a summons in the usual form was duly issued by the clerk of said court, returnable to the October term, and delivered to the sheriff of said city for service. Upon the same day said sheriff made the following return (formal parts omitted):

"Served this writ in the city of St. Louis, Missouri, on the within named defendant, the Mercantile Town Mutual Insurance Company (a corporation), this fourteenth day of July, 1905, by delivering a copy of the writ and petition as furnished by the clerk to J. W. Daugherty, manager of the said defendant corporation, ⁵⁸⁸ he being in said defendant's usual business office and in charge thereof. The president or other chief officer of said defendant could not be found in the city of St. Louis at the time of service."

Thereafter, at the October term, 1905, of said court, said defendant filed its (special and limited) motion to quash said return, for the reason that it is insufficient in law and does not confer jurisdiction over the person of the defendant.

While said motion to quash was pending, and without notice to defendant, the court, on October 13, 1905, at the same term, permitted the sheriff to amend his return by interlineation so as to read as follows (caption and signature of sheriff omitted):

"Served this writ in the city of St. Louis, Missouri, on the within named defendant, the Mercantile Town Mutual Insurance Company (a corporation), this fourteenth day of July, 1905, by delivering a copy of the writ and petition as furnished by the clerk to J. W. Daugherty, manager of the said defendant corporation, he being in said defendant's principal office and in charge thereof. The president or other chief officer of said defendant could not be found in the city of St. Louis at the time of service."

Thereafter, but upon the same day, the court overruled defendant's said motion to quash.

On December 4, 1905, during the December term of said court, the court rendered judgment by default in favor of the plaintiff and against the defendant for the sum of one thousand and fifty-five dollars and thirty cents, the amount of the judgment, interest and costs due on the said Indian Territory judgment.

During the same December term of said court, the defendant filed therein the following special motion to set aside said default and judgment (formal parts omitted):

“Defendant (appearing specially by its attorneys for the purposes of this motion only and for no other ⁵⁸⁹ purpose) moves this court to set aside the judgment rendered in the above-entitled cause of Kahn v. Mercantile Town Mutual Insurance Company, for the following reasons, to wit:

“1. This court has no jurisdiction over the person of this defendant in this cause;

“2. This court has not acquired jurisdiction over the person of this defendant in this cause;

“3. This court has no jurisdiction over the subject matter of this suit, under the United States statutes applicable to the Indian Territory which govern the subject matter mentioned in plaintiff's petition;

“4. The judgment herein is irregular because prematurely rendered;

“5. The judgment herein is irregular because it was rendered by default, without any inquiry of damages;

“6. Under the constitution of the United States (article 1, section 8) and the United States laws applicable to the Indian Territory, the said territorial court (mentioned in the petition herein) had no jurisdiction to enter the alleged judgment on which this suit is founded;

“7. The said judgment was rendered in violation of the rights, privileges and immunities of defendant under the constitution of the United States, article 1, section 8, and article 4, section 1, and the fourteenth amendment, section 1.

“8. The petition is founded on an alleged judgment purporting to be filed therewith as an exhibit, when in fact said exhibit was not filed until November 16, 1905, and the judgment in this court thereon is therefore irregular;

“9. The judgment by default was entered before the time for defendant to plead had expired;

“10. The judgment herein is excessive;

“11. The court erred in allowing an amendment of the return herein and entering judgment thereon.”

⁵⁹⁰ And thereafter, at the same term, December 8, 1905, defendant filed its motion in arrest, as follows (caption omitted):

“Defendant (appearing specially by its attorneys for the purposes of this motion only and for no other purpose) moves

this court to arrest the judgment in the above-entitled cause of Kahn v. Mercantile Town Mutual Insurance Company, for the following reasons, to wit:

"1. The petition does not state facts sufficient to constitute a cause of action.

"2. The court had no jurisdiction over the person of this defendant to render judgment against this defendant at the time when said judgment was rendered;

"3. This court has no jurisdiction over the subject matter of this suit."

At the February term of said court defendant's said motions to set aside said judgment and in arrest of judgment were by the court overruled. The defendant properly excepted to each of said rulings of the court.

From the judgment of the circuit court, the defendant duly appealed the cause to the St. Louis court of appeals.

On February 5, 1907, the latter court handed down an opinion, written by Bland, P. J., in which the other judges concurred, affirming the judgment of the circuit court in all things. In due time the defendant filed a motion for a rehearing. The record here does not disclose what disposition was made of that motion.

Thereafter, the defendant also filed in said court of appeals a motion to transfer said cause to this court, for the following reasons, stated:

"1. Defendant, in the trial court, by its motion duly filed, claimed immunity from the judgment rendered herein, invoking federal statutes cited in appellant's brief and argument in this court.

591 "The said claim of appellant was presented in the most formal way to the circuit court by motion, of which the following is a part, and the same points were made in this court." (Then follows a copy of the third, sixth and seventh reasons assigned by defendant in its motion filed in the circuit court, asking that court to set aside the default and judgment rendered therein against it.)

Proceeding: "The federal laws put the Indians and their reservations under protection of the United States, and persons asserting rights in that country must do so under federal statutes. We claim that those statutes do not warrant or authorize the judgment sued upon in this case. That is a question involving the construction of federal law alone, and as such it is distinctly a federal question falling within the reviewing authority of the supreme court." (Citing certain cases.)

"2. Under the constitution and laws of Missouri, the question of the extent of jurisdiction of the federal courts in the Indian Territory and of the limits of the jurisdiction of the tribal courts under the federal statutes are questions of

federal cognizance which must be finally determined by the federal judicial authority. If your honors will read the brief heretofore submitted in this appeal, you will see that some of the contentions of appellant depend upon federal legislation and a construction of the federal statutes relating to the subject matter involved in the case. Under the uniform course of decisions of the state and federal courts, a federal question is involved in this appeal; and, therefore, it should be transferred to the supreme court for final adjudication.

“The briefs heretofore submitted in this court distinctly raised these questions. They were duly raised in the trial court. We respectfully submit that every proper step was taken to bring the case within the appellate reviewing jurisdiction of the supreme court ⁵⁹² of the state and of the United States supreme court, in event the decisions of the state courts should be adverse to the claims made by this appellant under the federal statutes.

“The state and federal decisions support this view, and upon their authority we most respectfully request that this cause be transferred to the supreme court.” (Citing authorities.)

“The idea advanced in the learned opinion, that the recital in the pleadings shown only by the record of the judgment of the court in the Indian Territory (as sued upon) will support the judgment, does not avoid our point (based on the federal cases) to the effect that parties residing in the domain of the civilized tribes (of which the Chickasaws are one) are not subject to the United States courts there, except in special circumstances not averred or shown here.” (Citing cases.)

“Wherefore, appellant renews its prayer for a transfer to the supreme court.”

This motion to transfer the cause to this court was, by the following order of the court of appeals, sustained, viz.: “Now, at this day it is considered and adjudged by the court that the judgment rendered herein by this court on the fifth day of February, 1907, be set aside and for naught held and esteemed; and that the opinion filed herein be withdrawn; and the court now being of the opinion that a question involving the construction of a federal statute is in the cause for determination, doth order and adjudge that this cause be transferred to the supreme court of this state for determination.”

1. In our opinion this cause was erroneously transferred to this court by the St. Louis court of appeals, for the reason that if any constitutional or federal question is involved herein, it was not timely and properly raised in the circuit court; and, therefore, ⁵⁹³ was waived, and cannot for that reason be considered on appeal: *Sheets v. Iowa State Ins. Co.*, 226 Mo. 613, 126 S. W. 413.

The record shows that this suit was begun in the circuit court of the city of St. Louis, July 14, 1905, returnable to the October term thereof. Upon the same day the sheriff served the writ and petition upon the defendant and made his return thereon to the effect that he served the defendant by delivering a copy of the writ and petition to J. W. Daugherty, manager of the defendant, he being in said defendant's "usual business office and in charge thereof."

During the same term the defendant appeared specially and moved the court to quash the return because it was illegal and not sufficient to give the court jurisdiction over the person of the defendant. During the pendency of that motion, and at the same term of court, the sheriff by leave of court amended his return so as to show that he served the writ and a copy of the petition on said Daugherty, manager of the defendant, "he being in said defendant's principal office and in charge thereof." By comparing the two returns, it will be observed that the amendment consisted in erasing from the original return the words "usual business" and interlining in lieu thereof the words "principal office," as it appears in the amended return.

At the same October term, but subsequent to the amendment, defendant's motion to quash the service was by the court overruled. No further action was taken by either party to the suit during the October term; but the cause went over to the next December term of said court. On December 4th, and during the December term, there having been no answer filed in the cause, judgment by default was rendered against the defendant for the sum of one thousand and fifty-five dollars and thirty cents. Thereafter, during the December term, the defendant filed its motion ⁵⁹⁴ to set aside the default and the judgment so rendered against it, and thereby, for the first time, attempted to inject into the cause the federal questions alleged to be involved in the case. Clearly, that was too late.

The defendant was summoned to appear at the October term of the court, and under the law it was its duty to answer during that term. While it is true defendant filed its motion to quash the sheriff's return of service, yet that fact only excused it from answering during the pendency of that motion, which was overruled during the October term. When that motion was overruled it then became the duty of the defendant to plead or answer the petition, at which time it could and should have raised the federal questions now urged upon our attention. But having failed to so plead or answer, it was in default, and consequently the judgment by default was properly rendered against it, which was done at the December term.

This court at an early date held that the courts of this state will permit amendments to be made to the return of a writ to correspond with the facts of the case; and if the amendment be made even at a subsequent term, the return will relate back to the proper return day: *Webster v. Blount*, 39 Mo. 500. This has been the universal practice in this state ever since that opinion was written.

The only excuse counsel for defendant offers for not answering upon the overruling of the motion to set aside the default is that the circuit court had no jurisdiction to allow the sheriff to amend his return without notice to the defendant. In support of that position counsel cite, and rely upon, the case of *Little Rock Trust Co. v. Southern Missouri & Arkansas Ry. Co.*, 195 Mo. 669, 93 S. W. 944. While there is a dictum of that character in that case, yet it was not necessary to be stated in order to have properly reached a conclusion in that case, as we will presently try to demonstrate.

⁵⁹⁵ That was an erroneous conception of the law. It was the service of the writ and petition upon the defendant, and not the return, that gave the trial court jurisdiction over the person of the defendant. The return was merely the evidence by which the court was informed that the defendant had been served. The original return was a false return, and would not have justified the court in finding therefrom that the defendant had been properly served; but by the amended return, which in no manner or form changed the actual service upon the defendant, but bespoke the truth thereof and correctly informed the court that the defendant was in fact properly served. The defendant was no more entitled to notice of the making of the amended return than he was entitled to notice of the making of the original return. In so far as the defendant is concerned, both stand upon the same footing. Besides this, sections 657 and 660, Revised Statutes of 1899, make it the duty of the sheriff, when he has made an erroneous return, to amend it so as to make it conform to the facts; and the law is too well settled to need the citation of authorities to show that the sheriff would have been liable on his official bond for damages for making a false return had he not corrected the same and had injury resulted to plaintiff in consequence thereof.

This court, in the case of *Scruggs v. Scruggs*, 46 Mo. 271, in discussing the right of the sheriff to amend his return, said: "The right of a sheriff to amend a defective return, on leave of the court, is beyond question, and it makes no difference that he is out of office. Such amendments, in appropriate cases, are allowed even on application of the sheriff's administrator. And there is no specific limitation of time within which this class of amendments must be made;

although, after a lapse of years, the court should grant applications with great caution, lest the rights of innocent third parties should be injuriously affected. Such ⁵⁹⁶ applications are not granted as a matter of right. The granting of them rests in the exercise of a sound discretion on the part of the court. 'Amendments of this description,' says the court in *Johnson v. Day*, 17 Pick. 106, 'are not regulated by any certain rules; but the court is bound in every case to exercise a sound discretion, and to allow or disallow an amendment, as may best tend to the furtherance of justice. The forms of the court are always best used when they are made subservient to the justice of the case': *Blaisdell v. Steamer Wm. Pope*, 19 Mo. 157; *Webster v. Blount*, 39 Mo. 500; *Stewart v. Stringer*, 45 Mo. 113; *Welsh v. Joy*, 13 Pick. 477; *Fowble v. Walker*, 4 Ohio, 64; *Gwynne on Sheriffs*, 471; *Haven v. Snow*, 14 Pick. 28."

This has been the universal holding of this court from that date to this: *Feurt v. Caster*, 174 Mo. 289, 73 S. W. 576, where the rule announced in the *Scruggs* case (46 Mo. 271) is quoted with approval.

Returning to the case of *Little Rock Trust Co. v. Southern Missouri & Arkansas Ry. Co.*, 195 Mo. 669, 93 S. W. 944, in discussing the right of the sheriff to amend his return, the court, on page 689, said: "The first contention of the defendants is that the service of the summons which was directed to Dittenhoefer and the Southern Missouri & Arkansas Railroad Company, but which was served on the St. Louis, Memphis and Southeastern Railroad Company, by delivering a copy to the local agent of that company, was insufficient in law to bring the St. Louis, Memphis and Southeastern Railroad Company into court, even if it had been a party defendant to the action (which it was not), because the return did not specify that the service was had upon such agent at the business office of said company, as required by section 995, Revised Statutes of 1899. This subject has been so lately adjudicated by this court in *Williams v. Dittenhoefer*, 188 Mo. 134, 86 S. W. 242, that it is unnecessary to further elaborate it. The respondent, however, passes over ⁵⁹⁷ this contention and seeks to parry its effect by showing that since the submission of this case in this court, the sheriff, without notice to the defendant, filed an amended return which showed that the service was had on the agent of the company at its place of business. This proceeding was without notice, and therefore is not binding on the defendants, as a sheriff has no absolute right to amend a return. The right to amend a return rests in the sound judicial discretion of the court, and the party to be affected by the amendment has a right to a day in court before the court has a right to permit the amendment; *Feurt v. Caster*, 174 Mo. 289, 73 S. W. 576."

In that case, it must be remembered that the amendment was made after the cause had been submitted in this court; and the facts of that case do not show that the amendment was made by leave of the circuit court, or that the amended return had ever been brought properly before this court on a suggestion of a diminution of record. But be that as it may, the learned judge who wrote that opinion cites no authority for the position there taken, except the case of *Feurt v. Caster*, 174 Mo. 289, 73 S. W. 576. By inspecting the latter case it will be clearly seen that there is nothing in it which lends even a color of semblance to the doctrine announced in the former case. The latter case was a suit in ejectment, and the facts were the plaintiff's deceased wife owned a hundred and sixty acres of land in Daviess county, and he claimed a life estate therein by the curtesy, which was sold under execution issued on a judgment rendered against him in favor of Ellen Gilreath, his mother in law. The defendant became the purchaser of the land at that execution sale, and went into possession thereof. Some years later, the plaintiff in the latter case, who was the defendant in the Ellen Gilreath suit, claimed that his estate by the curtesy was not subject to execution sale, for the reason ⁵⁹⁸ that he claimed a homestead right therein. This court in discussing that case, among other things, said:

“The plaintiff claims that the judgment is void, and therefore may be attacked in this collateral proceeding, because the return of the sheriff on the summons issued in the case of Ellen Gilreath against him was insufficient in law to confer jurisdiction over his person, in that it simply recited: ‘I hereby certify that I executed the within writ in the county of Daviess, state of Missouri, on the twenty-first day of August, 1896, by leaving a copy of the same at the usual place of abode of Benjamin F. Feurt, with a member of his family over the age of sixteen years,’ while the statute requires not only that a copy of the writ shall be served upon the defendant, but also a copy of the petition shall be served upon him, and this return does not show that a copy of the petition was so served upon the defendant in that case (the plaintiff in this case), and therefore the court never had any jurisdiction to render a judgment against the defendant in that case, and the judgment is void, and hence, open to collateral attack.

“On the other hand, the defendant claims that the land in controversy never was the homestead of plaintiff, and hence his estate by the curtesy was subject to execution; and further, that the judgment aforesaid is not void, but only voidable or irregular, and that such irregularities were only subject to attack by the defendant in that case itself, and are impervious to attack in this collateral case; and, also, that

the trial court erred in refusing to permit the sheriff to amend his return so as to show that a copy of the petition, as well as of the writ, was served on the defendant in that case. The defendant offered the evidence of the deputy sheriff who served the writs which tended to show that a copy of the petition was attached to the writ, and that he served both at the same time by leaving them at the defendant's usual place of abode with a member of his ⁵⁹⁹ family over the age of sixteen years, but the deputy sheriff could not remember who such person was or whether it was a man or woman, but was certain that whoever it was was over the age of sixteen years. He also said he never served any other writs upon the plaintiff herein. On the other hand, the plaintiff proved by his stepdaughter, Mrs. Sinnie Cathcart, that someone, she could not say who, gave her some papers, she did not know what they were, and asked her to give them to her stepfather, the plaintiff, and that she did not do so. She also said she would be nineteen years old on April 5, 1901. The writ in question was served August 21, 1896. So that she was only fourteen years old at the time of the service. On motion of the defendant, however, the court struck out all her testimony, because she did not identify the person who served the papers as being the deputy sheriff who served the writ in question. Hence, her testimony is not open to consideration in this case in this state of the record.

"The defendant, however, contends that the sheriff had a right to make the amendment, and that evidence that the proposed amendment was untrue was inadmissible, for the reason that if the amended return be false, the party aggrieved would have a remedy on the sheriff's bond, just as if the original return had been as the proposed amendment contemplated, and that such remedy is exclusive. Per contra, the plaintiff claims that such amendment is not a matter of right with the officer, and can only be made by leave of court granted in the exercise of a sound judicial discretion, and that it ought not to be allowed in this case, because a right of action against the sheriff on his bond is now barred by limitation.

"The trial court entered judgment for the plaintiff, and the defendant appealed."

This court, after holding that plaintiff had no homestead in the land, proceeded:

⁶⁰⁰ "It is contended that the trial court erred in refusing to allow the sheriff to amend the return upon the summons in the case of Mrs. Gilreath against the plaintiff.

"Two reasons are urged in support of this contention: 1. That the sheriff had an absolute right to amend, being liable on his bond if the amended return be false, and therefore evidence that the proposed return is untrue is inadmissi-

ble; and 2. That under the evidence adduced in support of the application for leave to amend the return, the court ought, in the exercise of a sound judicial discretion, to have permitted the amendment.

“The defendant cites *Phillips v. Evans*, 64 Mo. 17, as authority for his first contention aforesaid. In that case it is said: ‘The return of the officer is conclusive, as to the facts therein recited, except in an action for a false return. . . . And the same reasons which would forbid any contradiction of the returns when made must operate with equal and controlling potency in precluding evidence to show that a proposed amendment is untrue.’

“Substantially the same rule was laid down in *Stewart v. Stringer*, 41 Mo. 400, 97 Am. Dec. 278. But on second appeal of the same case (45 Mo. 113) the power of a sheriff to amend a return without due leave of court was denied.”

Then follows the quotation before made from the *Scruggs* case (46 Mo. 271).

Proceeding, the court said: “In *McClure v. Wells*, 46 Mo. 311, it was said: ‘Leave should be granted to amend the return in accordance with the facts. Such amendments are always freely allowed in aid of a judgment, although denied where their effect is to create error.’

“In addition to this, any doubt that may heretofore have existed by reason of the divergent views expressed in the cases cited is removed and the question ⁶⁰¹ set at rest by sections 657 and 660, Revised Statutes of 1899, which provide that before or after final judgment ‘the court may, in furtherance of justice, and on such terms as may be just, amend,’ if after judgment, ‘in affirmance of such judgment’ and if before judgment ‘in furtherance of justice,’ ‘any record, pleading, process, entries, returns, or other proceedings in such cause,’ etc.

“By these statutes the power to allow amendments is vested in the court, to be exercised upon such terms as may be just, and the officer is not given any absolute power of amendment, and this must hereafter be taken as the rule of law in such cases.

“The second contention is not so easy of solution. The trial court refused to permit the sheriff to amend the return, because he could not identify the person upon whom he served the papers. As herein stated such amendments are allowed in the exercise of a sound judicial discretion, but as well said in *McClure v. Wells*, 46 Mo. 311, ‘such amendments are always freely allowed in aid of a judgment.’ And whilst this court is always loth to interfere with discretionary rulings of trial courts, nevertheless such rulings are not conclusive upon this court, and where they are interfered with it is because that discretion exercised by the trial judge is

not a personal discretion, but a judicial discretion, and because the ultimate responsibility for every judgment rests upon the court of final resort to which the case is taken, and therefore that court is in duty bound to approve or reject all rulings of lower courts even when made in the exercise of a judicial discretion: 17 Am. & Eng. Ency. of Law, 2d ed., pp. 844, 845, and cases cited in notes.

"It is with these principles in mind that the decision of the question under consideration is approached and reached.

"It is certain that some sort of papers were left by someone for the plaintiff at his usual place of ⁶⁰²abode, about the time the case of Mrs. Gilreath against the plaintiff was begun. The deputy who served these papers swears positively that these papers consisted of a copy of the writ and a certified copy of the petition attached to the writ, for he says he remembers stopping in the shade to rest his horse just before he reached the plaintiff's house, and that he took the papers out of his pocket and examined them to see that they were all right and then put a rubber band around them, and proceeded to the plaintiff's house. He also swears that he never served any other papers on the plaintiff or had any to serve on him at any other time. He also remembers that after leaving plaintiff's house he proceeded farther on his way and served a summons upon a neighbor, to serve on the grand jury. But he is unable to remember upon what member of the plaintiff's family he served the papers, and does not know whether it was a man or a woman, an old or a young person, but is sure it was on someone who was over sixteen years old, whom he found in the plaintiff's house, and who was pointed out to him by the plaintiff's young son, whom he found at the front fence, as a member of the family.

"It appears by other testimony that at the time of the service the plaintiff's family consisted of his son, Gabe Feurt, aged twenty years, his stepdaughter, Mrs. Sinnie Cathcart, aged fourteen years, his son, Frank Feurt, aged eleven years, and his daughters Bertha and Mary, aged ten and three years, respectively. Gabe Feurt swears the papers were not served on him. Mrs. Sinnie Cathcart said someone, she did not know who, gave her some papers, she did not know what, at a time she could not specify, and told her to give them to her stepfather and that she did not do so. Upon motion of the defendant her testimony was struck out because of her inability to identify the person who served the papers on her. And this ruling was unquestionably correct, in the abstract, but, taken ⁶⁰³in connection with the testimony of the deputy sheriff, it is not altogether clear that it was incompetent. The objection that she could not identify the person goes rather to the probative force of her testimony than to its competency in this case, where it appears on all

sides that there never was but one set of papers served upon the plaintiff. The testimony of the deputy sheriff made it sure what papers were served, and when they were served, but left it uncertain upon whom they were served, while the testimony of Mrs. Cathcart cleared up that uncertainty, by showing that the papers were served upon her and that she was at that time only fourteen years old. Hence, the testimony of these two witnesses related to the same and the only transaction of this kind that ever happened, and the one was the fitting complement of the other. But the defendant moved to strike out Mrs. Cathcart's testimony, and so he cannot complain, and the plaintiff submitted to the ruling, so he cannot complain. This leaves the application of the sheriff to amend supported only by the testimony of the deputy sheriff; and he is unable to say upon whom he served the papers. Gabe Feurt was the only member of the plaintiff's family who was over sixteen years old at that time, and he swears the service was not on him. It is shown by other testimony that Mrs. Cathcart was there at the time and that she was only fourteen years old.

"Under such a showing it cannot fairly be said that the trial court failed to exercise a sound judicial discretion in refusing to allow the sheriff to make the amendment proposed. It would be a wise provision of law if the officer serving process upon a member of a family should be required to state in his return the name of such member of the family."

At the cost of considerable time and labor we have stated the substance of the facts in the Feurt-Caster case (174 Mo. 289, 73 S. W. 576), and quoted fully therefrom all this court there ⁶⁰⁴ said regarding the right of a sheriff to amend his return.

It will be observed from reading the quotations from that case that not a word is said about the defendant being entitled to notice before the court could legally permit a sheriff to amend his return. In fact, in that case it was the defendant who was insisting that the amendments should be made, and consequently in the very nature of the case he was not entitled to notice; and as to the plaintiff, who was the defendant in the Gilreath case, he was there in court resisting the amendment, not for want of notice, but because, as he contended, the proposed amendment was not true in fact.

From these observations it must be clear that there was not and there could not have been a question of notice involved in that case. Therefore, in no sense can it be logically contended that it supports the dicta of the learned judge who wrote the opinion in the case of Little Rock Trust Co. v. Southern Mo. etc. Ry. Co., 195 Mo. 669, 93 S. W. 944.

Not only that, but in the Feurt-Caster case (174 Mo. 289, 73 S. W. 576) the defendant who was insisting upon the

return being amended was no party to the suit in which the original return was made and which was asking that it be amended.

There is no statute, text-book or adjudication which has been called to our attention, or which we have been able to find, which holds that the defendant is entitled to notice before the sheriff can amend his return by permission of court, except the dicta stated in the Little Rock Trust Co. (195 Mo. 669, 93 S. W. 944) case; and by reading that case it will be seen that those remarks of the judge were wholly unnecessary to a proper disposition of the case, for the obvious reason that the St. Louis, Memphis and Southeastern Railroad Company, which was sought to be brought in by the amendment, was not a party to the suit, and, clearly, if the amendment ⁶⁰⁵ had been allowed it would not have supported a judgment against it.

We therefore hold, as above stated, that it was the duty of the defendant in the case at bar to have answered the petition filed herein at the time the circuit court overruled its motion to quash the sheriff's return; and, having failed to do so, and thereby having failed, at the time, to raise the federal questions now presented, they were waived, and cannot be considered on appeal: *Sheets v. Iowa State Ins. Co.*, 226 Mo. 613, 126 S. W. 413.

Having reached this conclusion, and there being no fact or question involved in the case which confers jurisdiction upon this court, the cause should be transferred back to the St. Louis court of appeals. It is so ordered.

All concur.

VALLIANT, J. Whilst concurring in the opinion of my learned Brother Woodson in this case, I have some other views on this subject that I wish to express. The allowing of an amendment to a return being a matter in the discretion of the court, the sound judicial discretion, and the statute which authorizes it not expressly requiring notice of the application to amend, the question of the requiring of notice is also in the sound judicial discretion of the court, and therefore if, in a given case, the trial court has allowed the return to be amended without notice, the ruling will not on appeal be held to be error, unless, under the facts shown by the record, the appellate court is satisfied the discretion was not judiciously exercised, and injury probably resulted. The facts of this case illustrate what I am trying to say; this defendant was not in court by force of the return as it was originally made. But he entered a limited appearance for the purpose of moving to quash the return; he was therefore ⁶⁰⁶ in court for that purpose, and was bound to take notice of what the court did with his motion to quash and its ruling on the question

of the sufficiency of the return. Pending that motion the court allowed the return to be amended and its ruling on the motion was presumably based on that amendment. The defendant therefore had notice, and the court did not abuse its discretion in not requiring notice to be given.

In my opinion the practice of allowing a sheriff to amend his return has gone further than was originally contemplated, either by the General Assembly or by this court, and has reached a condition that calls for legislation to put a limit on it. As the law now stands, an indefinite number of years may have passed, conditions may have changed, the party's remedy on the sheriff's bond may amount to nothing, the sheriff himself may have died and his administrator is allowed to amend the return.

The statute says the amendment may be allowed when it would be in furtherance of justice, and in an early case cited by Judge Woodson in his opinion, McClure v. Wells, 46 Mo. 311, the court said: "Such amendments are always freely allowed in aid of a judgment, although denied where their effect is to create error." What was said may have been well said as applied to the facts of that case, but not for universal application. If, in fact, an original return is false, there is no more reason for allowing it to be amended to support a judgment than to defeat the judgment. For example, if the original return shows that defendant was duly served with the process and on that return a judgment by default was entered, yet in fact the return was false, the judgment rests on a false basis, and it would be as much in furtherance of justice to allow the sheriff to amend the return which would defeat the judgment as it would if the conditions were reversed.

607 It would not be in furtherance of justice to allow an amendment of a return to aid an unrighteous judgment, but would be to allow it to expose the error. Justice is no more concerned in upholding a righteous judgment than it is in defeating an unrighteous judgment.

But this practice to which I have alluded is of too long standing and is supported by too many decisions of this court to be now within the province of the judiciary to change it, but it is a matter which deserves the attention of the General Assembly. The statute ought to be amended so as to put a reasonable limit as to the time in which an amendment of a return should be allowed and to require notice if the party to be affected is within reach.

Lamm, P. J., and Graves, J., concur.

A Return of Service of Summons may be Amended After Judgment so as to show jurisdiction, and the amendment relates to, and becomes a part of, the original return, and imparts vitality to the judg-

ment: *Allison v. Thomas*, 72 Cal. 562, 1 Am. St. Rep. 89; *Shenandoah Valley R. R. Co. v. Ashby*, 86 Va. 232, 19 Am. St. Rep. 898. For limitations on the right of amendment, see the note to *Malone v. Samuel*, 13 Am. Dec. 179, and the recent cases of *Stubbs v. McGillis*, 44 Colo. 138, 130 Am. St. Rep. 116; *Knapp v. Wallace*, 50 Or. 348, 126 Am. St. Rep. 742; *Albright-Pryor Co. v. Pacific Selling Co.*, 126 Ga. 498, 115 Am. St. Rep. 108. As a rule, a liberal discretion is reposed in courts to authorize returns of service of process to be amended: *Jeffries v. Rudloff*, 73 Iowa, 60, 5 Am. St. Rep. 654. If the defendant does not appear and judgment is taken against him by default, but the return does not show the necessary jurisdictional fact of service, though the proper party was in fact served, the return may be amended after the entry of judgment to show that fact, and without personal notice to the defendant: *Cunningham v. Spokane H. Min. Co.*, 20 Wash. 450, 72 Am. Rep. 113. Where actual service of summons issued from a justice or probate court has been made, but the return of service was insufficient and did not show a good service, and the default of the defendant was entered and judgment was taken against him, it is proper to thereafter allow an amended return of service to be made so as to show that a good and valid service had in fact been made: *Call v. Rocky Mt. Bell Tel. Co.*, 16 Idaho, 551, 133 Am. St. Rep. 135.

McLAUGHLIN v. McLAUGHLIN.

[228 Mo. 635, 129 S. W. 21.]

CONVICTS—Suspension of Civil Rights.—The Statutes of Missouri manifest a legislative intent to modify the rigid rules of the common law suspending the civil rights of convicts. (pp. 684, 685.)

CONVICTS—Suit Attacking Estate—Trustee to Defend.—The Missouri statutes contemplate that when the estate of a person serving a term in the penitentiary is being attacked by suit, the convict should be in court through his trustee before a valid judgment can be entered touching his property. (p. 685.)

CONVICTS—Actions Against at Common Law.—Under the common law a convict in prison could be made a party defendant, but he was deprived of capacity to make a contract or adopt other means of making a defense. (pp. 688, 689.)

CONVICTS.—Summons in a Divorce may be Served on a convict in the penitentiary, and no trustee need be appointed for him, if no alimony or sequestration of property is sought. (p. 689.)

CONVICTS—Divorce and Alimony—Appointment of Trustee.—Under the Missouri statutes a judgment, in an action for divorce against a convict in the penitentiary, cannot divest him of his title to land if no trustee is appointed to represent him. (p. 689.)

QUIETING TITLE—Void Judgment.—In an Action under section 650, Revised Statutes of 1899, to ascertain and determine title, if a judgment conveying title is void upon its face, the court should so declare, and not sustain a demurrer on the ground that a bill in equity to cancel the judgment is unnecessary. (p. 690.)

QUIETING TITLE—Void Judgment.—Where the Fact Making a judgment void does not appear upon the face of the record, the

judgment casts a cloud and equity will remove the same upon proper proof. (p. 690.)

QUIETING TITLE—Void Judgment—Matter of Doubt.—Where it is a matter of grave doubt whether a judgment affecting land is void on its face, the judgment casts such a cloud as justifies equitable relief. (p. 691.)

J. M. Davis & Son, for the appellant.

Crosby Johnson and C. C. Johnson, for the respondent.

641 **GRAVES, J.** Plaintiff and defendant were formerly husband and wife. This cause comes here upon a judgment sustaining a demurrer to plaintiff's petition. His petition was in three counts originally, but it is stated that the second count thereof, which appears from the trial judge's written opinion filed in the cause to have been a count in ejectment, was dismissed.

In the first count plaintiff seeks by a direct count in equity to set aside that part of a judgment in a divorce suit between him and his wife by which the title to eighty acres of land in Caldwell county was decreed out of him and vested in his former wife, the defendant herein. In said count it is averred that plaintiff, from 1885 to 1897 was the owner of said land, was the head of a family and lived thereon; that his deed was recorded in Caldwell county; that he has never conveyed the same; that in 1897 he was convicted of murder and sentenced to the penitentiary of Missouri for ten years; that he remained in the penitentiary from 1898 to March 7, 1904, at which time he was released, and on May 19th was granted a full pardon by the governor of the state. It is then averred that in 1902, whilst plaintiff was thus confined in the penitentiary and civilly dead, the defendant brought suit against him for divorce and alimony, as well as the care and custody of the children, and asked that such alimony or support and maintenance be decreed to her out of the property of this plaintiff; that service of the summons in said divorce suit was had upon plaintiff while he was incarcerated in the penitentiary under the judgment and sentence for murder aforesaid; that he could not defend the same; that in such divorce suit the defendant in this case was **642** granted a divorce from this plaintiff, together with the custody of the children of their marriage, and in said judgment and decree it was further decreed that the defendant in this cause be vested with the title to the land aforesaid, and that the title to the land aforesaid was divested from this plaintiff; that said action was beyond the powers and jurisdiction of the circuit court, and such decree, in so far as it affects the land, was beyond the powers and jurisdiction of the court, but was such as to create a cloud upon plaintiff's title to said

land, as well as his homestead rights therein. The said first count concludes with the following prayer:

"Wherefore, plaintiff prays that said judgment and decree of this court divesting out of this plaintiff the title to said real estate described as aforesaid, and vesting the same in the defendant, Mary M. McLaughlin, be declared to be a cloud upon plaintiff's title to said real estate. That the same be set aside and for naught held, and that the court remove said judgment and decree as a cloud upon the title of plaintiff in and to said land, and for all such other and further relief as pertaineth to equity and good conscience, and as the plaintiff may on the trial of said cause show himself entitled to."

The third count is one under section 650, to have ascertained and determined the respective interests of the parties to the land in question. In this count it is averred that defendant claims some interest in the land under the judgment described in the first count. This second count pleads all the facts pleaded in the first count, and alleges in addition that the equity in said land did not exceed fifteen hundred dollars, the sum allowed as a homestead. By the prayer the court was asked to ascertain and determine the interests of the parties in and to the land.

To the petition the defendant demurred in this language:

643 "Defendant for plea to the first count of plaintiff's petition in above cause demurs to the same for the following reasons:

"1. Because the facts therein stated constitute no cause of action against this defendant.

"2. Because the reasons assigned therein as causes for holding the decree of divorce and alimony as void or invalid are not good in law.

"3. Because the facts stated therein do not entitle the plaintiff to the relief sought or any relief.

"To the third count of the petition the defendant demurs on the same grounds and for like reasons as those assigned as grounds of demurrer to the first count."

Plaintiff refused to plead further, and upon judgment being entered against him has appealed to this court.

1. Plaintiff does not challenge that portion of the decree in the original cause which grants the divorce, but only that portion which deprived him of his property. He charges in his petition that he was civilly dead, and that no trustee was appointed for his estate as might have been done under article 2, chapter 141, Revised Statutes of 1899. The position of plaintiff is that a trustee must be appointed under said article 2, before the court has jurisdiction of a case involving his estate, as contradistinguished from the marriage status.

Plaintiff was sentenced for a term of ten years. Our statute, Revised Statutes of 1899, section 2382, reads: "A

sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the persons so sentenced, during the term thereof, and forfeits all public offices and trusts, authority and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead."

Section 8930 is the statute pertaining to the appointment of a trustee, and reads: "Whenever any ⁶⁴⁴ person shall be imprisoned in the penitentiary for a term less than his natural life, a trustee, to take charge of and manage his estate, may be appointed by the circuit court of the county in which such convict last resided; or if he have no known place of residence, then by the court of the county in which the conviction was had, on the application of any of his relatives, or any relative of his wife, or any creditor."

By other sections of article 2, chapter 141, *supra*, it is provided, (1) such trustee shall take an oath and give bond, (2) and shall be under the control of the court appointing him; (3) upon taking of the oath and filing of the bond all of the estate of the convict shall vest in the trustee; (4) such trustee may prosecute and defend actions by or against such convict; (5) the court may order sale of property for support and maintenance of family and education of children; (6) trustee shall settle with creditors, and to that end may examine witnesses, and (7) such trustee may redeem mortgages, conditional contracts and pledges of the convict. Other provisions are found in this article, but the ones enumerated suffice to illustrate the scope thereof. Finally, the trustee is required upon the release of the convict to turn over the estate to him, or in the event of his death to account to the personal representative.

The question, therefore, is, Should the plaintiff in the divorce proceeding have had a trustee appointed before instituting a suit which involved the taking of the convict's estate, and without there being such a trustee did the circuit court have the right to proceed with the cause in so far as it pertained to the estate of the convict? The question is not one void of difficulties. Nor are the cases from other states always enlightening, because of the difference in the statutory provisions.

It would appear that under the common law, the convict could not sue, but he could be sued. The exact ⁶⁴⁵ status of the convict at common law is not one to be determined without some perplexities. Andrews, J., in *Avery v. Everett*, 110 N. Y. 317, 6 Am. St. Rep. 368, 18 N. E. 148, 1 L. R. A. 264, in discussing the status of a convict under the statutes of New York, but having occasion to exploit the field of the common law, has well said: "Anyone who takes the pains to explore the ancient, and in many respects obsolete, learning

connected with the doctrine of civil death in consequence of crime, will find that he has to grope his way along paths marked by obscure, flickering and sometimes misleading lights, and he cannot feel sure that at some point in his course he has not missed the true road. But there is a guiding principle which, in the present case, greatly aids in solving the question presented, and that is, that no one can or ought to be divested of his property, in invitum, except by the clear warrant of law, and this, we think, is not found in the statute relating to civil death."

The law-writers usually announce the broad rule that at common law the convict could be sued, but being deprived of his civil rights, could not sue: 6 Am. & Eng. Ency. of Law, 2d ed., p. 65; 9 Cyc. 871.

In the latter authority, at page 874, it is said: "By the great weight of authority, offenders, whether sentenced to state prison for life or for a term of years during which their civil rights are suspended, are still liable to be sued, and this liability necessarily carries with it the right to defend, although there are cases holding that a pending action is abated by the conviction and sentence of the defendant to imprisonment in the state prison. But again it has been held that a plea or answer in abatement setting up the civil death of the defendant is inconsistent and bad on demurrer, because the fact that he is able to plead or answer shows him to be alive. Where the statute provides for the appointment of a trustee of the estate of one imprisoned for crime, it is clear that such trustee should defend any action against the convict ⁶⁴⁶ that may be pending at the time of his conviction and sentence, and proceedings ought to be stayed until after his appointment and qualification."

In some cases it has been suggested that statutes declaring the civil death of convicted felons are but declaratory of the common law. In a way this is no doubt true, but it should not be overlooked that often statutes, whilst being in a sense declaratory of the common law, give indication of a legislative purpose to thwart the rigors of the common law. So to our mind the solution of the point in issue must be found in our statutes. The first section quoted (section 2382) modifies and changes the common law. Under it a person sentenced for a felony for a term less than life only has his civil rights suspended during the term of the sentence. The common-law rule went much further. In fact, under our constitution, no statute could fully declare the common-law status of a convicted felon. Not only is this true, but by article 2, chapter 141, supra, full provision is made for the protection of the estate of the convict. At common law he could not sue to protect his estate, but under article 2 the law provides for a trustee to sue for him. Here we have an evidence of a legis-

lative intent to modify the rigid rules of the common law. Section 2382, and the various sections of article 2, *supra*, must be construed together. Whilst by the first section the convict's civil rights are suspended, yet they are not so suspended as to prevent the proper administration of his affairs under the sundry provisions of the latter article. And may it not be suggested that whilst at common law he could be sued, yet there was no adequate means given him for a proper defense, and the sections of article 2, *supra*, were no doubt passed to the end that this situation would be relieved? This court has held that a deed of trust executed by a convict is void: *Williams v. Shackleford*, 97 Mo. 322, 11 S. W. 222. If sued, therefore, the convict would be powerless to make a contract ⁶⁴⁷ binding himself and his estate to procure legal talent to defend the suit, or to procure the necessary incidental expenses of a defense to the suit. The only way a defense could be properly made would be through the trustee provided for by the terms of article 2 of chapter 141. Under these statutes, the trustee under the direction of the court appointing him could see that the suit was properly defended.

When all of our statutory provisions are taken and considered as a whole, as must be done, we are of opinion that they contemplate that when the estate of a convict is being attacked by a suit, such convict should be in court through his trustee before a valid judgment could be entered touching his property. In *Bowles v. Habermann*, 95 N. Y. 246, the New York court deals in a limited measure with the question before us. In that case Bowles had procured, before his conviction of murder, a judgment against the defendant in an action for tort. An appeal was taken by the defendant to the New York court of appeals. Pending this appeal the defendant was convicted, sentenced to the penitentiary for ten years, and was incarcerated therein. Defendant filed his motion to suspend action on the case during the term of plaintiff's sentence. This motion the court overruled. And later the case was heard and the judgment affirmed: *In re Phillips*, 98 N. Y. 267. In the opinion upon the motion, 95 N. Y. 246, Earl, J., said: "But provisions are made by law by which this judgment may be enforced, and the appeal defended on behalf of the plaintiff. It is provided in the Revised Statutes (2 Rev. Stats. 15), that whenever any debtor shall be imprisoned in a state prison for any term less than his natural life, or in any penitentiary or county jail for any term more than one year, application may be made to the officers specified by any creditor of such person, or by any relative, or by any relative of his wife, for the appointment of trustees to take charge of his estate; ⁶⁴⁸ that the trustees so appointed shall have the same rights in, and power over, his real and personal estate as trustees of the estate of an ab-

sconding debtor appointed under the Revised Statutes have; and it is further provided that such trustees shall pay the debts of the imprisoned debtor, and after paying his debts and their disbursements and commissions, that they may, under the direction of the officer who appointed them, or of any equity judge, from time to time, apply the surplus of any moneys in their hands to the support of the wife and children of such debtor and of such other relatives as he may be bound to support, and to the education of his children. So in this case trustees may be appointed under these provisions who may defend this appeal and enforce this judgment, and collect the money thereon, and after paying the debts of the plaintiff, if there is any surplus and no relatives to be supported, the trustees will hold that for him until the term of his imprisonment shall have expired, when they will be bound to account to him." The provisions of the New York statute are much like our own for the appointment of a trustee. In effect, the New York court holds that whilst at common law the plaintiff could not prosecute a suit, yet after the prosecution was begun, under the statute his trustee could proceed.

In Kansas the statutes are much like those of this state. In fact, most of the sections are practically literal copies of our article 2, chapter 141. The force and effect of such statutes came under review in the case of *Commissioners of Rice County v. Lawrence*, 29 Kan. 158. In that case the court passed judgment upon sections 338 and 348 of chapter 82, Compiled Laws of 1879. Section 338 is identical with our section 8930, quoted *supra*, and for that reason we shall not repeat the language here. Section 343 of the Kansas law is identical with our section 8935, and reads thus: "Such trustee may sue for and recover, in his own ⁶⁴⁹ name, any of the estate, property or effects belonging to, and all debts and sums of money due or to become due to, such imprisoned convict, and may prosecute and defend all actions commenced by or against such convict." We quote this section in full, as we had only given the substance thereof above after having quoted our section 8930.

In the *Lawrence* case, the facts were: Lawrence was a defaulting treasurer of Rice county, Kansas. November 25, 1876, suit was brought against him and his bondsmen to recover twenty thousand dollars. In this suit issue was joined, and in June, 1877, by agreement the venue thereof was changed to Reno county. February 5, 1878, Lawrence and his attorneys being present, the case was referred to a referee by an order of the court. The referee qualified, heard the case and reported to the court. The report was confirmed and judgment entered April 15, 1878, for something over fourteen thousand dollars. Execution was issued June 5,

1878, and on August 3d following the personal and real property of Lawrence was sold, and this sale confirmed by the court April 8, 1879. Such is the history of the civil case. It will be noticed that defendant was not only duly served, but appeared and answered. Now to the accompanying criminal case. June 20, 1877, whilst the civil action was pending, but before the referee order was made, Lawrence was indicted for embezzlement. August 21, 1877, the venue of the cause was changed to Reno county. On February 5, 1878, the same day that the referee was ordered, Lawrence was sentenced to the penitentiary for three years for embezzlement. He remained in the penitentiary until June, 1880, when he was released upon pardon from the governor. February 4, 1882, he filed a motion to set aside the judgment in the civil cause entered as above stated, on the ground that he was under sentence when the judgment was entered, and no trustee was appointed to manage his estate or defend said civil action. ⁶⁵⁰ This motion was sustained by the lower court and its judgment affirmed by the supreme court. In the course of the opinion, Horton, C. J., after quoting sections 338 and 343, chapter 82, of their laws, which are practically identical with sections 8930 and 8935 of our laws, among other things said: "Under these and the other sections of the article relating to the custody and management of the estates of convicts, we think that the service of a summons on a defendant, while imprisoned in the penitentiary for a term of years—excepting in a single instance hereafter noticed—must be treated as void, and that the conviction, sentence and imprisonment of the defendant in the state penitentiary, pending the action against him prior to the hearing or trial thereof, must abate the action; at least, a judgment rendered in such a case may be treated as a nullity and set aside by the court rendering it, upon proper proceedings had: Comp. Laws 1879, art. 17, secs. 770–773. Of course, if a trustee is appointed under the statute, he may contest any action already commenced against the convict, and the judgment thus rendered would be valid in all respects. The provisions of said article 17 prescribe the remedy to be pursued by the court, when the civil rights of the debtor are suspended by imprisonment in the penitentiary under sentence for life, or for a term of years less than life, and these provisions in the nature of things are and ought to be exclusive, not merely cumulative. Inextricable confusion would follow if one creditor proceeded personally against the convict after he is imprisoned, and another against a trustee, appointed upon his application. Not only would the proceedings to collect the judgments be liable to conflict, but, moreover, the object of the statute would be nullified. After a debtor is imprisoned under the law, he is in no condition

to appear to defend a civil action pending against him; he is in no condition to consult or advise with witnesses or counsel concerning the defense ⁶⁵¹ of the action; nor is he in any condition to employ counsel, or continue the services of counsel previously engaged. That conviction, sentence and imprisonment of the defendant suspended his civil rights, and also suspended his creditors' rights to bring action against him. After his imprisonment, a trustee might have been appointed, upon the application of plaintiff or any other creditor, to take charge of and manage his estate; but no valid judgment could be rendered after his imprisonment, without the appointment of a trustee."

The court then proceeds to discuss the New York cases, but finally reaches a further question urged in the case at bar. It is urged in the case at bar that the statute makes a conviction for felony a ground for divorce, and therefore the defendant was properly served in this case. The supreme court of Kansas in the Lawrence case thus disposes of the same question: "Again our attention is called to section 639 of the Civil Code, empowering a district court to grant a divorce where either of the parties has been convicted of a felony and imprisonment in the penitentiary therefor subsequent to the marriage. Upon this, counsel contend that the statute recognizes that process for the commencement of an action against a convict may be served after imprisonment. Granted; but this is an exception specially provided for by the statute, and therefore does not militate against the construction given by us to the statute regarding the estates of convicts. In an action for divorce, for such a cause, the conviction and imprisonment are the material facts to be proved, and there are manifest and manifold reasons, which will naturally occur to anyone upon consideration, why the service in a divorce proceeding founded upon the conviction and imprisonment of the defendant ought to be excepted from the general rule forbidding the service of process upon a defendant in prison."

⁶⁵² The doctrine of the Lawrence case (29 Kan. 158) is reiterated by the Kansas court in the case of New v. Smith, 84 Pac. 1030. We find that the Kansas court is the only one which has undertaken to express views upon statutes like our own, and the construction given such statutes appears to be reasonable.

To our mind the enactment of article 2, chapter 141, had no other purpose than that of protecting the estate of a convict. It is a step in advance of the common law. Under the common law he could be made a party defendant, but he was shorn of the power to make a real defense. Civilly dead, he could not contract as to his defense. Incarcerated, he could not defend in person. Every means of a real defense was

taken from him, and the legislature had some purpose when it passed these laws as to the preservation of his estate. To our mind, that purpose was to compel the appointment of a trustee whenever it was desired to attack his estate, either for the payment of debts or for the support and maintenance of his wife and children.

By section 8950, it is provided: "The court shall have power, from time to time, to make, and cause the trustee to execute, orders for the application of any portion of the proceeds of estates in their hands for the support and maintenance of the family of such convict, and the education of his children, and to set apart and reserve to the use of such family any property, real or personal, when it may be done, without prejudice to the rights of creditors."

As to creditors, section 8937 provides: "The trustee shall settle matters and accounts between such imprisoned convict and his creditors, and may examine witnesses touching such matters and accounts, upon oath, to be administered by him; he may, under the direction of the court, compound with any person indebted to such imprisoned convict, and thereupon discharge all demands against such convict."

⁶⁵³ Other sections provide the details of hearing and determining the claims of creditors. In fact, this article provides a complete scheme within itself for the holding, management, protection and disbursement of the estate of a convict. Its very purpose is the preservation and protection of the estate and the thwarting of the designs of creditors and others in their attack upon the estate of one helpless by his incarceration. The broad generalities of the common law have no place in a state with such statutes as we have. As said by Chief Justice Horton, the service of a summons for a divorce should be considered as an exception grafted upon our statutory law. This exception should not be permitted to extend to a case where under a petition for divorce it is sought to confiscate the estate of the convict. The proceeding for a divorce pure and simple, without alimony or sequestration of property, is one affecting the status of the parties and not the estate, and to this extent the exception could in reason go, and no trustee need be appointed. The statute does not contemplate that the trustee look after the marriage status of the parties, but the statute does contemplate that when the convict's estate is attacked, a trustee should be present in court and as a party to the proceeding.

We are cited to the case of *Gray v. Gray*, 104 Mo. App. 520, 79 S. W. 505, wherein the St. Louis court of appeals held that a convict in the penitentiary could be sued for divorce. The lower court held that the party was civilly dead and could not be sued and the plaintiff's bill was dismissed. This judgment the court of appeals reversed, but added: "Courts

should carefully protect the rights and interests of a disabled defendant in a proceeding like this, and it would not be improper to appoint some attorney to look after the case as the friend of the court if no defense is made; especially if property interests are involved."

⁶⁵⁴ What was said as to property interests was gratuitous in that case, and without any consideration of article 2, of chapter 141, of our statutes. The cases relied upon by that court were the old cases announcing the old common-law rule, which cases, in our judgment, have no application in a case where it is sought to obtain a money judgment, or sequester property in a jurisdiction having such statutes as we have in this state.

We therefore hold that on the face of the admitted facts, for the demurrer admits the facts pleaded, the judgment in the divorce suit was invalid and void in so far as it divested the present plaintiff of title to the land in dispute.

2. Another extremely delicate question is presented by this record, and that is whether or not the homestead of the head of a family can be decreed in kind to the successful plaintiff in a divorce suit. What we have concluded above obviates a discussion of this question, and we leave it to a case wherein necessity requires a ruling.

In other words, having found that the judgment attacked in this case is invalid and voidable, it is not necessary to discuss it further for the full determination of the case at bar.

3. But it is urged that if the judgment is void upon its face, then there is no necessity for a bill in equity to cancel it, and therefore the demurrer was properly sustained. How stands this proposition, remembering that the first count is one in equity to remove cloud upon title, and the other an action under section 650 to define title? As to the latter count, this insistence could not be sustained. In an action under section 650, if the judgment conveying title was void upon its face, then the court should so say, and declare that defendant acquired no title thereby, and ⁶⁵⁵ further, that the title was vested in plaintiff under the facts pleaded, if such facts are proven.

Nor are we prepared to say that the insistence of defendant is good as to the first count. On the theory that the judgment should be held void because defendant was a convict at the time it was entered, it must be borne in mind that such fact making it void does not appear upon the face of the record, but must be shown *dehors* the record. When such is the case, the judgment itself does cast a cloud, and equity will remove the same upon proper proof.

But going to the other question, i. e., as to whether or not the judgment is void upon its face because of decreeing the title to a homestead in lieu of alimony, it can be said that

the question is one of such grave doubt that even on that ground such a cloud would be cast upon the title as to justify equitable relief. This latter question as to the validity of the judgment is by no means clear, and the best legal minds might differ thereon.

The demurrer was improperly sustained, and the judgment in this case is reversed and the cause remanded to be proceeded with in accordance with the views herein expressed.

All concur.

The Doctrine of Civil Death and the Extent to Which it is recognized in America is the subject of a note to *Avery v. Everett*, 6 Am. St. Rep. 379. Subsequent cases on this question are *Gray v. Stewart*, 70 Kan. 429, 109 Am. St. Rep. 461; *Estate of Donnelly*, 125 Cal. 417, 73 Am. St. Rep. 62; *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99; *Davis v. Laning*, 85 Tex. 39, 34 Am. St. Rep. 784.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

**ARCHER v. CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.**

[41 Mont. 56, 108 Pac. 571.]

PAROL LICENSE—Right to Revoke After Improvements Made.—A parol license, not coupled with an interest nor based on any consideration, to construct a dam and irrigating ditch is revocable at the pleasure of the licensor, although the licensee has made the improvements and expended money in so doing. (pp. 697, 698.)

PAROL LICENSE—What Constitutes Revocation.—An appropriation of lands to a use inconsistent with the enjoyment thereon of a parol license works a revocation of it. (p. 698.)

PAROL LICENSE.—Notice of the Revocation of a parol license is unnecessary where the licensee has no removable property on the premises. (p. 698.)

PAROL LICENSE—Revocation by Grant for Railroad Right of Way.—A parol license to construct a dam and irrigation ditch is revoked by the licensor granting a right of way to a railroad company for a grade embankment, the natural consequence of which will be to injure the dam and ditch at seasons of high water. Any resulting injuries to the dam and ditch from the construction of the railroad embankment are *damnum absque injuria*. (p. 700.)

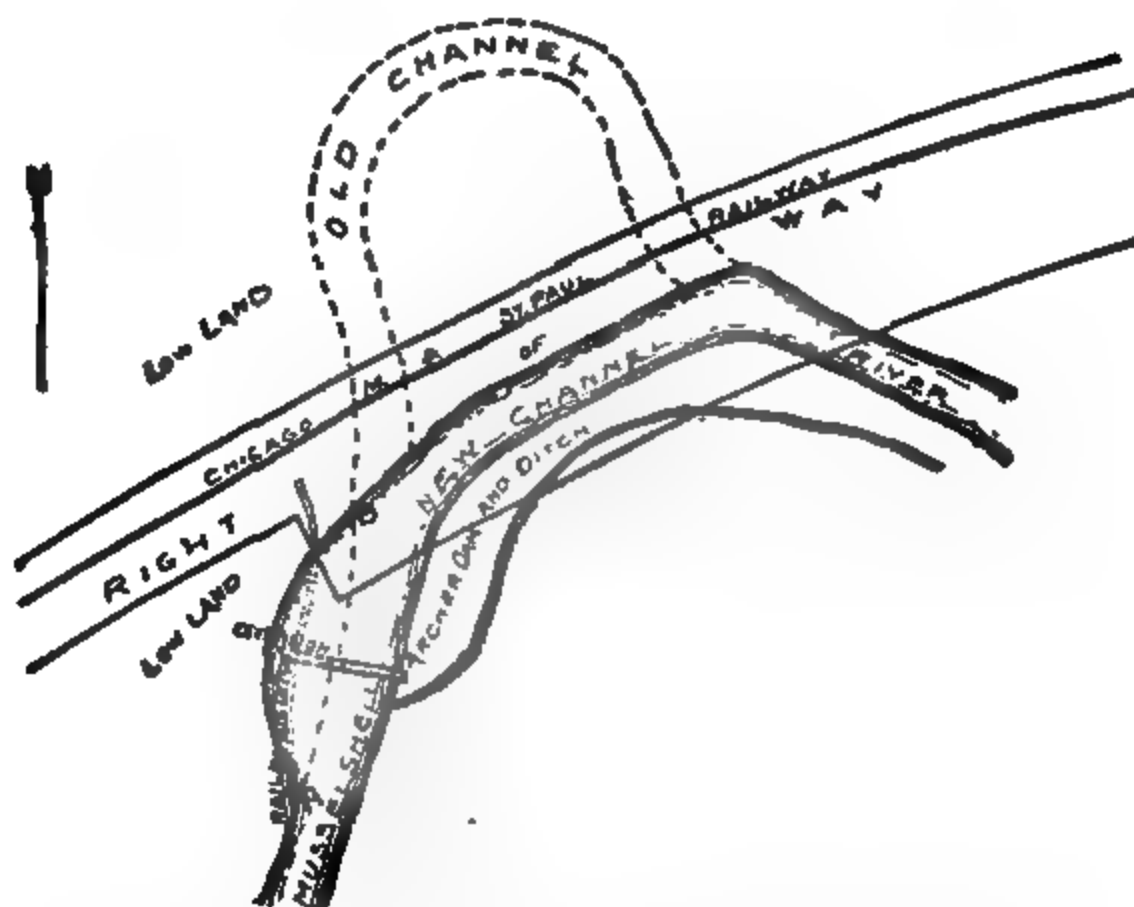
APPEAL—Evidence not Warranted by Pleading.—If evidence touching a right not pleaded is admitted without objection, it will be given the same consideration on appeal as though fully warranted by the pleadings. (p. 700.)

Wm. Wallace, Jr., and W. M. Johnston, for the appellants.

Gunn & Rasch, for the respondent.

⁶² **HOLLOWAY, J.** The map herewith presented will serve to illustrate the facts appearing on this appeal.

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In 1899 Kreichbaum, Cartwright, Gile, and Bethke constructed the dam across the Musselshell river at the point shown on the map, and likewise constructed a ditch tapping the east bank of the river immediately above the dam, for the purpose of conveying water for irrigating their lands lying farther down the river. Kreichbaum succeeded to the interest of Gile, Davis to the interest of Bethke, and Davis, Archer, and Cooley, each also acquired certain interests from Kreichbaum. From 1899 to the present time the dam and ditch have been used continuously by the plaintiffs during every irrigation season, except as hereinafter mentioned. For convenience the dam and ditch are marked on the map "Archer Dam and Ditch." The dam, the head of the ditch, the point where the line of railway crosses the original channel, at the initial letter "M," and all the territory at and to the left of these points and below the ⁶³ north line of the right of way, is on the southeast quarter of section 27, township 9 north, range 28 east, part in Fergus county and part in Yellowstone county. At the time the dam and ditch were constructed that land was, and continuously since has been, owned and possessed by George Bachman, except such of it as was conveyed to the defendant railway company. In 1906, when the Chicago, Milwaukee and St. Paul Railway Company came to construct its line of road through this state, it purchased by deed from Bachman a strip of land for right of way purposes, one hundred feet in width, and, at the point illustrated by the map, an additional strip two hundred feet

wide, for the purpose of changing the channel of the Mussel-shell river. The deed from Bachman and wife to the railway company, in addition to conveying these strips of land, particularly authorizes the company to change the channel of the river at this point, and releases it from any and all claims for damages on account of such change. The deed requires the company to make some practical arrangement for taking water for irrigation purposes across the right of way, requires the company to make one grade crossing, and, if it could be done in a practical manner, to make an underground passageway for stock at a slough. The location of this slough is not fixed either in the deed or by the evidence. Upon one of the maps used upon the trial the location of a slough is indicated some distance west of the points mentioned above, and doubtless this is the slough to which reference is made in the deed. After making certain provisions for the use of snow fences by the railway company, the deed continues: "And said parties of the first part [Bachman and wife], for themselves and for their heirs and assigns, covenant and agree that said grant is upon no other consideration than that named herein; that neither said party of the second part [railway company] nor its agents have made any agreement, promise, or condition, verbal or written, for or relating to any crossing, passageway, or other privilege over, across or under said railway; and that the right thereto shall be only that conferred by statute or by an instrument in writing under the corporate seal of the party of the second part. And said party of the first part hereby releases all damages and claims thereto to all its other lands by reason of the location, construction and operation of a railway over and upon said premises, hereby conveyed." Having secured this conveyance, the railway company excavated a new channel for the Mussel-shell river, as indicated on the map, and then constructed a solid grade embankment, about seven feet high, across the old channel at the point "M," and across the low land immediately adjacent thereto. The company also constructed an irrigation ditch, marked on the map "Railroad Ditch," tapping the west bank of the river some distance above plaintiffs' dam, and thence running in a northerly direction, substantially parallel with, and but a short distance from, the west bank of the river, to the railway grade and passing through grade by means of a box flume. Prior to June, 1908, the location of the west bank of the river is represented on the map by the dotted line between points "A" and "B." Parallel with, and a short distance from, the west bank of the river as it was before the channel was changed, was a considerable area of land lower than the bank of the river itself, indicated on the map as "Low Land." During the period of high water, which occurred every spring, the water which

overflowed the west bank of the river would flow over this low land and return to the main channel some distance below. After the railway company constructed its grade across the low land and across the old channel, the water was confined between this solid embankment and the bluff on the east and south sides of the new channel. During the high-water season in the early part of June, 1908, the west bank of the river at the dam and above and below it for some distance was overflowed, the embankment between the west bank and the railroad ditch completely cut out down to the level of the river-bed, the west bank of the river given the new position indicated on the map, and the plaintiffs' dam left as an obstruction to little more than one-half of this new channel, and wholly useless as a means of raising the water in the river so that it would flow through ⁶⁵ the Archer ditch. In order to repair the damage, it was necessary for plaintiffs to extend the dam westward to the new bank a distance of about ninety feet (the new portion of the dam is indicated on the map as the "Extension"), and this was done at a necessary expense of seventeen hundred and twenty-seven dollars and twenty-three cents. Plaintiffs thereupon brought this action against the railway company to recover that amount. There is also a second cause of action set forth in the complaint for damages caused to the Archer ditch some distance below the dam; but from the fact that the amount of the verdict is exactly the amount claimed in the first cause of action, it seems reasonably certain that the jury disregarded the second cause of action altogether. The briefs of counsel deal with the first cause of action; and hereafter, in speaking of the pleadings, it will be understood that reference is made to the issues arising upon the first cause of action only.

The wrongful acts of the railway company which are said to have caused the injury to plaintiffs' dam are (a) constructing the solid grade embankment over and across the old channel and the low land, thereby preventing the flood waters from spreading over the low lands as they had theretofore done; and (b) constructing the railroad ditch so close to the west bank of the river, and failing to place in the ditch, at the point where it taps the river, a headgate to control the amount of water diverted by the ditch. It is said that because of these alleged wrongful acts the west bank of the river was washed away from the west end of the dam, resulting in the injury to plaintiffs, for which compensation is demanded. The cause, being at issue, was tried to the court sitting with a jury. At the conclusion of the evidence, counsel for defendant railway company moved the court for a directed verdict for defendant, upon the ground that the dam and head of the Archer ditch were shown to have been constructed and maintained by the plaintiffs upon the land of

Bachman under a mere parol license, which had been revoked by the deed from Bachman and wife to the railway company. This motion was denied, the cause submitted to the jury, and a verdict returned in favor of the ⁶⁶ plaintiffs for the amount claimed in the first cause of action. The defendant moved for a new trial, and this motion was granted in an order in which the court gives the reason for its ruling. The reason is the same as that specified as the ground of defendant's motion for a directed verdict. From the order granting a new trial the plaintiffs appealed. Two questions are presented for solution: (1) Did the right of plaintiffs to the use of Bachman's land for their dam and the head of their ditch rest merely in parol license, revocable at the will of Bachman? And (2) If the right amounted only to such license, was it revoked by the deed from Bachman and wife to the railway company?

1. When the Archer dam and ditch were constructed on Bachman's land, there was not any agreement made between the parties. Bachman's consent was not asked; but he knew of plaintiffs' operations, made no objections, and gave them permission to take from his adjacent land brush, rock and earth for the construction of the dam. Under these circumstances, it is urged by appellants that Bachman lost his right to maintain against the plaintiffs either trespass or ejectment, and that his only right, if any, was a right to maintain an action for damages. If the only claim which Bachman could assert against the plaintiffs was one for damages, then we agree with counsel for plaintiffs that such right was personal to Bachman, and did not pass to his grantee, the railway company, by virtue of the deed. But the extent of Bachman's right depends upon the character of plaintiffs' interest at the dam and head of the ditch. It cannot be questioned that at its inception the right of plaintiffs was merely a license resting in parol, a license not coupled with an interest, and for which there was not any consideration whatever paid. There are two classes of cases sustaining appellants' contention. The first proceeds upon the theory that when the licensee expends large sums of money in making the improvement, and such expenditure is made without opposition by the licensor, the license becomes executed and irrevocable; that, in fact, what was in its inception a license ⁶⁷ becomes in reality a grant. Typical of this class of cases is *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497, decided in 1826. The other class proceeds upon the theory of estoppel in pais; that, by standing by without making objection and permitting the improvement to be made and large sums of money to be expended, the land owner is estopped to maintain ejectment or to have an injunction. A leading case of this character is *Goodin v. Cincinnati & White Water C. Co.*, 18 Ohio St.

169, 98 Am. Dec. 95, decided in 1868. By the second class it is held that the land owner's only remedy is an action for damages for the injury to his property. The doctrine of the Pennsylvania court has been adopted in some other states. In *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. Rep. 756, 39 L. ed. 873, decided in 1895, the doctrine announced by the second class of cases is asserted, though the decision of the Ohio court is not mentioned. The Roberts case has been followed in *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. Rep. 592, 46 L. ed. 820, and in *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. Rep. 349, 47 L. ed. 539, and by some state and other courts. That the doctrine of each of these classes of cases was well recognized long prior to 1898 is sufficiently evidenced by the many decisions upon the subject extant at that time. In *Great Falls Waterworks Co. v. Great Northern Ry. Co.*, 21 Mont. 487, 54 Pac. 963, decided in 1898, the same contentions were made that are now urged upon our attention. Particular emphasis is laid by appellants upon the fact that, while the Roberts case above was decided more than three years prior to the Great Falls case, it was not called to the attention of this court, and we are now asked to reconsider the questions decided. But, while it is true that the case of *Roberts v. Railroad Co.* was not considered by this court, the principle of that case received very thorough attention, and the Pennsylvania and Ohio cases above, and many others supporting the doctrine announced in each of them, were relied upon by the waterworks company, and considered by this court. It was then recognized that the authorities are in conflict upon the subject,⁶⁸ but after a painstaking review, this court announced its conclusion as follows: "Now, the sequence of the rule that an easement can only be created by deed is that a license which merely renders lawful an entry which otherwise would be unlawful cannot, except by prescription—which is equivalent to a deed—become an absolute right in property without practically doing away with the statute of frauds, and completely overturning the common-law rule, as pointed out by Baron Alderson in *Wood v. Leadbitter*, 13 Mees. & W. 838, 16 Eng. Rul. Cas. 49: Browne's Statute of Frauds, sec. 29. An extended examination of cases bearing upon the doctrine of the revocability of parol licenses has impressed upon us the belief that the sound, the logical, as well as the safe, reasoning, sustains the rule that a parol license of the character of the one under consideration is always revocable at the pleasure of the licensor, so far as any further enjoyment of the privilege extended goes: Freeman's note to *Lawrence v. Springer*, 31 Am. St. Rep. 715. Modern text-writers, deducing principles from the more recent opinions of the courts, have taken this view of the subject; and to give that security to titles so es-

entially important in affording protection against flaws, and burdens not imposed by writing, but resting upon verbal permissions or agreements, it is well settled that the doctrine of estoppel is inapplicable, 'inasmuch as the licensee is bound to know that his license was revocable, and that in incurring expense he acted at his own risk and peril.' " The principle of the Great Falls case (21 Mont. 487, 54 Pac. 963) was again asserted by this court in *Prentice v. McKay*, 38 Mont. 114, 98 Pac. 1081; and now, after further consideration, we are thoroughly convinced of the correctness of this court's decision in each of the two cases cited above.

As a further ground of argument in favor of invoking against Bachman the doctrine of estoppel in pais, it is urged by appellants that, under the constitution and laws of this state, they could have acquired their dam site and the right of way for their ditch by condemnation proceedings; but that question was likewise considered in the Great Falls case. We are unable to ⁶⁹ see wherein the fact adds anything to the character of plaintiff's right. They were upon Bachman's land under a mere parol license or they owned a servitude upon his land. As was observed in the beginning, at its initiation plaintiffs' right rested merely in a parol license, and under the authority of this court, in the cases cited above, that right was not augmented by anything done by the parties thereafter, so far as this record discloses. The authorities supporting the decision in the Great Falls case are collected at length in 25 Cyc. 648.

2. Having reached the conclusion that the right of plaintiffs upon Bachman's land rested in a mere parol license, revocable at the will of the licensor, we are brought to a consideration of the second question, *viz.*: Was that license revoked by Bachman? "A license may be revoked by obstructing the land licensed to be used, but an appropriation of the land to any use inconsistent with the enjoyment of the license works a revocation": 25 Cyc. 651; *Prentice v. McKay*, 38 Mont. 114, 98 Pac. 1081. And again: "Where the licensee has movable property on the premises, he should be given reasonable notice of a revocation of the license and an opportunity to remove it. But where the termination of the license necessitates no removal of property, no notice is necessary": 25 Cyc. 652. These plaintiffs did not have any removable property upon Bachman's land, and notice of revocation was therefore not necessary. Under the grant in the deed from Bachman and wife to the railway company, the company was authorized (a) to change the channel of Musselshell river; (b) to construct its grade embankment along the right of way over the old river channel and across the low land adjacent; and (c) to construct the railroad ditch. There was not any limitation imposed as to the manner of the use of

the lands granted, except that the railway company was to provide some practical method for conveying water for irrigation purposes across its right of way, and, in the absence of any evidence to the contrary, we must assume that the railroad ditch with its box flume met that requirement to the satisfaction of Bachman, for whose benefit it was imposed. The right ⁷⁰ of the company to construct the ditch in the manner in which it was constructed cannot be questioned. It was excavated upon Bachman's land, with Bachman's consent, and of itself the ditch did not interfere in any manner with whatever right the plaintiffs had. Furthermore, the provision of the deed for the construction of this ditch leaves it discretionary with the railway company to construct it in any manner, at least in any manner satisfactory to Bachman, and, so far as this record goes, the ditch as constructed appears to have met Bachman's approval. The deed also required the company to make a grade crossing; but that would not affect this case in any particular, and the evidence does not disclose whether it was or was not made. There is also the requirement that the company should construct an underground passageway for livestock at the slough, if it could be done in a practical manner, but we are not informed by this record whether that requirement was or was not fulfilled; in fact, the location of the slough is not identified. Neither is there anything to indicate that, if such passageway was not constructed, it was practical to provide for it.

It is plain from this record that plaintiffs' injury arose as the natural consequence of the building and maintenance of the solid grade embankment across the old channel at the initial letter "M" and over the low land immediately adjacent thereto. Such building and maintenance of the grade is not at all inconsistent with the grant contained in the deed, and in thus building the railway company was apparently proceeding in a manner best calculated to secure the safety of the traffic which would be moved over the road, as it was its duty to do: *State v. District Court*, 34 Mont. 535, 115 Am. St. Rep. 540, 88 Pac. 44. Furthermore, the deed does provide: "That neither said party of the second part [railway company] nor its agents have made any agreement, promise, or condition, verbal or written, for or relating to any crossing, passageway, or other privilege over, across, or under said railway; and that the right thereto shall be only that conferred by statute, or by an instrument in writing under the ⁷¹ corporate seal of the party of the second part." This is in effect a direct grant to the railway company to construct a solid grade embankment, except for the box flume and the underground passageway for livestock; and we must therefore assume that the railway company carried into execution the plan in contemplation by both parties to the deed at the

time of its execution. Now, if the construction and maintenance of the railroad grade as it was built and maintained in the ordinary course of events so far interfered with the right of plaintiffs to maintain their dam and the head of their ditch as that damage would naturally result therefrom, then it must follow that, since the parties to the deed contemplated the use of the right of way as it was actually used, both Bachman and the railway company intended that any further use by the plaintiffs of their dam and ditch would be wholly at their own risk. Any injury which might result would be comprehended by the terms "damnum absque injuria." That the injury to plaintiffs was the natural result of the use to which the railway company put the right of way is demonstrated by this record. It is perfectly apparent that a like injury every year during the high-water period can only be effectually avoided by substituting trestlework for the solid embankment across the old channel and the low land; and there is not anything in the record to justify a court in imposing that burden upon the company, particularly in view of the grant contained in the deed, even assuming that the trestlework would be equally safe and as well adapted to the company's use.

There is a suggestion in appellants' brief that, in order to raise the question of the character of plaintiff's right, the defendant should have pleaded it; but it is a sufficient answer here to say that the evidence touching such right was admitted without objection, and will be given the same consideration on appeal as though it was fully warranted by the pleadings: *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994; *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724.

⁷² The trial court held "that the plaintiffs were mere licensees in the construction of the ditch and dam in question; that their license was revocable; that the conveyance from Bachman to the defendant was a revocation of such license; that, therefore, defendant cannot be held for damages in this action; and that its motion for a directed verdict on the above grounds should have been granted." We agree with this view so far as it relates to the first cause of action, and, since that cause of action is now finally disposed of, judgment in favor of the defendant thereon shall be entered.

The order granting a new trial is affirmed.

Mr. Chief Justice Brantly and Mr. Justice Smith concur.

A Parol License to Enter upon Land is generally revocable at the pleasure of the licensor: *Hodson v. Kennett*, 73 N. H. 225, 111 Am. St. Rep. 607; *Miser v. O'Shea*, 37 Or. 321, 82 Am. St. Rep. 751. As to whether or not this rule is applicable where the licensee has expended money or labor in the execution of the license, the authorities

are conflicting: See the note to *Lawrence v. Springer*, 31 Am. St. Rep. 715-719; *Entwhistle v. Henke*, 211 Ill. 273, 103 Am. St. Rep. 196; *Huber v. Stark*, 124 Wis. 359, 109 Am. St. Rep. 937; *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301; *Howes v. Barmon*, 11 Idaho, 64, 114 Am. St. Rep. 255. According to *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301, a parol license to construct an irrigating ditch, when executed by the construction of the ditch, becomes in all essentials an easement for such length of time as the use itself may continue, and according to *Munsch v. Stelter*, 109 Minn. 403, 134 Am. St. Rep. 785, when, pursuant to a verbal contract, the owners co-operate in the construction of a ditch for the purpose of draining their lands, the equitable doctrine of estoppel will prevent one of them from damming up the ditch to the detriment of the others.

McINTYRE v. MACGINNISS.

[41 Mont. 87, 108 Pac. 353.]

NEW TRIAL—Premature Notice of Intention to Move.—Notice of an intention to move for a new trial cannot be served before notice of the entry of judgment. (p. 703.)

NEW TRIAL—Waiver of Notice of Entry of Judgment.—Although formal notice of the entry of judgment may be waived by the party moving for a new trial by instituting proceedings in support of his motion without it, such waiver is not properly imputable to one who inadvertently institutes his proceedings before the time at which he may do so. (p. 703.)

NEW TRIAL—Service of Notice on Adverse Party.—Where both the notice of the intention to move for a new trial and the notice of appeal are served upon the only party who appears from the record to have any interest in opposing the purpose sought by the motion and appeal, the service is not open to the objection that all the adverse parties have not been served. (pp. 703, 704.)

MECHANIC'S LIEN—Mining Claim.—The Limitations Prescribed in section 7293 of the Revised Codes do not apply to mining claims, but a lien upon such property extends to the whole claim, because it cannot be divided and the improvements or structures put upon it often cannot be removed. (p. 706.)

MECHANIC'S LIEN—Description of Mining Claim.—A notice of a mechanic's lien upon a group of several mining claims is not insufficient because it does not specifically mention one lode claim which falls within the boundaries of a described placer claim. (pp. 706, 707.)

MECHANIC'S LIEN—Group of Mining Claims.—Notice of mechanics' liens for work done in the exploitation of a group of contiguous mining claims may be prepared upon the theory that the group constitutes a single consolidated claim. (p. 707.)

MECHANIC'S LIEN—Work Done in Exploiting Mining Claims. Mechanics' liens may properly be filed for labor performed in making repairs and alterations, building roads, cutting wood for fuel, keeping machinery in order, and clearing away debris, in the exploitation and sampling of mining claims. (p. 707.)

MECHANIC'S LIEN—Notice and Account—Items and Classification.—One who files a mechanic's lien on mining claims is not required to classify the character of the work done or set out the items

of it in the account filed with the notice. All that is required is a just and true account, an honest statement, from which may be understood what amount is claimed. (p. 708.)

MECHANIC'S LIEN—Group of Mining Claims.—One Entitled to a lien on the whole of a group of seven contiguous mining claims does not lose his right altogether by asserting a lien on only three of the claims. (p. 708.)

MECHANIC'S LIEN.—Where Work is Done on Mining Claims at the instance of two lessees who in part pay for it, they are personally liable for the unpaid amount, whether or not they are technically partners. (p. 708.)

John F. Davies, for the appellant.

M. P. Gilchrist and W. D. Kyle, for the respondent.

⁸⁰ BRANTLY, C. J. This action was brought by plaintiff to recover of defendants Montana Gold Mountain Mining Company (hereafter referred to as the company), John MacGinniss, B. T. Spaulding and James Breen for services performed by him as a laborer, at their instance and request, between August 1, 1907, and November ⁹¹ 1, 1907, and to establish a lien for the amount alleged to be due upon three mining claims, with a mill thereon, situate in Silver Bow county, upon which the labor was performed, and of which the said defendants are alleged to be the owners. Plaintiff also sued as assignee of sixteen other claimants for similar services rendered to the same defendants at various times between August 1, 1907, and December 5, 1907, setting forth these claims in separate counts. The amended complaint, after alleging facts sufficient to support a judgment for the different amounts alleged to be due as upon account, alleges the filing of notices of claim of lien by plaintiff and each of his assignors in conformity with the requirements of the statute. The Silver Bow National Bank (hereafter referred to as the bank) was made a defendant because it asserts an interest in the property upon which plaintiff claims liens. Several other persons from whom the company acquired its interest in the property were also made parties defendant; but at the close of the hearing the action was dismissed as to them. Breen appeared by filing a demurrer to the complaint, but no disposition was ever made of it, and, as to him, the action is still pending in the district court. Spaulding suffered entry of default for failure to appear. The answer of MacGinniss and the company denies generally all the material allegations of the complaint. In addition to the same general denials, the bank alleges that on October 15, 1907, it became the owner of the mill by purchase from Spaulding, together with all the tools, machinery and appliances therein, and is now the owner thereof. This allegation the plaintiff puts in issue by reply. The court found for plaintiff, as

against defendants MacGinniss and Spaulding, for the full amount claimed in each count of the complaint, except one. As to this no evidence was offered. It rendered and caused to be entered a personal judgment against them, and declared the plaintiff entitled to liens upon the property for the several amounts due, and to have sale of it to satisfy his judgment, as follows: First, an undivided interest in the mining claims and in the mill and other improvements thereon, belonging to MacGinniss; ⁹² and, second, in case the proceeds are not sufficient to satisfy the judgment, of the entire mill. Plaintiff was also awarded counsel fees, to be paid out of the proceeds of the sale. The defendant MacGinniss has appealed from the judgment and an order denying his motion for a new trial.

1. When the record was filed in this court, counsel for plaintiff submitted a motion to affirm the order denying the motion for a new trial, on the ground that the notice of intention had not been served upon all the adverse parties, and because it had not been served in time. They also submitted a motion to dismiss the appeal from the judgment, on the ground that the notice of appeal had not been served upon all the adverse parties. Disposition of these motions was deferred until hearing upon the merits, because a determination of them required an examination of the entire record. Now that we have made this examination, aided by the argument and admissions of counsel, we have concluded that the motion should be denied.

Proceedings on the motion for a new trial were first instituted by MacGinniss by serving his notice of intention after the decision was made, but before entry of judgment. These proceedings were premature. Under the statute, a party intending to move for a new trial may do so by serving his notice within ten days after the notice of entry of judgment, but not before: Rev. Codes, sec. 6796. When the bill of exceptions first prepared in the case was submitted to the trial judge for settlement, it was found by counsel for MacGinniss that the notice of intention had been served prior to the entry of judgment. Thereupon, having then for the first time knowledge of the entry of judgment, counsel abandoned the proceedings as nugatory, and served and filed a new notice. The proceedings on the motion based upon the second notice were timely; for, though formal notice of the entry of judgment may be waived by the moving party by instituting his proceedings in support of his motion without it, such waiver is not properly imputable to one who inadvertently institutes his proceedings before the time at which he may do so. Both the notice of intention and the ⁹³ notice of appeal were served upon Spaulding, the only party who appears upon the record to have any interest in opposing the purpose sought to be accomplished by

the motion for a new trial and the appeal, viz., the vacation of the judgment. The fact of service does not appear of record; but counsel for defendant MacGinniss, during the oral argument on the motions in this court, having repeated a statement made in his brief, to the effect that the service had in fact been made of both notices, this statement was accepted by counsel for plaintiff as true. This dispensed with the necessity of an amendment to the record showing the fact, which counsel for defendant stated they were ready to make.

2. On the merits, the first contention is that the court erred in admitting in evidence the notices of lien, for the reason that they do not describe the property upon which the work was done, nor properly indicate the character of the work. It is argued that there are three classes of liens claimed, to wit: Certain ones for work done exclusively in the mine; others for work done exclusively in the construction and operation of the mill; and still others for work done both in the mine and in the mill; and that, since the notices do not segregate the items for work done upon the different parts of the property and specifically describe such parts, they furnish no basis to support a claim of lien, either upon any specific part of the property or upon the whole of it as a unit. It is also said that the statute does not grant a lien for repair work, or for the cutting of cordwood, and that certain of the claims for work done in this behalf are made without authority of law. These contentions will be better understood if a brief statement be made of the circumstances under which the lienors were employed and the situation and character of the property upon which the work was done.

The company and MacGinniss were in 1906 owners as tenants in common of a contiguous group of mining claims, seven in all. Defendant Spaulding, having in the latter part of that year obtained an option from the stockholders of the company to purchase all of its capital stock held by them if the claims should, ⁹⁴ after thorough examination and test by sampling, prove of sufficient value to justify the purchase, the option contract authorizing him to take possession of the property for that purpose, and to build a sampling mill if necessary, assigned to MacGinniss and Breen certain shares of his option. Thereupon the three, Spaulding and MacGinniss acting for Breen, took possession, and in August, 1907, began the erection of a sampling mill near the portal of a tunnel which had theretofore been driven into the mountain upon a claim designated as the "Clara Jurgens." Previous to taking possession, MacGinniss and Spaulding entered into a contract with the stockholders of the company to redeliver the property to them in case they failed to take up the option, free from liabilities or encumbrances of any kind or character. The tunnel mentioned extends into the mountain about eight

hundred feet, passing entirely through the Clara Jurgens claim and into the "Mabel Beal," a contiguous claim on the north. Immediately to the south is another claim in the group, designated "Placer Lot No. 42." Covering a part of the placer, and overlapping a portion of the Clara Jurgens on the south, is still another claim, designated as the "Central Lode." The mill is situated within the boundaries of this claim, and upon the boundary line between Placer No. 42 and the Clara Jurgens claim. Some of the men employed by Spaulding and MacGinniss worked exclusively in the construction of the mill and in operating it. Others worked exclusively in making repairs to the tunnel and in the pursuit of mining operations conducted in the Clara Jurgens claim. The repair work in the tunnel extended to its full length, and was therefore done in part within the boundaries of the Mabel Beal claim. Some of the men were employed in building a roadway, so that teams could reach the mill. Others were hired to cut cordwood for use as fuel in the boiler-house connected with the mill. Still others were engaged exclusively in construction work upon additions made to the mill building, and alterations and repairs made in the machinery. Some did a small amount of work in gathering samples of ore from claims not mentioned in the ⁹⁵ notices. None of them were employed under special contract, but all worked for wages at an agreed rate per day.

The contention is that, the plaintiff and his assignors having failed to specify in the accounts attached to their respective notices exactly the amount due them for each kind of work done by them, whether it was construction work or upon repairs, or in mining or road building, and to limit the claim of lien to the specific portion of the property upon which the work was done, the notices are insufficient, and should therefore have been excluded from the evidence. The statute declares: "Sec. 7290. [Revised Codes.] Every mechanic, miner, machinist, architect, foreman, engineer, builder, lumberman, artisan, workman, laborer, and any other person performing any work and labor upon, or furnishing any material, machinery or fixture for any building, structure, bridge, flume, canal, ditch, aqueduct, mining claim, quartz lode, tunnel, city or town lot, farm, ranch, fence, railroad, telegraph, telephone, electric light, gas or waterworks or plant, or any improvements, upon complying with the provisions of this chapter, for his work or labor done, or material, machinery or fixtures furnished, has a lien upon the property upon which the work or labor is done, or material furnished." It is apparent from even a casual reading of this provision that the legislature intended to provide for a lien in favor of any person who bestows labor upon any character of property as such, or by

whom material is furnished for the improvement of the property. That this is so is clear from the declaration at the close of the section that such person "has a lien upon the property upon which the work or labor is done, or material furnished." Under other provisions, the extent to which property, other than mines, is affected by the lien, is defined and limited. If the structure and land upon which it is situated both belong to the same person, the lien extends to the lot or lots occupied by the structure, if within a city or town, or to one acre of land if it is outside a city or town. If the interest of the person owning the structure is less than the fee, the lien affects his interest only: Rev. Codes, sec. 7293. In the latter case the structure may be sold and removed within twenty days after sale: Rev. Codes, sec. 7294. It was pointed out in *Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72, however, that the limitations prescribed in section 7293, *supra*, do not apply to mining claims, but that a lien upon such property extends to the whole claim; and this must be so, because such claims cannot be divided, and the improvements or structures put upon them often cannot be removed. They generally consist of shafts, tunnels and similar excavations. The rule stated in *Smith v. Sherman Min. Co.* was held to be the rule under the statute of 1868 (Laws 1872, p. 509, sec. 1) in *Alvord v. Hendrie*, 2 Mont. 115. This statute has been amended in various other particulars, but the section referred to has been brought forward into the different compilations of our laws substantially as it then stood. In *Alvord v. Hendrie*, 2 Mont. 115, it was held that, where one had expended work partly on a quartz claim and partly upon a mill erected thereon, he could claim and enforce a lien upon both the claim as an entirety and the mill. The decision in *Smith v. Sherman Min. Co.* proceeded upon the theory that, since the limitations declared in section 7293 cannot properly apply to this character of property, they were not intended to change the rule as declared in *Alvord v. Hendrie*, though they had been added to the statute by way of amendment since the decision in this case.

The rule declared in these cases was evidently had in mind by the person who prepared the notices involved in this case. The plaintiff and each of his assignors claimed a lien upon the mill and the claims upon which it is situated; that is, upon the Clara Jurgens, Placer Lot No. 42, and the Central Lode. One of the notices does not mention specifically the Central Lode, but, as already stated, this claim falls entirely within the boundaries of Placer Lot No. 42, and in our opinion the description of the latter is sufficient to indicate the area within which the work was done, though this claim is not specifically mentioned. Evidently, also, there was had in mind at the time the notices were prepared the idea that, since

the work was done for the ⁹⁷ exploitation of a group of contiguous claims, it was proper to treat them as constituting a single consolidated claim. This theory, we think, is correct. It is frequently the case that a group of contiguous claims is treated as a single one, and work is done upon one for the benefit of all. If such work is reasonably adapted to the development of all the claims and tends in any measure to accomplish this object, it is considered as annual representation work for all of the claims (*Copper Mt. Min. Co. v. Butte & Corbin C. & S. Min. Co.*, 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540), and all of them may be patented as a single claim. If this theory is legitimate for the purpose of developing and patenting mining claims, we see no good reason why lien claimants may not proceed upon the same theory in making their claims. There is nothing in the statute, *supra*, prohibiting it, and it is entirely consonant with the correct notion of what constitutes a mining claim.

Here the purpose had in view by Spaulding, Breen and MacGinniss was the exploitation and sampling of the entire group of claims. All the work done, including the erection of the mill, was with that end in view. The mill was apparently intended to be a permanent structure, and to become a part of the unit property, made up of the entire group. The workmen were all employed upon the enterprise, whether in construction work as such, or in repairs and alterations, or in mining work, or in building roads, or in cutting cordwood. The entire group constitutes a consolidated claim, and the work of the whole enterprise was expended upon it. The statute does not mention repairs and alterations; yet it takes labor to accomplish them. Touching the labor expended in building roads and preparing fuel belonging to the owner for use in producing power to carry on his enterprise, it may be said it is as much labor done on the claim as is that expended in the use of a pick or hammer and drill in the workings of the mine above or below ground. The same may be said of operatives in the mill whose duty requires them to keep the machinery in order and to clear away debris which accumulates from time ⁹⁸ to time in and about the buildings erected to house the machinery. It is true that it was held by this court, in *McGlauffin v. Wormser*, 28 Mont. 177, 72 Pac. 428, that one must look to the statute for the right to claim a lien for labor done or materials furnished, and that no such right exists unless specific provision is made for it. It was also held in *Holter Hardware Co. v. Ontario Min. Co.*, 24 Mont. 198, 81 Am. St. Rep. 421, 61 Pac. 8, 20 Morr. Min. Rep. 518, that one furnishing fuel or lubricating oil to a mining company has no lien for the price of it, because lubricating oil and fuel are consumed in the use, and do not become a part of the property of the owner. Neither of these cases

furnishes, even by implication, support for the conclusion that one employed by a mine owner to do work upon his property in connection with his enterprise, without which it cannot proceed, has not a lien upon the property to secure the price of his work. The statute does not require the character of the work done to be classified or even the items of it to be set out in the account filed with the notice. All that is required is a just and true account—an honest statement—from which may be understood what amount is claimed: Rev. Codes, sec. 7291; *Black v. Appolonio*, 1 Mont. 342; *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; *Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72.

It is argued in this connection that, since the evidence shows that a portion of the work done by some of the men was done upon the Mabel Beal claim and others in the group not included among those described in the notices, and the value of this portion of the work cannot be definitely ascertained, all lien claims affected by this condition should have been excluded. This argument is fully answered by the statement that the plaintiff and each of his assignors was entitled to a lien upon the entire group, including the seven claims, and that the defendant cannot complain that they claimed less than they were entitled to and asserted their right as to only three claims of the group. If they had a right of lien upon the whole group, they had the same right as to each claim constituting the group. The work done, whether upon one or the other of ⁹⁹ the claims, affected each claim. Therefore it seems unreasonable to say that, because they failed to assert as extensive a right as they really had, they lost their right altogether.

3. The foregoing discussion disposes of the contention that the court erred in rendering judgment for plaintiff. The evidence fully establishes the fact that the work was done at the instance of Spaulding and MacGinniss, and that they are personally liable for the amounts claimed to be due. Whether they were technically partners or not, the work was done at their instance and in part paid for by them. Neither the company nor the bank had any connection with the employment of any of the men.

From the facts detailed in the statement heretofore made, it is apparent that some of the lien claimants were engaged in construction work upon the mill exclusively. Those so engaged might have proceeded upon the theory that Spaulding and MacGinniss were lessees, and claimed their liens against the mill only and enforced them by sale of it under the provisions of section 7294, *supra*. It might plausibly be argued that, since they did not pursue this course, but elected to treat the mill as a part of the realty, neither they nor the rest of the claimants who had no such right, because they did other

kinds of work, ought to have ordered a sale of the mill as a whole as the judgment directs. The company, which is the owner of the other interest in the property, is the only person who could complain of this feature of the judgment. Since this is so, and since it did not appeal, we must presume that it is satisfied with the result. The judgment is clearly correct in ordering the sale of the MacGinniss interest in the realty, including his interest in the mill.

The judgment and order are affirmed.

Mr. Justice Holloway concurs.

SMITH, J. I am unable to concur in that portion of the foregoing opinion which deals with labor performed upon the Mabel Beal claim.

The Right to a Mechanic's Lien is purely statutory, and a claimant must, to be entitled to a lien, in the first instance bring himself clearly within the terms of the statute, but when his right is established, the law will be interpreted liberally toward accomplishing the purposes of its enactment: *Potter Mfg. Co. v. A. B. Meyer & Co.*, 171 Ind. 513, 131 Am. St. Rep. 267.

Under a Statute Giving a Mechanic's Lien to Every Person who shall do work or furnish materials for the working or development of any mine, or in searching for metals, the lien is given to every person who shall do work or furnish materials, either in mining or prospecting, and applies as well to claims in which minerals have not, as well as those in which minerals have, been found: *Williams v. Toledo Coal Co.*, 25 Or. 426, 42 Am. St. Rep. 799. When labor or material is expended in developing an oil claim, a mechanic's lien attaches thereto. If it is the claim of a single locator to twenty acres, the lien covers the twenty acres; if it is a consolidated claim of several locators, worked as a whole, the lien covers the entire consolidated claim: *Berentz v. Belmont Oil Min. Co.*, 148 Cal. 577, 113 Am. St. Rep. 308. Where a lease of mining property provides that the lessees shall work and develop the mine and pay the lessor a percentage of the net profits, the lessees are, under section 1183 of the Code of Civil Procedure, regarded as the agents of the lessor, and both his and their interests are subject to liens for work done in developing the mine and extracting ore: *Higgins v. Carlotta Gold Min. Co.*, 148 Cal. 700, 113 Am. St. Rep. 344.

DA RIN v. CASUALTY COMPANY OF AMERICA.

[41 Mont. 175, 108 Pac. 649.]

LIFE INSURANCE—Notice and Proof of Death.—The giving of notice and the furnishing of proof of death are separate acts. But proof of death, seasonably made, may serve the purpose of both notice and proof, because the formal statement of facts made in the proof ordinarily includes all the information imparted by the notice. But a mere informal notice does not usually supply the place of formal proof. (p. 713.)

LIFE INSURANCE—Sufficiency of Notice of Proof of Death.—The determination of the question whether sufficient proof of death has been given does not rest with the insurer alone. (p. 714.)

LIFE INSURANCE—Sufficiency of Notice of Proof of Death.—Sufficient proof of death is made by evidence in any form which is substantial and trustworthy enough to enable the insurer to form an intelligent estimate of his rights and liabilities under his contract. Any succinct and intelligent statement, giving the information called for by the policy, whether verified or not or whether by eye-witnesses or not, is sufficient to put the insurer upon inquiry to determine whether he is liable. The proofs may be other than judicial evidence, such as the sworn testimony of witnesses delivered orally or by deposition or by affidavit. They include evidence of any degree which would tend to establish a disputed fact. (pp. 714, 715.)

LIFE INSURANCE—Proofs of Death—Waiver of Insufficiency. When notice and proof of death are incorporated in the same communication to the insurer, and the proof of the cause of death, with the attending facts, meets all the requirements of the policy, except that it is not so full and explicit as it might be, the silence of the insurer is a waiver of his right to object. (pp. 715, 716.)

LIFE INSURANCE—Voluntary Exposure to Danger.—A miner does not, as a matter of law, expose himself to unnecessary danger so that a recovery cannot be had on his insurance policy where, finding a fellow-workman a few feet from the entrance of the drift overcome by gas he goes to his rescue and in dragging him out is himself overcome and killed by the gas. (p. 716.)

NEGLIGENCE—Attempt to Save Human Life.—The law has so high a regard for human life that it will not impute negligence to one who attempts to save it, unless the attempt is made under such circumstances as to constitute it rashness in the estimate of prudent persons. (p. 716.)

Kremer, Sanders & Kremer, for the appellant.

Jesse B. Roote and James E. Murray, for the respondent.

¹⁸⁰ BRANTLY, C. J. Action by the plaintiff, as administrator of Joseph Battista Pinazza, deceased, to recover on a policy of insurance for the death of his intestate, caused by accident. On May 20, 1908, one Labek, a miner working underground in a drift in one of the mines of the Boston and Montana Consolidated Copper and Silver Mining Company (hereafter referred to as the mining company), in Silver Bow county, was overcome by gas. Upon discovery of his condition, through the outcry of his companion, Pinazza, with others who were working with him near by, ran to his assistance. Pinazza preceded the rest, and while attempting to drag the injured man out into the other workings where the air was better and he could have relief, he was himself overcome, and thereafter, on the same day, died from the effects of the inhalation. Prior to that time, and for the benefit of the miners and others in its employ, including Pinazza, the mining company had negotiated with the defendant a policy of insurance, under the terms and stipulations of which the latter ¹⁸¹ insured these employes against bodily injuries, whether resulting in death or not, "suffered directly through external, violent and accidental means, on account of an accident occurring during the term" of the policy, by reason of the busi-

ness operations therein stated, and "while on the premises of the company or upon the ways immediately adjacent thereto, provided for the use of such employes or the public." The policy, among other special agreements, contains the following:

"(A). If the death of any employe shall so result within ninety days from such injuries, independently of all other causes, the company will pay to the assured a sum equal to fifty-two weeks' wages, computed at the rate per week received by such injured employe at date of accident; but such sum shall not exceed one thousand five hundred dollars."

"(F). Recovery may be had for the benefit of the same employe under one of the foregoing clauses only as respects the result of injuries caused by any one accident; and in no event shall the company's liability for a casualty resulting in injuries to or death of several persons, exceed ten thousand dollars:

"(G). It is further understood and agreed that injuries, fatal or otherwise, resulting from poison or anything else accidentally absorbed or inhaled while actually engaged in operation connected with business of the assured, are covered by this policy."

It also contains the following general agreements:

"GENERAL AGREEMENTS.

"1. The assured, upon the occurrence of a casualty covered hereby shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company's duly authorized local agent or to its home office in New York City; and shall also give immediate written notice, with full particulars, of any and all claims which shall be made on account of a casualty covered hereby; and shall at all times render to the company all possible co-operation and assistance.

"2. Affirmative proof of death, of loss of limb or sight, or of duration of disability must be furnished to the company ¹⁸² within two months from the time of death, loss of limb or sight, or termination of disability. Legal proceedings for recovery hereunder may not be brought within three months from date of filing final proofs at the company's home office; nor brought at all unless begun within six months from time of death, loss of limb or sight, or termination of disability.

"10. This policy does not cover disappearance, or suicide—sane or insane; nor injuries of which there is no visible mark upon the body, nor injuries resulting from voluntary over-exertion, exposure to unnecessary danger or violation of law," etc.

There was indorsed upon it the following, as an amendment to paragraph 10 of the General Agreements: "Indorsement:

It is understood and agreed that the clause in paragraph 10 of the General Agreements reading 'nor injuries of which there is no visible mark upon the body,' is not to apply to death or permanent disability, resulting directly from an accident covered by this policy, provided that affirmative proof is given to the company that said death or permanent disability was the direct, sole result of an accident as aforesaid."

The policy was taken by the mining company in its own name, but the premium paid for it was obtained by deductions by the mining company from the monthly wages of all the employés for whose benefit it was negotiated. These deductions were made by their consent. At the time of his death Pinazza had been receiving wages at the rate of twenty-eight dollars per week. It is alleged in the complaint that the death of Pinazza occurred during the term of the policy; that the mining company, on behalf of deceased, and on or about May 23, 1908, gave to the defendant written notice of the casualty, and furnished to it affirmative proof of the resulting death, with the fullest information concerning it, according to the terms of the contract, using for that purpose a blank form supplied by the defendant, that the mining company and the plaintiff have performed all the conditions of the contract to be by them performed, and that under the agreements and stipulations contained in it, there is due and owing to the plaintiff fourteen hundred and fifty-six dollars, no part of which has been paid, ¹⁸³ though demand has been made. Judgment is demanded for this amount.

The answer of the defendant, after denying generally the material allegations of the complaint, alleges, as affirmative defenses, the following: (a) That the plaintiff failed to comply with clause 1 of the General Agreements; (b) that he likewise failed to comply with clause 2 of these agreements; (c) that the deceased exposed himself to unnecessary danger, thus causing his own death; and (d) that the plaintiff failed to comply with paragraph 10 of the General Agreements, as amended by the clause indorsed upon the policy. There was issue by reply. The plaintiff had verdict and judgment. The defendant has appealed from the judgment and an order denying its motion for a new trial.

Though the policy in terms designates the mining company as the insured, no question is made but that the defendant is directly liable to the plaintiff, if he, or anyone else on behalf of the deceased, furnished the proof required by the terms of the policy. The principal contention is that the evidence is insufficient to justify the verdict, in that it does not show that affirmative proof that the death of Pinazza was the direct, sole result of poisoning by an inhalation of poisonous gas was furnished to the defendant within two months, or at all.

The defendant did not introduce any evidence. Plaintiff's evidence tends to show the following: On the next day after the death there was delivered to the local agent of the defendant, signed by the foreman of the mining company, a report on the death of Pinazza, giving the name and address of the mining company, the name, address and occupation of the deceased, together with the weekly rate of wages paid him, the place where the accident occurred, the name of the foreman in charge, the hospital call made, the name of the attending physician, the alleged cause of the death, and the names and addresses of all persons who witnessed the accident. This was made upon a printed blank furnished by the defendant. The cause of the death is stated as follows: "Battista Pinazza went to 955 to help ¹⁸⁴ rescue a man who was knocked out by gas, and inhaled gases which caused his death." There is no evidence as to how or upon what information this report was made up other than the following: Mr. Burns, a clerk of the mining company, testified: "What I have to do with the accident, part of it, is to receive the report of the accident that comes from the different time-keepers at the mines, enter them in this book [record of accident], and turn them over to whoever is in charge—the superintendent—for his signature. . . . The original is sent to their [defendant's] agents here, and the copy that I keep placed on file." Thomas, one of the local agents of the defendant, stated: "I said I received a report similar to this; I never received any other report than this, in connection with this, to my knowledge or recollection. I believe this was the only report served on me; that is to the best of my recollection." There is not any evidence tending to show that there was any communication of any kind between the defendant and the mining company, or the plaintiff, after the delivery of the report. From this evidence it is a fair inference that the report was made up by Burns, the clerk, from the statements of the timekeeper, upon one of a supply of blanks kept for that purpose, and that it was signed by the foreman as a part of the routine business of the office. It is conceded that the report was a sufficient notice of the death. The question, therefore, is whether it is sufficient as affirmative proof of the cause of death, required by paragraph 2 of the General Agreements and the indorsement amendatory of paragraph 10.

The giving of the notice and the furnishing of proof are distinct and separate acts. Proof of death, seasonably made, may serve the purpose of both notice and proof, because the formal statement of facts made in the proof ordinarily must include all the information imparted by the notice. But a mere informal notice does not ordinarily supply the place of formal proof: *O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 169, 19 Am. Rep. 151; *May on Insurance*, sec. 460; 4

Joyce on Insurance, sec. 3285. However the two acts may be done, whether conjunctively ¹⁸⁵ or separately, both are conditions precedent, which must be complied with in order to render the insurer liable, unless there is an express or implied waiver: 4 Joyce on Insurance, sec. 3286. In the absence of an express stipulation as to the form and character of the evidence which must be furnished, it is difficult to determine in a given case whether the provision as to proof has been complied with. The determination of the question, however, does not rest with the insurer alone. Mr. Joyce, speaking on this subject, says: "The provision requires such notice and proof as may appear to a court to be in accordance with the rules of evidence; and, if such notice and proof have been given, then there has been a compliance with the provision. The question, then, as to what is due proof is to be determined by the court according to the rules of evidence, and not by the insurers": Section 3290. This statement seems to imply that the evidence furnished must be such as would be adjudged by a court admissible under the rules applicable in judicial proceedings. To the same effect is the statement of the rule in *Taylor v. Aetna Life Ins. Co.*, 13 Gray, 434, and in *O'Reilly v. Guardian Mut. Life Ins. Co.*, 60 N. Y. 169, 19 Am. Rep. 151. In the latter case it is said: "The condition can only be performed by furnishing evidence in some form of the truth of the fact stated in the notice, and upon which the right of action depends. It need not be that full, clear and explicit proof which would be required upon the trial of an issue upon the question, but it must be such reasonable evidence as the party can command at the time, to give assurance that the event has happened upon which the liability of the insurers depends. . . . The purpose of the condition is that the insurer may be able intelligently to form some estimate of his rights and liabilities before he is obliged to pay, and some proof must be exhibited." Our statute (Rev. Codes, sec. 5628) declares: "When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time." While this provision, ¹⁸⁶ when read in connection with the preceding and following sections, would seem to apply to fire insurance policies exclusively, it applies as well to life and accident insurance: Rev. Codes, sec. 5249.

The rule stated by the foregoing authorities is vague and indefinite, and the provision contained in the statute is not less so; nevertheless the evident purpose of the legislature in enacting it was to dispense with the necessity of the production, in the first instance, of formal depositions or sworn statements of eye-witnesses, and declare evidence in any form sufficient when it is substantial and trustworthy enough to enable the

insurer to form an intelligent estimate of his rights and liabilities under his contract, and is the best evidence which the insured has in his power at the time. It makes it entirely clear that any succinct and intelligent statement, giving the information called for by the stipulation in the policy, whether verified or not, or whether by eye-witnesses or not, is sufficient to put the insurer upon inquiry to determine whether he is liable. It recognizes evidence other than that which falls within the range of judicial evidence, as defined in section 7844, Revised Codes, such as the sworn testimony of witnesses, delivered orally or by deposition, or, in some cases, by affidavit or the like. It includes evidence of any degree which would tend to establish a disputed fact; and the court must in each case determine whether, in whatever form it may be furnished, it gives substantially the information stipulated for.

The report set forth in the statement herein was furnished to the defendant on the next day after Pinazza died. The statement contained in it, touching the cause of his death and the attendant circumstances, is brief, and does not enter into particulars, yet it contains the information that he died from inhaling poisonous gas while in the company's mine. It is not sworn to; but this formality was not required. It purports to be a statement of an eye-witness, and there is no suggestion in the pleadings or the evidence that it is not a true statement. It tends to show that death was caused solely and exclusively by ¹⁸⁷ the inhalation of poisonous gas, because the statement is: "He inhaled gases which caused his death." This direct statement, while not sufficient to establish the fact of death and the cause of it in a judicial investigation, because not sworn to, was nevertheless affirmative evidence of the fact, and was sufficient to put the defendant on inquiry to determine its rights in the premises. If it desired evidence more conclusive because entering more into detail, it should have called for it without unreasonable delay. The names and residences of all the witnesses and of the attending physician were stated; thus the opportunity was afforded to the defendant, if such course was deemed necessary. Having made no objection, it must be deemed to have waived its right to demand more explicit proof: Rev. Codes, sec. 5630. We do not mean to be understood as saying that, if the report had amounted to nothing more than a mere notice of the death, any duty would have rested upon the defendant to demand the affirmative proof required by the policy. Mere silence does not under such circumstances amount to a waiver on the part of the insurer: *O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 169, 19 Am. Rep. 151. We do mean to say, however, that when the insured undertakes to incorporate the notice and the proof in the same communication to the insurer, and

the proof of the cause of death, with the attending facts, meets all the requirements of the policy, except that it is not as full and explicit as it might be, the silence of the insurer is a waiver of his right to object.

What we have already said is sufficient answer to a further contention by counsel that the required proofs were not furnished to the defendant within two months from the death of Pinazza, as required by paragraph 2 of the General Agreements, and that the action was therefore prematurely brought.

Contention is made that recovery cannot be had because it appears affirmatively that Pinazza voluntarily exposed himself to unnecessary danger, within the meaning of paragraph 10 of the General Agreements. When it became known to deceased and his companions that a fellow-workman was in danger, and they went to his rescue, they found him lying about five feet¹⁸⁸ from the entrance of the drift. They had hurried up a ladder to reach the place. Pinazza, apparently thinking that he could go in that distance with safety, did so, and, in attempting to drag the injured man out, was overcome, and while the rest of the party were engaged in rescuing the two, he was so far injured that he died. The presence of gas was apparent as soon as the party reached the place. The general rule on this subject is that the law has so high a regard for human life that it will not impute negligence to one who attempts to save it, unless the attempt be made under such circumstances as to constitute it rashness in the estimation of prudent persons: 1 Labatt on Master and Servant, sec. 360; Thompson on Negligence, 2d ed., 5435. Thus stated, the rule is broad enough to cover, not only an attempt to save life under spontaneous impulse, aroused by sudden and unexpected perception of the peril, and without thought or calculation of the chances of injury or loss of life to him who makes the attempt, but also an attempt which is made after such calculation as the circumstances permit, the rescuer acting upon the conclusion that he can save the life without the loss of his own. In the latter case the exposure is voluntary in a sense, yet, if under the same circumstances a prudent man would obey the impulse to save a life, the exposure ought not to be held to be voluntary, within the meaning of the contract. At any rate, the danger is not, under the circumstances, unnecessary. This rule, we think, is fairly deducible from the adjudicated cases: *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Fidelity & Casualty Co. v. Sittig*, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359; *Cottrill v. Chicago etc. Ry. Co.*, 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376; *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914; *De Loy v. Travelers' Ins. Co.*, 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; *Williams v. United States Mut. Acc. Assn.*, 60 Hun, 580, 14 N. Y. Supp. 728; *Tucker*

v. Mutual Benefit Co., 50 Hun, 50, 4 N. Y. Supp. 505; *United States Mut. Acc. Assn. v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453; *Smith v. Aetna Life Ins. Co.*, 115 Iowa, 217, 91 Am. St. Rep. 153, 88 N. W. 368, 56 L. R. A. 271; *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157; *Providence L. & I. Co. v. Martin*, 32 Md. 310.

The rule which applies to this provision of the policy is analogous to that which governs the defense of contributory negligence. The engineer who stands at his throttle in the presence of imminent danger of collision or the derailment of his train by an obstruction on the track, in an effort to save his passengers, and is killed or injured, cannot be said, as a matter of law, to be guilty of contributory negligence. He voluntarily exposes himself to the peril, but not unnecessarily so. The circumstances demand that he do his duty, and he does so in obedience to those higher impulses which must govern the conduct of the average prudent man. He may use his best judgment as to whether he can save his passengers by assuming the risk, and it is for the jury to say whether in doing so he is guilty of contributory negligence. So, also, in other practical affairs of life. Emergencies often arise calling for immediate action. In all such cases, though action may be accompanied by danger, yet while the exposure to it is voluntary, the danger cannot in any sense of the term be said to be unnecessary. On this subject the court in *Fidelity & Casualty Co. v. Sittig*, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359, said: "For one to leap into a turbulent stream, rush into a burning building, or do any other hazardous thing to save human life, would be a voluntary exposure to danger, but not to unnecessary danger. So, too, many emergencies in the lives of men occur where the most urgent necessity requires their presence at some particular place at some particular time, and where to miss a train would involve serious consequences. In such a case a voluntary exposure to danger might not be unnecessary. The presence of a physician or surgeon at some critical period in the illness or injury of a human being might be necessary to save life, and it might be necessary for him to expose himself to danger to reach his patient, or in some other respect to perform his professional duty. The necessity implied in the provision of the policy does not mean only that which is unavoidable or inevitable, but also any object or purpose which men of moral responsibility and prudence would regard as of such serious importance in the performance of duty as to demand or justify the incurring of risk of danger to accomplish it." Under the circumstances, the question whether the exposure of himself, by Pinazza, was unnecessary, was for the jury.

Contention is made that the evidence does not show that Pinazza's death was caused by the inhalation of gas. There is no merit in this contention. The evidence establishes the presence of gas in the drift; that Labek was overcome by it; that Pinazza went in to rescue him, and was apparently overcome just as was Labek; that his companions suffered more or less from it during the process of rescue; and that they were finally compelled to make use of helmets to protect themselves, before they succeeded in accomplishing it. There was no medical testimony introduced as to the specific cause of death, but, taking the evidence as a whole, it is amply sufficient to justify a finding that the cause of it was the inhalation of gas, as alleged.

Fault is found with certain of the instructions. In the preparation of their brief counsel failed to comply with the rule as to the specifications of error in this regard (Rule X, subdivision "b" [37 Mont. xxxii, 103 Pac. x]); we have nevertheless given attention to the criticisms made, and conclude that they are also without substantial merit.

The judgment and order are affirmed.

Mr. Justice Smith and Mr. Justice Holloway concur.

PROOFS OF DEATH IN CASES OF ACCIDENT AND LIFE INSURANCE.

- I. The Necessity for Proof of Death, 718.**
- II. What Proof of Death is, 719.**
- III. Where the Person Insured has Disappeared, 723.**
- IV. The Manner of Making the Proof, 724.**
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- VI. The Time Within Which Proof must be Furnished.**
 - a. The Limit, 727.**
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 - a. Express, 730.**
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I. The Necessity for Proof of Death.

To the ordinary lay mind anything that savors of formality in the transaction of every-day business affairs is unfairly ascribed to the practice of what Dickens has immortalized as the circumlocution office, and credit is never given for the necessity which exacts compliance with form, leaving out of consideration altogether that very frequently such compliance with form is only the performance of a contract cheerfully entered into by the complainant, complacently regarded while it is executory, and when completion waits on the doing of some act, the act of completion becomes irksome. Perhaps in no class of contracts more than policies of insurance, be they life, accident, fire, guaranty or marine, is this more noticeable than when the contingency has happened upon which the money has become payable on the proper notice and proof thereof. Immediately then the insured or beneficiary has a pseudo grievance against the insurer because certain set formal inquiries have to be answered—always regarded as fishing inquiries—

although the company uses every effort to smooth the way for the bona fide applicant for the fruits of the policy. Time and again these applications by the company are regarded as unnecessary and aggressive, and the beneficiary hugs his grievance, parting parsimoniously with his answers piecemeal, and as though the questions were all framed in a sinister setting. Yet, the demands of reputable companies are invariably reasonable. They say we have insured against accident or death, as the case may be, and whenever and wherever it occurs we require you to tell us, both for reasons of record in our books, and, in case of doubt of our liability, that we may verify the information you have furnished, and then we will pay the amount we have contracted to pay. You have contracted to give us this information; it is contained in the conditions indorsed on your policy, and if we are called upon to make payment in accordance with our contract, why should you not make demand equally in accordance with your obligation under the same instrument? In this note we purpose considering the proof of death which the beneficiary under the policy should furnish and what proof the insurer can call for under a policy—life or accident—which provides for payment in the event of the death of any given person. It will be necessary also to consider the time within which and the person by whom such proof must be furnished, the manner in which it is to be given to the insurer, and finally the waiver of proof by the insurer in certain cases.

II. What Proof of Death is.

It makes but little difference in what form of words the condition that the claimant under a policy shall give proof of death is couched, so long as the performance is not made impossible by the terms. Proof is merely that quantity of evidence which produces a reasonable assurance of the existence of an ultimate fact: *Missouri etc. Trust Co. v. McLachlan*, 59 Minn. 468, 61 N. W. 560. It has been defined to be a sufficient reason for assenting to a proposition: *Orth v. St. Paul etc. Ry. Co.*, 47 Minn. 384, 50 N. W. 363; or that quantity of appropriate evidence which produces assurance and certainty: *Buffalo & State Line R. Co. v. Reynolds*, 6 How. Pr. 96. Sometimes in policies of life insurance we find the expressions of due proof, or satisfactory proof, but the addition of the word "due" or "satisfactory" carries the degree of proof to be demanded very little, if at all, further than if it had not been used at all. In *Jarvis v. Northwestern Mut. Relief Assn.*, 102 Wis. 546, 72 Am. St. Rep. 895, 78 N. W. 1089, due proof of a claim of loss under a policy of insurance is said to mean such a statement of facts, reasonably verified, as, if established in court, would *prima facie* require payment of the claim, and does not mean some particular form of proof which the insurer arbitrarily demands. For example, a condition that proof is to be made to the satisfaction of the insurer does not constitute him an arbitrary or despotic judge of the sufficiency of the proof: *Noyes v. Commercial Travelers' Eastern Acc. Assn.*, 190 Mass. 171, 76 N. E. 665. The insurer, necessarily, has authority to require reasonable proof of the existence of the conditions upon which the claim against him under the contract is based. Due proof is such as the law will pronounce reasonable and satisfactory: *Buffalo Loan etc. Co. v. Knights Templar etc. Assn.*, 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942; *Charter Oak L. Ins. Co. v. Rodel*, 95 U. S. 232, 24 L. ed. 433; *Connecticut Mut. etc. Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294.

Where a policy of insurance requires notice and proof of death as a condition precedent to payment, notice alone is not sufficient; and though the insurers on receipt of such notice do not call for further proof, they do not thereby waive their right to insist upon it: *Fraizer v. Commercial Travelers' Eastern Acc. Assn.*, 202 Mass. 292, 88 N. E. 901; *O'Reilly v. Guardian Mutual Life Ins. Co.*, 60 N. Y. 169, 19 Am. Rep. 151; *Metropolitan Life Ins. Co. v. Wagner*, 50 Tex. Civ. App. 233, 109 S. W. 1120. In this note we are not dealing directly with the subject of necessity for notice, but only with the proof of death required under the contract of insurance. They are two entirely distinct and separate acts. In *Da Rin v. Casualty Co. of America*, 41 Mont. 176, ante, p. 709, 108 Pac. 649, 27 L. R. A., N. S., 1164, the principal case, the marked difference between proof and notice is thoroughly treated, Brantly, C. J., having apparently made a fine research among the authorities. In *O'Reilly v. Guardian Mutual Life Ins. Co.*, 60 N. Y. 169, 19 Am. Rep. 151, it was said that proof of death, if seasonably made, might serve for both the proof and notice contemplated as conditions precedent to the right of action. "The more authentic and verified information, contained in the 'proofs,' would ordinarily include all the particulars which would be communicated by the informal notice. But the converse is not true. A mere notice cannot supply the place of, or dispense with, the more formal proof provided for in the policy. The two are entirely distinct in their character, and are mentioned as two distinct acts to be performed by one who claims the benefit of the insurance. A notice may be an informal, unverified and uncorroborated assertion of the claimant. . . . What the character of the 'proof' should be when not prescribed by the terms of the policy must depend very much upon the fact to be proved, and the evidences by which it is ordinarily established, or of which it is susceptible." Common sense must tell us that proof means more than an unverified statement that a named person is deceased, and that the word cannot possibly be defined as *eiusdem generis* with notice. It also tells us that, having given notice that the person whose life or limb is insured is dead or has suffered injury, some more specific account should be furnished—some account so substantiated—as will convince a reasonable insurer that the time has arrived when under his contract he must pay according to its terms. "The bare statement," continues the opinion last cited, "of one of known character for truth might convince one who knew him of the reality of the facts stated by him, but it would not be proof, in any proper sense." The words "proof" and "evidence" are sometimes treated as synonyms, and in insurance cases the use has crept into being, because as a rule the condition can only be performed by furnishing evidence in some form of the truth of the statement in the preliminary notice, upon which the right of action depends. The proof is not required to be that full, clear and explicit proof, which would be required on the trial of an issue in a court upon the question, but it must be such reasonable evidence of the event as the party can command at the time, giving assurance that the event has happened upon which the liability of the insurer hinges: *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427. In *Taylor v. Aetna Life Ins. Co.*, 13 Gray, 434, which was an action on a life policy, proof of death had been furnished to the insurer, and the company admitted that it was sufficient, except that, in their contention, the evidence

of the attending physician should have been also furnished. They claimed that by the terms and reasonable intendment of the contract, and by the usage and understanding of their own and other life insurance companies, an affidavit or certificate of such doctor was a requisite and essential part of the proof to be supplied by parties demanding the amount of a policy which was payable in ninety days after due notice and proof of the death. In support of their contention they produced in evidence a pamphlet which they had given the insured when the policy was issued, and among other instructions and required proofs, it stated that such a certificate, duly sworn, was necessary. The court said: "We find no defense to the action. The policy does not embody nor refer to any by-law, requisition, usage or understanding of the defendants as to the kind of proof, which they should require, of the death. . . . Whatever, therefore, might be such by-law, requisition, usage or understanding, the plaintiff would not be bound thereby. He is bound only by the policy itself; that is, to furnish 'due proof' of death. . . . The question, what is due proof, is to be determined by the court, according to the rules of evidence, and not by the defendant, nor by any other life insurance companies." Where the parties have themselves agreed on what shall be the proof to be furnished, their contractual compliance is essentially necessary, but when they have not, then what is proof must be determined according to the rules of evidence so far as they can be applied to extrajudicial proceedings: *O'Reilly v. Guardian Mutual Life Ins. Co.*, 60 N. Y. 169, 19 Am. Rep. 151. The testimony of eye-witnesses to the death or accident, as the case may be, cannot be required unless the policy demands it, and even if the policy does demand it and there were no eye-witnesses, they must be satisfied with what would be sufficient evidence to satisfy a jury. The claimant has only to make out a prima facie case: *Preferred Acc. Ins. Co. v. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 Ann. Cas. 916; *Knights Templars' & Masons' Life Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066; *Preferred Acc. Ins. Co. v. Barker*, 93 Fed. 158, 35 C. C. A. 250.

From what we have shown it will be the more readily understood that proof or due proof is limited to the demands of the language of the policy. It frequently happens that insurance companies are almost inquisitorial in their questions, and while it is truly incumbent on the claimant to comply with his contract, and while it may be polite to give even a little more information than the insurer is legally entitled to seek, yet there is no obligation on the part of the claimant to stand an unnecessary and prying cross-examination. For example, where the contract obligates the insurer to pay "within sixty days after due notice and satisfactory proof of the death," without requiring that the cause of death should be communicated, the insurer has no right to demand information thereof. All that he can require is, that the fact of death shall be shown with reasonable definiteness and certainty: *Buffalo Loan etc. Co. v. Knights Templar etc. Aid Assn.*, 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942. An interesting decision on a somewhat similar defense is to be found in *Flynn v. Massachusetts Benefit Assn.*, 152 Mass. 288, 25 N. E. 716. In that case the certificate issued by the association provided for payment of the benefit after "satisfactory proof of death" was furnished by the sworn certificates of the physician who attended the decedent and certain other named persons. The association withheld consideration of the

claim until the claimant would furnish a similar certificate from a doctor who had attended the decedent several years before but not at or near the time of his death. The court said: "All the information was given that was required by the terms of the certificate. The fourth clause of the certificate required that satisfactory proof of death should be furnished by the sworn certificates of the attending physician and other persons named. Sworn certificates from all these persons were furnished, and the defendant had no right, as it contended it had, to require a certificate from Dr. Plympton, who had not attended the deceased for several years, and thus to provide itself with a statement from a witness friendly to itself, who was not one of the class named in the certificate. The words 'satisfactory proof of the death' in the body of the certificate, are explained and limited by the fourth clause above referred to, which defines the mode in which, and the persons by whom, this proof is to be furnished: *Clapp v. Massachusetts Benefit Association*, 146 Mass. 519," 16 N. E. 433.

It will occasionally happen that the performance of the condition becomes impossible, as in the case of the death of the attending physician, or his refusal to give the certificate required. The latter contingency actually occurred in *O'Neil v. Massachusetts Benefit Assn.*, 63 Hun, 292, 18 N. Y. Supp. 22. In that case the attending physician refused to give his certificate, by reason of his bill being unpaid. The court took the common-sense view of the situation and put it that it was unnecessary to discuss the proposition that when, through no fault of his own, a party having a claim against another is unable to present the particular kind of proof which the contract between them calls for, the failure may be excused. In the case of building contracts, although the presentation of the architect's certificate is required to entitle the builder to payment, yet, if the certificate is unjustly withheld, a recovery may be had without it; and so in the case referred to "The claimants, under a policy of insurance are not required to perform impossible conditions. They are bound to use diligent efforts to comply with the stipulated conditions, but if prevented from doing so without fault or negligence on their part, they are not thereby precluded from recovery in a contested case."

We have dealt with the demand of the company for more information than they were entitled to, and we now come to that phase of proof in which the mischief of saying too much, of voluntarily giving more information than that sought, is exemplified. Claimants need show no more than is necessary to establish a *prima facie* case: *Aetna Life Ins. Co. v. Milward*, 118 Ky. 716, 82 S. W. 364, 68 L. R. A. 285, 4 Ann. Cas. 1092; *Fisher v. Fidelity Mut. Life. Assn.*, 188 Pa. 1, 41 Atl. 467. The law is well stated in the principal case, and is that if the statement made for proof is sufficient as proof, that part of the statement other than what is sufficient will not invalidate the performance of the condition, though it is apparent that the insurer can use the narrative in support of the defense that other conditions of the policy have been violated: *Bowen v. National Life Assn.*, 63 Conn. 460, 27 Atl. 1059; *Connecticut Mut. L. Ins. Co. v. Siegel*, 9 Bush, 450; *Cluff v. Mutual Ben. L. Ins. Co.*, 99 Mass. 317; *Goldschmidt v. Mutual Life Ins. Co.*, 102 N. Y. 486, 7 N. E. 408. But the statements in the proof outside and beyond their actual relation to the proof, are not conclusive against the claimant who has the right to offer explanation of any portion of the narrative which is relied on by the insurer adversely to such claimant: *Abraham v. Mutual Reserve Fund Life*

Assn., 183 Mass. 116, 66 N. E. 605; *Bowen v. Preferred Acc. Ins. Co.*, 82 App. Div. 458, 81 N. Y. Supp. 840; *Barnett v. Prudential Ins. Co.*, 91 App. Div. 435, 86 N. Y. Supp. 842; *Puls v. Grand Lodge A. O. U. W.*, 13 N. D. 559, 102 N. W. 165. It does not necessarily follow that any and every condition in the policy must be complied with where possible before the insurer will be liable. In *Life Assur. Co. of America v. Haughton*, 31 Ind. App. 626, 67 N. E. 950, the policy was payable on death without limiting in any way the cause. It contained a provision that it would pay immediately after proof of death and if the cause of death was furnished. It also contained a provision that proofs of death should be furnished to the company at its home office within one year after the death of the assured and must comply fully with the company's form. The form was furnished and no objection taken to it. It will be noted that the last clause referred to applies only to the proof of death and not proof of the cause of death. "Taking the policy as a whole," says the opinion in the case referred to, "and construing the contract of insurance most strongly against the appellant, as we must, we think that the first provision, relating to proof of death and cause of death, is so qualified by the latter that the inference is fair and reasonable that the parties intended as a condition of payment only that proof of death should be made."

Occasionally insurers call for satisfactory proof or affirmative proof of death. "Satisfactory," as we have shown, is held to mean "reasonable." In *Potter v. Union Cent. Life Ins. Co. of Cincinnati*, 195 Pa. 557, 46 Atl. 111, a claim was made on the insurer within the proper time, in which the death of the insured by murder was alleged as having occurred at a specific time. Such statement was sufficient, the court holding that it was probably not in the power of the claimant to give full particulars for want of knowledge of them. The statement that decedent died from injury on a train constitutes affirmative proof of death as required by an accident policy which called for that form of proof, especially as the insurer had its own doctor assisting at the post-mortem examination: *Van Eman v. Fidelity & Casualty Co. of New York*, 201 Pa. 537, 51 Atl. 177. In *Metropolitan Casualty Ins. Co. v. McAuley*, 134 Ga. 165, 67 S. E. 393, the claimant in an "affirmative proof" policy was held not bound by a condition which required him to furnish the proof on the insurer's blanks, it being shown that they were not appropriate, and contained questions he could not answer as put.

III. Where the Person Insured has Disappeared.

The subject of the presumption of death has been dealt with in this series, and in a monographic note to *Wilson v. Brownlee*, 91 Am. Dec. 526, will be found information dealing with the many phases in which the presumption is called into operation. In the note to *Sprigg v. Moale*, 92 Am. Dec. 704, the presumption of death is again dealt with; in the note to *Hoyt v. Newbold*, 46 Am. Rep. 761, is reprinted an excellent article on the presumption of death contributed to the *Albany Law Journal* by John D. Lawson; and in the note to *Policemen's Ben. Assn. v. Ryce*, 104 Am. St. Rep. 198, the authorities are brought to date and the subject generally treated. It is chiefly by reason of their bearing on the subject of proof of death in insurance cases that these references will for the purposes of this note be found of use to the student. In the ordinary run of cases, little or no difficulty is experienced in furnishing direct evidence of the death of the person

insured; but in cases of disappearance, indirect evidence is necessarily all that can be afforded. Assuming, then, that the circumstances do not point to absence from other causes, it is within the power of the jury to find that he is dead. We are not now referring to the presumption of death after absence for seven years and which is fully discussed in the notes we have cited. In a number of cases it has been decided that death may be inferred from disappearance irrespective of that period, and the rights of the claimant are not prejudicially affected by the policy calling for direct and affirmative proof. All that the claimant can be reasonably called upon to do is that which any prudent man would do under like circumstances. Assuming the insured to be the head of the family, and that he has disappeared and the circumstances point to death, notice should be given to the insurance company and from time to time such further information as may be of assistance to them. In general practice, they make requests for information, but in the event of their repudiation of liability the claimant must make out his circumstantial case to the satisfaction of the jury. We refrain from repeating the illustrations, as they are set out at ample length in the notes already referred to, and it has been held that, given the circumstances, the jury may infer death from the disappearance: *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *Tisdale v. Connecticut Mut. L. Ins. Co.*, 26 Iowa, 170, 96 Am. Dec. 136, 28 Iowa, 12; *Supreme Council Catholic Benevolent Legion v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105; *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 43.

IV. The Manner of Making the Proof.

Having regard to what we have shown to be the generally accepted meaning of proof and due proof, there is hardly occasion to say there need be little method in the manner in which it must be furnished. As a rule, the requirements of the policy call for the delivery of the proof at the office of the company, and if so delivered no necessity exists for proving the official standing of the one who receives it. In *Supreme Lodge v. Matejowsky*, 190 Ill. 142, 60 N. E. 101, it was held that the claimant was under no such obligation. If the company evinced no disposition to aid the person claiming, it would be on him to obtain what evidence of the death of the assured would satisfy a court of law. As we have shown, this is even more than the insurance company is entitled to, but the line of demarcation is very faint between the two. The mode of furnishing the information differs very little indeed from that required to verify any fact. The identity must be established of the dead with the living man on whose life the insurance was effected. Some person who knew him can make an affidavit of the facts that he knew him, that he knew he had insured his life in the company, that the person named in the policy died on a certain day, that the affiant saw him lying dead at the certain place where he died or to where his body was removed, and finally that the person known to the affiant, the person insured and the person whose body was so seen by the affiant are identical, and one and the same person. The medical attendant can testify as to his attendance on the person referred to and give the cause of death. The funeral director can testify as to the date and place of burial. We do not say all these are necessary, but, assuming there were no other guides in the shape of pamphlets issued by insurance companies or instructions annexed to the policy, and assuming an

insurance company was standing on its strictly legal and technical rights, the fact that the claimant has bound himself to furnish proof of the death of the insured, these are the facts, baldly stated, which he must have verified to satisfy his obligation. Happily, it is rare to meet with such cases. Insurance companies, for the sake of the usual business advertisement which naturally comes from a prompt settlement of claims, are quite ready to give information to claimants, and most companies have blanks ready for filling in the necessary particulars. An illustration of the simplicity of furnishing the necessary information is to be found in *Simpkins v. Hawkeye Commercial Men's Assn.* (Iowa), 126 N. W. 192. The policy was an accident policy against death by external, violent and accidental means. The proof stated that death was caused by poisoning, the poison being introduced by a needle, and was held sufficient. Even where the policy requires delivery of the proofs at the office of the company, and though they are not delivered there, if it can be proved they received them, it is sufficient. In *Wright v. Vermont Life Ins. Co.*, 164 Mass. 302, 41 N. E. 303, the policy provided that the company would pay the sum named therein "at its office in the city of Burlington ninety days after satisfactory proof, at its said office, of the death of the said insured." The proof of the death was made out on blanks furnished by the company, was taken to the office of the defendant company in Boston, and there received by a person apparently in charge of the office, who promised to forward it to Burlington, and it was produced at the trial by the company's counsel. There was no suggestion of imperfection in the proof, and it was held that the jury were warranted in their finding on the issue that proof was furnished in accordance with the terms of the policy.

Among the so-called technicalities is to be ranked the proper and careful description of the decedent. For example, in the case just cited, the occupation of the decedent at the time of taking out the policy was stated by him to be a waiter. It was proved by the defendant he was a calker, and by the plaintiff that he was both a calker and a waiter, and the plaintiff explained that although his trade was that of a calker, he did not do any calking at the time of the policy or afterward, although he tried to get some jobs at calking. We need hardly say the objection was not sustained. If the insured had made some grievously false or misleading answers to inquiries, or had made a voluntary false answer, the right to recovery might be barred on that account, but where it related to his occupation at the time of the application, and at the worst was merely inaccurate, it did not come within the category of insufficient, incomplete and untrue answers such as were considered in *Dwight v. Germania Ins. Co.*, 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654, where the applicant untruly gave a negative answer to the question, "Are you now or have you ever been engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquor?"

Once the proof of death is delivered in accordance with the policy, the duty of the plaintiff in a subsequent action for the money is merely to give evidence of its delivery. The onus of again proving the death is not cast upon him. The documents are in the hands of the company, and if they desire to impugn them, it lies on them to produce the various challenged proofs. Failing that, the statement of the plaintiff of their delivery is sufficient: *Hincken v. Mutual Benefit Life Ins. Co.*, 50 N. Y. 657. We deal elsewhere with the ques-

tion of who should make the proof, but draw attention to the cases of *Hilmer v. Western Travelers' Acc. Assn.*, 86 Neb. 285, 125 N. W. 535, 27 L. R. A., N. S., 319, and *Guy v. United States Casualty Co.*, 151 N. C. 465, 66 S. E. 437, and *Mellen v. United States Health and Accident Ins. Co.*, 83 Vt. 242, 75 Atl. 273, which decided that the notice of injury could be given by a third person for the insured.

If there has been an inquest on the death of the assured, the evidence taken thereat has been held to be admissible: *United States Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65; *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59. The utility is questionable, however, as in such cases there can be little or no difficulty in procuring the necessary proof of death without the inquisitions of the coroner's court. In addition it is always fraught with the danger of other statements which might injure the claimant's case, or at the best, unfavorably and prejudicially affect the issue of proof of the death alone. Such a condition was disclosed in *Goldschmidt v. Mutual Life Ins. Co.*, 102 N. Y. 486, 7 N. E. 408, where the insurer asked for the verdict of the coroner's jury. It was furnished and annexed to it were documents which disclosed the death of the insured by suicide. The result of the case was in favor of the claimant, although it was ruled in the trial court on the production of the documents referred to that the burden of proving the death was thereby shifted to the plaintiff, it was held on appeal that upon the pleadings the burden was on defendant, and that the proofs taken as a whole were no concession by plaintiff sufficient to change the burden. This case is mentioned advisedly in support of our suggestion that in such cases the proper as well as the easiest method is to furnish proof of the death outside of any collateral proceeding, except, of course, the condition of the policy calls for it, as in the case of *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 851, in which it was made a condition precedent.

V. By Whom the Proof Should be Made.

Where the policy does not specifically name the person by whom the proof must be made, it is clear that it may be furnished by any person who can give the required information. Indeed, we very much question the proposition that even though the person were named, that no other could give the proof. Be that as it may, where the policy contains the usual provision that the proofs shall contain answers to certain questions, it was held in *Kelly v. Metropolitan Life Ins. Co.*, 15 App. Div. 220, 44 N. Y. Supp. 179, that where the policy was in the usual form and did not say that the claimant should furnish the proofs, the fact that some other person did it in support of the claim could furnish no ground of objection on the part of the company.

In *Wuesthoff v. Germania Life Ins. Co.*, 107 N. Y. 580, 14 N. E. 811, the notice and proofs were given by a guardian de facto and not objected to at the time by the insurer, who subsequently took refuge in the strict condition of the policy issued.

"It is, we think," said the court, "a sufficient answer to this proposition that while Eliza F. Wuesthoff was not, by the appointment in the will and the death of her husband, invested with any power to interfere with the infants' estate before giving security, she, nevertheless, was nominally the guardian of the children, and as such had sufficient

authority to justify her taking a step in the interest of the children, designed merely to accelerate the maturing of the claim on the policy, and that the company, having accepted and acted upon the notice without objection, cannot now question its sufficiency."

In *Delameter v. Prudential Ins. Co.*, 52 Hun, 615, 5 N. Y. Supp. 586, the last-named case was followed in the rejection of an absurd contention of the company, that at the time the proof was furnished the one giving it was only the husband of the decedent, whereas at the time of action he was the administrator. In citing these what we may call scouted objections, we have to marvel at the patience of the judges who have to listen to them. What possible difference to the company if they have an honest intention to pay their contract obligation? The court dealt with the objection very temperately. "The defendant's objection appears to be that in these proofs the present plaintiff stated that he claimed as husband, while he now sues as administrator. Whether he had at the time of making the proofs been appointed administrator does not clearly appear in the printed case. Now, the object of proof is to give information of the facts of death, and the circumstances under which it occurred. This information is obtained, whoever gives it. We need not say that an utter stranger can make valid proofs. That case is not before us. Here the present plaintiff made them. He may adopt those which he made as husband. On the facts the court could not properly have held, as a matter of law, that the plaintiff had not complied with this condition." In *Globe Mut. Life Ins. Assn. v. March*, 118 Ill. App. 261, the claimant wrote "executor" after his name when signing the proofs, and such error did not invalidate the claim. But it is not sufficient for the claimant to support his case only with the affidavit of the undertaker who buried the decedent: *Stephenson v. Bankers' Life Assn. of Des Moines*, 108 Iowa, 637, 79 N. W. 459. When the claim was by the assignee of the policy, the answer was not permitted to create conditions not contained in the policy as to proof of assignment: *Braker v. Connecticut Indemnity Assn.*, 27 App. Div. 234, 50 N. Y. Supp. 547.

VI. The Time Within Which Proof must be Furnished.

a. **The Limit.**—As a rule, the policy of insurance contains the time limit of so many days after the death: *Ellis v. Massachusetts Mut. L. Ins. Co.*, 113 Cal. 612, 54 Am. St. Rep. 373, 45 Pac. 988; *Standard Life & Accident Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856; *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 851. In those cases where it is silent upon the point, the law is the same as to the construction of such a contract as it is to the construction of any other agreement, where a limit of time for performance is not named. A reasonable time is always assigned by law in such cases, and the courts will look at all the circumstances in deciding what that reasonable time is. Where eleven years had elapsed, as in the case of *Harrison v. Masonic Mut. Ben. Society*, 59 Kan. 29, 51 Pac. 893, the delay was held unreasonable, notwithstanding that that was a case of disappearance of the person insured. (See, ante, "Where the Person Insured has Disappeared.") And in *Spratley v. Mutual Benefit Life Ins. Co.*, 11 Bush, 443, a delay of nine years was fatal. Where the question of time is, however, most important, apart from the ordinary doctrines of laches and stale

claims, is the effect of the statutes of limitation upon the demand. For a long time it was considered that as the right of action was dependent upon the proof of death, that time did not run until the claimant had furnished the necessary evidence. The point appears well decided in *Spratley v. Mutual Benefit Life Ins. Co.*, 11 Bush, 443, above referred to. In that case counsel for the claimant argued that as by the terms of the policy the money was not due and payable until ninety days after due notice and proof of death, limitation did not begin to run until such notice with proof was given to the company, and it was attempted to assimilate the contract sued on to notes payable on demand. (See monographic note on the limitation of actions on obligations payable on or after demand, 136 Am. St. Rep. 469.) The court said: "It seems to us there is an essential difference between them. In cases of notes payable on demand the debtor is fully advised as to the existence of his debt and of his subsisting obligation to pay it. It is within his power to seek his creditor and discharge himself from liability by paying it. So long as he remains quiet and inactive it is to be presumed that he consents to the inactivity of the creditor, and that the time when the limitation is to begin to run is postponed by the consent of both the parties to the contract. Not so in cases of life insurance. The company has no certain means of ascertaining when, by the death of the insured, its liability to pay occurs. To remedy this difficulty the contract requires the assured to notify the insurer of the happening of this event. The presumption is conclusive that the parties to the contract intend that this notice shall be given as soon as it is reasonably possible to do so. The insurer has the right, whilst the witnesses are still alive, and the circumstances still fresh in their memories, to investigate the causes of the death in order to ascertain whether or not he is liable to pay the insurance. In cases of apparently unreasonable delay the assured must present a satisfactory explanation therefor, or else the statute should be held to begin to run within a reasonable time after the death."

In *Trippe v. Provident Fund Society*, 140 N. Y. 23, 37 Am. St. Rep. 529, 35 N. E. 316, 22 L. R. A. 432, which was an action on an accident policy, written notice with full particulars was required to be given within ten days from injury or death, and failure to give it was to invalidate all claims under the policy. The body of the insured was found on the 25th of August, 1891, among the ruins of a building which had fallen on the 22d of August, 1891, crushing and killing, among others, the insured. Notice was given of the death on the 2d of September following, which was within ten days of the discovery of the body, but over ten days from the death. The court said that on the authority of *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475, the condition should receive a liberal and reasonable construction in favor of the beneficiaries. The company stood on the technical construction of ten days from the death, but the court held that the fair and reasonable construction of the condition was that the ten days within which the notice was to be given did not begin to run from the date of the accident or the disappearance of the insured, but from the time when the body was found, and the important fact of death, with the circumstances and particulars under which it occurred, ascertained.

"This construction secures to the defendant every benefit and advantage that was intended by this provision of the policy, and it

cannot, therefore, complain if the very harsh and technical meaning which it now seeks to put upon a condition subsequent is rejected. The plaintiff was the widow of the deceased, and the beneficiary named in the certificate. She was the only party interested in the enforcement of the contract, and who could give the notice, and she could not give it, within the meaning of the condition, until she had knowledge of the facts which she was bound to communicate. To hold that the plaintiff was bound to give notice of the death of her husband, with full particulars, before she had any knowledge of the facts, would be to require her, by a technical and literal construction, to do an impossible thing, which was not within the intention of the parties when the contract was made: *Insurance Companies v. Boykin*, 12 Wall. 433, 20 L. ed. 442." Very similar reasoning was adopted in the recent case of *Continental Casualty Co. v. Lindsay* (Va.). 69 S. E. 344, where the existence of the policy was not known for several months after the death, and the beneficiary, as soon as it was found, gave notice to the company. The court held that all had been done that could be required under the circumstances, and that it would be a harsh rule that would forfeit a policy under those circumstances. They further held that compliance with the terms of a policy as to notice and proof of loss within a reasonable time after knowledge of its existence under all the circumstances of the particular case was all that could be required. In *Cornell v. Travelers' Ins. Co. of Hartford*, 192 N. Y. 587, 85 N. E. 1107, the insurer was verbally informed of the death by drowning of the insured two days after it occurred; a few days thereafter the company declined to furnish claim blanks, and thirteen days after the death telegraphic particulars, full and detailed, were sent. These acts were a sufficiently substantial compliance with the condition of notice of death contained in the policy. In *Pacific Mut. Life Ins. Co. v. Carter*, 92 Ark. 378, 123 S. W. 384, 124 S. W. 764, the insured substantially complied with an accident policy, which required notice within twenty days by sending in his proof thirty-three days thereafter at the suggestion of the insurer's agent, the insured having in the meantime been in a hospital, where one of his eyes was removed in consequence of an accident covered by the policy.

In Texas there is a statutory time limit of ninety days: *Sayles' Ann. Civ. Stats.* 1897, art. 3379, amended by *Gen. Laws* 1907, p. 241, c. 129; and in *Aetna Life Ins. Co. v. Griffin* (Tex. Civ. App.), 123 S. W. 432, it was held that a provision in a policy requiring "immediate" notice was void for conflict with that statute. In those states when there is no time limit, the word "immediate" in such connection should be construed as it was in *Hughes v. Central Accident Ins. Co.*, 222 Pa. 462, 71 Atl. 923, and *Cady v. Fidelity & Casualty Co. of New York*, 134 Wis. 322, 113 N. W. 967, 17 L. R. A., N. S., 260, as within a reasonable time.

b. *Waiver of Time Limit.*—As in all other contracts, the time limit may be waived by the insurer, and if he, with knowledge of all the facts, requires the assured by virtue of the contract to do some act, or incur some expense or trouble inconsistent with the claim that the contract had become inoperative in consequence of a breach of some of the conditions, the claim is waived: *Goodwin v. Massachusetts Mut. Ins. Co.*, 73 N. Y. 480; *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560, 29 N. E. 991; *Travelers' Ins. Co. v. Edwards*, 122 U. S. 457, 7 Sup. Ct. Rep. 1249, 30 L. ed. 1178. In *Trippe v. Provident Fund*

Society, 140 N. Y. 23, 37 N. E. 529, 35 N. E. 316, 22 L. R. A. 432, the facts that a notice served more than ten days after the death of the assured was retained without objection, as well as a subsequent one served six weeks thereafter, after the plaintiff had been appointed administratrix; that three days before the second notice was served the defendant company, upon written application made to it, furnished the necessary blanks for proof of loss; that after such proofs were made on such blanks they were forwarded to the defendant company in compliance with the terms of the contract and retained without objection; that five months thereafter such company asked for further information, which was given—were such as to establish a waiver by the defendant company which was precluded from arguing them as a defense.

VII. Waiver of Proof.

a. **Express.**—Just as the time limit for delivering of proof of death may be waived (ante, p. 729), so the necessity for proof at all may be waived by the insurer, and the ordinary doctrine of waiver will apply to the construction to be placed upon acts or statements of the insurer. In *Webster v. State Mut. Fire Ins. Co.*, 81 Vt. 75, 69 Atl. 319, the difference between waiver and estoppel is especially well marked. Waiver was defined to be that which involved the act or conduct of one of the parties to the contract only, and as the intentional relinquishment of a known right, not necessarily implying that one has been misled to his prejudice. Estoppel is that which involves the acts or conduct of both parties, and may arise where there is no intent to mislead, but the party is misled to his prejudice notwithstanding. In *Fillmore v. Knights of Maccabees*, 109 Mich. 13, 66 N. W. 675, the widow of a deceased member of the benefit association named had brought suit upon a certificate of insurance (*Fillmore v. Knights of Maccabees*, 103 Mich. 437, 61 N. W. 785), and being defeated petitioned for leave to file a bill of review. After the first decision referred to she paid the costs of the suit and presented her claim to the executive committee of the defendant association, stating that proof of death had been waived. They replied that they could not entertain the claim unless proofs of death were submitted in the usual way and on the blanks prescribed by the committee, which blanks they forwarded. It appeared that one of the committee of three appointed by the defendant association had written to her agent, some months previously, that the decedent was not, at the time of his death, in good standing, and therefore there was no necessity of sending blank proofs of death. The petitioner also alleged that she could not now comply with the requirement to supply the proof of death within one year of its occurring, as the year had elapsed. The dicta of the court were conclusive. "We think the committee should have proceeded to hear the claim in the form it was presented. They had expressly waived proofs of loss. It was, therefore, unnecessary and unreasonable to require her to use the blank form of proof, with many of the provisions of which she could not comply. It has been repeatedly decided, by this court and others, that, when insurance companies expressly waive proofs of loss or of death, it is unnecessary to furnish them, and the hearing of the claims should proceed without them." In *McClure v. Great Western Acc. Assn.*, 141 Iowa, 350, 110 N. W. 269, the insurer expressly waived further proof, and was, of course, bound by its concession.

b. Implied.—The question of any implied act is always more intricate and interesting than that of an express one. To the mind of the lawyer it always presents itself very much as a comparison of circumstantial evidence with direct. In considering the implied waiver of a condition, it is always necessary to view both the language of the condition and the party to the contract on whom the performance falls, which then involves the position of the one who may waive such performance. In insurance policies, starting out with the knowledge that the law does not favor forfeitures of any character, the inquirer finds a provision requiring proof of death to be submitted within a given number of days after the death has occurred. That provision is manifestly inserted exclusively for the benefit of the insurer, to enable it to inquire into the circumstances attending the death within a comparatively short period after it has occurred. It has been repeatedly held that such a provision is one which the insurer may easily waive, and that such waiver may be implied from any acts or conduct on the part of the insurer apparently inconsistent with an intention to stand upon the letter of the condition as opposed to the spirit of the contract: *Equitable Life Assur. Society v. Winning*, 58 Fed. 541, 7 C. C. A. 359; *Continental Casualty Co. v. Lindsay* (Va.), 69 N. E. 344. If the insurer refuses to pay the claim, after a loss has occurred, because of a breach of any of the substantive provisions of the policy, or because the policy was not in force, such refusal is in itself a waiver of the provision requiring notice and proof of death to be submitted in accordance with the condition: *Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co.*, 34 Conn. 561, Fed. Cas. No. 10,363; *Merritt v. Cotton States L. Ins. Co.*, 55 Ga. 103; *Metropolitan L. Ins. Co. v. Zeigler*, 69 Ill. App. 447; *United States Health & Accident Ins. Co. v. Harvey*, 129 Ill. App. 104; *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534; *National L. Ins. Co. v. Whitacre*, 15 Ind. App. 506, 43 N. E. 905; *United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760; *Rutherford v. Prudential Ins. Co.*, 34 Ind. App. 531, 73 N. E. 202; *Protective Union v. Whitt*, 36 Kan. 760, 59 Am. Rep. 607, 14 Pac. 275; *Fidelity & Casualty Co. of New York v. Cooper*, 137 Ky. 544, 126 S. W. 111; *Prudential Ins. Co. of America v. Devoe*, 98 Md. 584, 56 Atl. 809; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Welsh v. Chicago Guaranty Fund L. Soc.*, 81 Mo. App. 30; *Weber v. Ancient Order of Pyramids*, 104 Mo. App. 729, 78 S. W. 650; *United Zinc. Cos. v. General Accident Assur. Corp.* (Mo. App.), 128 S. W. 836; *German Ins. & S. Inst. v. Kline*, 44 Neb. 395, 62 N. W. 857; *Marston v. Massachusetts L. Ins. Co.*, 59 N. H. 92; *Seeley v. Manhattan L. Ins. Co.*, 72 N. H. 49, 55 Atl. 425; *Dean v. Aetna L. Ins. Co.*, 4 Thomp. & C. (N. Y.) 497; *O'Rourke v. John Hancock Mut. L. Ins. Co.*, 30 N. Y. Supp. 215; *Cole v. Preferred Acc. Ins. Co.*, 92 App. Div. 612, 86 N. Y. Supp. 1132; *Miles v. Casualty Co. of America*, 115 N. Y. Supp. 1; *Girard L. Ins. Co. v. Mutual L. Ins. Co.*, 97 Pa. 15; *Standard Life Ins. Co. v. Koen*, 11 Tex. Civ. App. 273, 33 S. W. 133; *Metropolitan L. Ins. Co. v. Gibbs*, 34 Tex. Civ. App. 131, 78 S. W. 398; *Daniher v. Grand Lodge*, 10 Utah, 110, 37 Pac. 245; *Travelers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553; *Tayloe v. Merchants' F. Ins. Co.*, 9 How. 390, 13 L. ed. 187; *Lazensky v. Supreme Lodge*, 24 Blatchf. 533, 31 Fed. 592; *Unsell v. Hartford Life Ins. Co.*, 32 Fed. 443; *Equitable L. Assur. Soc. v. Winning*, 58 Fed. 541, 7 C. C. A. 359. And where the company has first attempted a compromise with the

claimant and on its failure denied liability, their actions impliedly waived their right to strict compliance: *Willison v. Jewelers' & Tradesmen's Co.*, 34 Misc. Rep. 216, 68 N. Y. Supp. 1129. But where there has been no denial of liability until after the time for furnishing the proofs has expired, there is no waiver in the denial: *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 851.

Refusal to furnish blanks for making the proof of death on the ground that the insurer repudiates his liability has been held to disentitle the insurer from claiming an escape from liability for the breach of not furnishing the proof in accordance with the policy: *National Masonic Acc. Assn. v. Seed*, 95 Ill. App. 43; *Pray v. Life Indemnity Co.*, 104 Iowa, 114, 73 N. W. 485; *Meagher v. Life Union*, 65 Hun, 354, 20 N. Y. Supp. 247; *Stepp v. National Life Assn.*, 37 S. C. 417, 16 S. E. 134; *Metropolitan L. Ins. Co. v. Gibbs*, 34 Tex. Civ. App. 131, 78 S. W. 398, in fact, any conduct of the insurer calculated to induce delay or the belief that strict compliance will not be called for, amounts to a waiver: *American Ins. Co. v. Dannehower*, 89 Ark. 111, 115 S. W. 950.

The acceptance of a verbal notice, where the company has acted upon it, will operate as a waiver. In *Edward v. Travelers' Life Ins. Co.*, 20 Fed. 661, the insurer sought to take advantage of the absence of written notice. The court, after saying that no attempt would be made to conceal the fact that such a defense did not commend itself to them, continued: "Where a life insurance company seeks to avoid the sacred obligation which it has assumed, because, for instance, a fact is communicated to it orally instead of in writing, the court should be very sure of the rectitude of such a defense before permitting it to succeed. These policies are prepared with great care; . . . they are surrounded by agreements and warranties innumerable—a labyrinth of conditions, where one heedless or uninformed may easily go astray. . . . A strict construction would often work injustice to both parties alike. To the insured, by permitting nonessentials to defeat an equitable claim; to the insurer, by shaking the confidence of the people in the system of life insurance." The oral notice was given within the time limited and blanks obtained. The blanks were returned filled in, after the specified time. Further information was sought thereafter by the company. The court held that if the plaintiff had not followed the contract literally, it was because she was misled by the acts of the company, which had placed it beyond their power to take advantage of the technical omissions, they having waived a strict performance. And where the insurer was asked within the time limit for blanks and duly sent them, but they did not reach the claimant, who so informed the insurer, and other blanks were sent after the time limit, the waiver was held effective: *Robinson v. North Western Nat. Ins. Co.*, 92 Minn. 379, 100 N. W. 226; and where the insurer wrote saying the policy was forfeited and the claim considered invalid, but he sent the blanks asked for out of courtesy, the waiver of strict compliance with the policy as to notice and proof of death was established: *Continental Casualty Co. v. Lindsay (Va.)*, 69 S. E. 344.

The plain duty of an insurer on receiving proof of death in substantial compliance with the condition requiring it is to express his dissatisfaction with it, if it falls short of his requirement, for if there are any irregularities and the insurer does not object to them, he is taken to have waived them: *Jennings v. Metropolitan Ins. Co.*, 148

Mass. 61, 18 N. E. 601; *Peacock v. New York L. Ins. Co.*, 1 Bosw. (N. Y.) 338; *Guldenkirch v. United States Mutual Acc. Assn.*, 5 N. Y. Supp. 428; *Girard Life Ins. Co. v. National Life Ins. Co.*, 97 Pa. 15; *Stambler v. Order of Pente*, 159 Pa. 492, 28 Atl. 301. No injustice is done thereby to the insurer. His acceptance of the proof deals only with their form and not their substance, and his silence is only construed a waiver as to the former. If the statements are untrue, they are made at the peril of the claimant: *Crotty v. Union Mut. L. Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. Rep. 749, 36 L. ed. 566. In the case last named, Mr. Justice Brewer puts it thus concisely: "The purpose of proofs of death in life insurance and proofs of loss in fire insurance cases is to put the insurance company in possession of the facts concerning the death or loss, as claimed by the beneficiary or insured, upon which it is to base its determination as to making or refusing payment, and when it receives such proofs without question, it is an admission on its part that they are in form sufficient, but not that all the facts stated therein are true." In the course of the opinion, the case of *Manhattan L. Ins. Co. v. Francisco*, 17 Wall. 672, 21 L. ed. 698, was referred to, and Mr. Justice Brewer commenting on it said that all that was in fact determined in that case was that if the proofs were retained without objection, the court could not declare them insufficient. That case is not in conflict with *Crotty v. Union Mutual Life Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. Rep. 749, 36 L. ed. 566, referred to.

VON TOBEL v. CITY OF LEWISTOWN.

[41 Mont. 226, 108 Pac. 910.]

MUNICIPAL CORPORATION—Estoppel to Open Street.—

Where a city has, without objection, permitted a person to occupy land for twenty years and place permanent improvements thereon, it will be estopped to assert that a portion of the land has been dedicated for a street and to open the alleged street through the tract to his great injury. (p. 736.)

Wm. M. Blackford, for the appellant.

O. W. Belden and Rudolf Von Tobel, for the respondent.

²³⁰ HOLLOWAY, J. This suit was brought to obtain an injunction restraining the city of Lewiston from opening or attempting to open a public ²³¹ street through certain premises claimed by plaintiff. The plaintiff alleges that he is, and for more than twenty years last past has been continuously, the owner and in possession of certain lands situated within the corporate limits of the city of Lewistown (then follows a description by metes and bounds); that Third avenue in said city abuts on his property, and that about August 16, 1907, the city, without any right and against the

will of the plaintiff, tore down his fence inclosing his property and threatens to, and, unless restrained, will, open and extend Third avenue through his property for a distance of about three hundred feet. The answer admits that defendant tore down plaintiff's fence, that unless restrained it will open and extend Third avenue through his premises; but denies that in so doing it has acted or will act wrongfully. The answer then contains new matter by way of defense, to the effect that in 1882 Francis A. Janeaux and wife were the owners of the southwest quarter of the northeast quarter of section 15, township 15 north, range 18 east, in Meagher (now Fergus) county; that they then caused a portion of said land to be surveyed and platted as a townsite, and a plat thereof to be duly filed in the office of the county clerk and recorder; that one of the avenues surveyed, staked out, and made to appear on said plat was and is the Third avenue mentioned above; that thereafter, in 1884, the said Janeaux and wife again caused the said lands to be surveyed, staked out, marked and platted, and a plat thereof to be filed in the office of the county clerk and recorder; but, by mistake, the plat and indorsements thereon made it appear that the land so surveyed and platted was the southwest quarter of the northwest quarter of said section 15, whereas it was intended to represent the southwest quarter of the northeast quarter of said section; that thereafter, on August 20, 1890, for the purpose of correcting the erroneous description, an amended map or plat was filed; that in making the surveys, marking and designating the lots, blocks, streets, avenues, and alleys, and in filing the plats, it was the intention of the owners to "devote, remise, grant, quitclaim, convey and dedicate the streets, avenues and alleys thus staked off, laid out, marked, ²³² and designated to the public for its use and benefit forever." It is then alleged that in 1886 the plaintiff purchased from Francis A. Janeaux and wife the land now claimed by him, and received a deed therefor which described the land by metes and bounds, which description concludes: "Except the streets and alleys contained thereon." It is further alleged that within the exterior boundaries as given in the deed above there was a portion of Third avenue, a portion of Water street, and a portion of the alley which passes through block S22, and that the respective portions of said avenue, street and alley were expressly excepted from the grant contained in the deed to plaintiff. It is then alleged that the public accepted the dedication of the streets, avenues and alleys, and, as rapidly as the same could be, they were improved and used by the public. Most of these affirmative allegations were put in issue by reply. There is in the reply also a plea of the bar of the statute of limitations, a plea of estoppel in pais, and an attempt to

plead title by adverse possession. The trial court found in favor of plaintiff on his plea of adverse possession, and further found that the evidence was not sufficient to show that any of that portion of Third avenue in question had ever been dedicated to the public as a street, highway or otherwise. From the findings made the court concluded that the acts of the defendant city in attempting to extend Third avenue through plaintiff's property were wrongful, and that plaintiff was entitled to a permanent injunction restraining the city from further interfering with his possession of that particular portion of his property. From the decree entered in favor of plaintiff and from an order denying it a new trial, the city appeals.

Much of the argument of counsel for the respective parties is devoted to a consideration of two questions: 1. What is necessary to constitute a valid and effective dedication of a street? And 2. Does the statute of limitations run against a municipal corporation with respect to property held in trust for the public use? While a discussion of these questions would involve many interesting legal propositions, we do not deem it ²³³ necessary to consider either of them to any great extent. This is a suit in equity, and the evidence is all before us. It therefore devolves upon us to make such disposition of the questions involved as the exigency of this particular case requires.

The record discloses that in 1882 Janeaux and wife filed the first plat of the original townsite of Lewistown. At that time there was not any statute authorizing such procedure. Therefore the acts done by the owners of the property in that year could not amount to a statutory dedication of the streets, avenues and alleys; furthermore, the 1882 plat does not embrace the premises now in controversy, and, so far as this case is concerned, all evidence touching that survey and the proceedings had thereon is of little or no value. In 1884, after the passage and approval of the act of February 19, 1883, authorizing the laying out of townsites on private property, Janeaux and wife caused a portion of forty acres to be surveyed, staked out, and platted, and a plat thereof to be filed with the county clerk and recorder, but by a mistake that plat and indorsements thereon are made to describe and represent land a quarter of a mile away from the original townsite of Lewistown. In several minor particulars the proceedings taken at that time did not conform to the statutory requirements. This, then, was the condition of affairs when, in 1886, this plaintiff purchased the land now claimed by him, went into possession, and commenced improving the same. In 1890 the mistake in the 1884 plat was discovered, and an attempt was made by the administratrix of the Janeaux estate to correct the same by having another plat filed; but the

evidence fails to show that any authority was sought or obtained from the probate court for the proceedings taken. From the evidence presented in this record we are left somewhat in doubt as to whether Third avenue, where it passes through the property claimed by plaintiff, was ever actually surveyed. McFarland, who made the survey for Janeaux and prepared the 1884 and 1890 plats, testified that he could not remember whether he established the corners along that portion of Third avenue. But these facts are ²³⁴ recited only for the purpose of showing that at the time plaintiff purchased the property, and went into possession of it, it was at least doubtful whether any attempt had been made to dedicate that portion of Third avenue to the public use. In view of these conditions, and the fact of the proximity of this property to the business center of the city; the fact that Third avenue, before it reaches the boundaries of plaintiff's property, has been during all these years practically cut off and terminated by a creek and slough, and that it will require great expenditure of time and money to improve it; the further fact that there is some evidence that the survey of the original townsite did not extend to the east line of the forty-acre tract, and therefore the city would be without authority to connect this avenue with any other street or alley, or, to speak more accurately, would be confronted with a strip of land from thirty to thirty-five feet in width, extending diagonally across this avenue, to which strip of land the plaintiff appears to have a good title—all lead us to entertain a serious doubt whether the city ever intended to assert any claim to this particular portion of Third avenue, so called, until this controversy arose. And in view of the fact that for more than twenty years the city has lain by and without objection has permitted plaintiff to occupy this portion of the so-called Third avenue, and at considerable expense to place permanent improvements thereon, and the fact that the plaintiff must sustain great injury in having a portion of his premises segregated from the rest, by the opening of this avenue, that he would be compelled to remove his barn and other outbuildings, and would suffer his trees, vines and shrubbery to be destroyed, it would seem extremely inequitable for the city at this late date to assert its right to devote to public use, without compensation to the plaintiff, a portion of this property which he has so long claimed and the undisputed possession of which he has so long enjoyed. Under these circumstances, we think the city should be, and is, estopped to assert the claim which it now makes.

In 2 Dillon on Municipal Corporations, fourth edition, section 675, it is said: "The author cannot assent to the doctrine that, ²³⁵ as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to

recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case, to hold the public estopped or not, as right and justice may require." Acting upon the doctrine of this text, the courts have repeatedly applied to municipal corporations the doctrine of equitable estoppel, and we think it peculiarly applicable here: *John Mouat Lumber Co. v. City of Denver*, 21 Colo. 1, 40 Pac. 237; *Baldwin v. Trimble*, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489; *Orr v. O'Brien*, 77 Iowa, 253, 14 Am. St. Rep. 277, and note, 42 N. W. 183; *Chicago & N. W. Ry. Co. v. People*, 91 Ill. 251; *Piatt County v. Goodell*, 97 Ill. 84; *Hamilton v. State*, 106 Ind. 361, 7 N. E. 9; *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108.

Without determining whether the trial court was correct upon the theory which it adopted, we approve the result, but prefer resting our decision upon the application of the doctrine of estoppel in pais. The judgment and order are affirmed.

Mr. Chief Justice Brantly and Mr. Justice Smith concur.

The Doctrine of Estoppel in Pais can, according to perhaps the prevailing trend of authority, be appealed to effectively, as against a municipal corporation, only when it is acting in its private, as contradistinguished from its public or governmental, capacity: *Philadelphia Mtg. etc. Co. v. Omaha*, 63 Neb. 280, 93 Am. St. Rep. 442; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143; note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 494, 495. But according to *People v. City of Rock Island*, 215 Ill. 488, 106 Am. St. Rep. 179, if a person acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied against the city. And in *Davenport v. Boyd*, 109 Iowa, 248, 77 Am. St. Rep. 536, it is affirmed that if a city taxes land and levies special assessments upon it for thirty years, and an individual occupies it under a claim of right in good faith for nineteen years, without deceiving or misleading the officers of the city, and its rights could have been easily ascertained at all times, the city is estopped to assert title to the land as against him.

The Estoppel of a County or Municipal Corporation to Contest Illegal Claims or Expenditures forms the subject of a note, ante, p. 354.

BRACEY v. NORTHWESTERN IMPROVEMENT COMPANY.

[41 Mont. 338, 109 Pac. 706.]

NEGLIGENCE—Rescue of Person in Peril.—One who, observing another in peril, voluntarily exposes himself to the same danger in order to protect him or save his life, may recover for any injury sustained in effecting the rescue, against the person through whose negligence the perilous condition has been brought about, provided the exposure is not made under such circumstances as to constitute rashness in the judgment of prudent persons. (p. 741.)

NEGLIGENCE—Rescue of Person in Peril.—Where one voluntarily exposes himself to danger to save the life of another, the incurring of the danger is not per se negligence. The question of his negligence is ordinarily to be answered by the jury, upon proof of the circumstances surrounding the attempt to rescue, such as the alarm, excitement and confusion usually present, and the uncertainty as to the means to be employed, the promptness required, and the liability to err in the exercise of judgment as to the best course to pursue. Great latitude of judgment must be allowed to one who is impelled by the dictates of humanity to decide and act in the face of emergencies. (p. 741.)

NEGLIGENCE—Rescue of Person in Peril.—To warrant a recovery where one voluntarily exposes himself to danger to save human life, negligence toward the person rescued, or the person making the rescue after the attempt has been made, is essential. (p. 743.)

NEGLIGENCE—Rescue of Person in Peril.—Where one sues for injuries sustained while voluntarily exposing himself to danger to save human life, the presumption that he was impelled by the dictates of humanity is of itself sufficient to send the case to the jury, unless it is apparent that when he encountered the danger, he ought, as a prudent person under the circumstances, to have known that he could not escape injury or death. (p. 743.)

NEGLIGENCE—Rescue of Person in Peril.—Where the complaint in an action to recover for the death of a coal miner, who was overcome by gases while rescuing a fellow-workman, alleges that the death was due to the accumulation of gases spontaneously generated in unused workings which he entered, while the evidence discloses that the gases which caused his death were generated by a fire in the mine, the variance is such as amounts to a failure of proof, and brings the case within the rule that unless the evidence furnishes substantial support for the cause of action alleged, the plaintiff has failed to make out his case, even though the evidence shows negligence in other respects. (p. 746.)

NEGLIGENCE—Pleading and Evidence.—In an action for personal injuries the evidence must tend not only to show the negligence alleged, but also the causal connection between it and the injury. (p. 746.)

Walsh & Nolan and Meyer & Wiggenhorn, for the appellants.

William Wallace, Jr., John G. Brown and R. F. Gaines, for the respondents.

³⁴¹ BRANTLY, C. J. This action was brought by Alice Bracey in her own right, as the widow and heir of J. E.

Bracey, deceased, and as guardian of her minor children, for damages for the death of said Bracey, which it is alleged was caused by the negligence of defendants. The death of Bracey was caused by the inhalation of poisonous gases during an attempt by him to rescue miners in the employ of the defendant company, in its coal mine at Red Lodge, in Carbon county, who had themselves been overcome by inhaling such gases while engaged in an effort to extinguish fire then burning in the mine.

The complaint is very long and somewhat indefinite in some of its allegations; but these may be epitomized as follows: The defendant Pettigrew was the superintendent and general manager of the defendant company and had full charge of its business operations. On and prior to June 7, 1906, there were in the mine gases, deadly and explosive. In order to expel them, the defendant company resorted to ventilation by means of electric fans, which drove currents of air into and through the passageways and out through other openings, thus expelling the gases, or, by reverse movement, drew them out by currents produced by suction, thus allowing fresh air to be forced in through other openings. In some of the passageways there were obstructions, created by debris which was permitted to accumulate therein from falls of rock and earth. These obstructed the free passage of air currents. There were unused workings, from which the coal had been extracted. In these, gases accumulated from time to time, and, escaping therefrom when the fans were ³⁴² not in operation, accumulated in the passageways. On and prior to June 7th a fire had for some days been burning in the mine. On June 6th one of the ventilating fans had been stopped, and for this reason gases accumulated in the passageways through which men going in to subdue the fire must pass. This fan was started on the morning of the 7th, but had not been running a sufficient time to clear the passageways of the gases. The defendants did not examine these to ascertain their condition. Several miners were sent in by the direction of defendant Pettigrew to subdue the fire, without being informed, however, of the presence of these gases, and, being overcome by them, were in peril of their lives. Information of this condition was brought to the knowledge of defendants and was circulated in the vicinity of the mine, and the defendants knew that rescue parties were likely to go in to effect a rescue. The deceased, Bracey, did not know of the conditions prevailing. At the request of the defendants, and by reason of the information gained through persons in the vicinity, Bracey entered the mine to aid in the rescue. After stating these facts, the complaint proceeds: "That the defendants, wholly disregarding of their duty in the premises, negligently failed

to inform and advise the said J. E. Bracey, so entering said mine in the manner hereinabove set forth and under the circumstances therein stated, and for the purpose specified, as to the existence of the poisonous gases that had accumulated in said mine and the workings thereof, and that were then existing through the negligent acts and conduct of the defendants, as above set forth, and negligently failed to advise the said J. E. Bracey of the lack of ventilation then and there existing as above set forth; and the said J. E. Bracey, then and there ignorant of the lack of ventilation, and then and there suspecting and believing that the only dangers and risks to which he was then exposing himself in the work of rescue, aforesaid, were the dangers and risks which arose from the gases then being created and existing on account of the prevalence of the fire in said mine, hereinbefore referred to, on the date named entered said mine and the workings thereof for the purpose of rescuing ³⁴³ the said named persons therein, and the said J. E. Bracey so entering said mine and the portions thereof where said work of rescue was to be performed by him, as aforesaid, and so engaged in said work, was overcome by the gases so negligently permitted to accumulate, as aforesaid, in consequence of which, on the day named, he died in said mines; and plaintiffs further aver, in that connection, that the gases then and there causing his death were gases other than those generated and developed by said fire and of whose existence he was then and there conscious."

The answer denies all of the allegations of the complaint charging the defendants with the acts and omissions constituting the negligence alleged. It alleges that the deceased entered the mine as a volunteer, and that his death was due to his own contributing fault and negligence. At the close of plaintiff's evidence, the defendants moved the court to direct a verdict in their favor, on several grounds, among others, in substance, the following: For that while it is alleged in the complaint that the death of Bracey was due to the inhalation of gases other than those generated by the fire, of which he had knowledge, the evidence shows conclusively that it was caused by gases generated directly by the fire. The motion was sustained, and judgment entered accordingly. The appeal is from the judgment.

The only question submitted for decision is whether the trial court properly withdrew the case from the jury. Recovery is sought upon the theory that the defendants are chargeable with the death of Bracey, by requesting or permitting him to enter the mine for the purpose of rescuing the imperiled miners, without informing him of the dangerous conditions known or which should have been known to them to exist therein, and thus exposing him to a peril of which

he had no knowledge. It will be noticed that the existence of the fire is not attributed to any negligence or omission of duty by the defendants; nor is it alleged that gases generated by it were permitted to accumulate. It is alleged that the peril of the miners was due to the accumulation of gases spontaneously generated in the unused workings, ³⁴⁴ and that the accumulation of these in the passageways which he entered was the cause of Bracey's death. Plaintiff's right of recovery must, therefore, be sustained or denied upon the showing made by the evidence on this point.

The rule is recognized generally that one who, observing another in peril, voluntarily exposes himself to the same danger in order to protect him or save his life, may recover for any injury sustained in effecting the rescue, against the person through whose negligence the perilous condition has been brought about, provided the exposure is not made under such circumstances as to constitute rashness in the judgment of prudent persons. In Mr. Thompson's work on Negligence, we find the rule stated as follows: "One who, acting with reasonable prudence, voluntarily exposes himself to danger for the purpose of protecting the person of another, may recover for the consequent injuries which he receives, from the persons whose negligence or other wrong caused the injury to himself and the danger to the person whom he sought to rescue": Section 199. The rule rests upon the principle that it is commendable to save life, and, though a person attempting to save it voluntarily exposes himself to danger, the law will not readily impute to him responsibility for an injury received while doing so. In such cases the incurring of the danger is not per se negligence, and the question whether there was contributory negligence is ordinarily to be answered by the jury upon proof of the circumstances surrounding the attempt to rescue—such as the alarm, excitement and confusion usually present, and the uncertainty as to the means to be employed, the promptness required, and the liability to err in the exercise of judgment as to the best course to pursue—and great latitude of judgment must be allowed to one who is impelled by the dictates of humanity to decide and act in the face of emergencies. This is true in a case where an effort is made to rescue a person discovered upon the track in front of a rapidly moving train: *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553, 28 N. E. 172, 13 L. R. A. 190. In this case the plaintiff was injured while attempting to rescue ³⁴⁵ a child which he discovered in front of a train approaching at an unlawful rate of speed, at a public crossing which had been left unguarded by the defendant company. The court said: "The act of the defendant in error was not only lawful, but it was highly commendable;

nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the railroad company in having no watchman at this public crossing and the unlawful rate of speed at which the train was running toward it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances, it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether, if the danger was imminent. The attendant circumstances must be regarded. The alarm, the excitement, and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be done—suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is supported by neither principle nor authority.”

Eckert v. Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721, was a similar case, and in declaring the rule of law applicable the court said: “Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without ³⁴⁶ serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt to do so, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment’s delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons”: See, also, *Becker v. Louisville & Nashville R. R. Co.*, 110 Ky. 474, 96 Am. St. Rep. 459, 61 S. W. 997, 53 L. R. A. 267; *Donahoe v. Wabash, St. L. & Pac. R. Co.*, 83 Mo. 560, 53 Am. Rep. 594; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Whitworth v. Shreveport Belt Ry. Co.*, 112 La. 363, 36 South. 414, 65 L. R. A. 129; *Corbin*

v. Philadelphia, 195 Pa. 461, 78 Am. St. Rep. 825, 45 Atl. 1070, 49 L. R. A. 715; Maryland Steel Co. v. Marney, 88 Md. 482, 71 Am. St. Rep. 441, 42 Atl. 60, 42 L. R. A. 842; Saylor v. Parsons, 122 Iowa, 679, 101 Am. St. Rep. 283, 98 N. W. 500, 64 L. R. A. 542; Gibney v. State, 137 N. Y. 1, 33 Am. St. Rep. 690, 33 N. E. 142, 19 L. R. A. 365; Wharton's Law of Negligence, sec. 314.

In *Corbin v. Philadelphia*, 195 Pa. 461, 78 Am. St. Rep. 825, 45 Atl. 1070, 49 L. R. A. 715, the defendant had left in one of its streets an excavation, made in an endeavor to find an old sewer. The work had been abandoned because gas had accumulated in the excavation in such quantity as to make it unsafe to continue it. It was near a vacant lot, where boys were in the habit of playing ball. No warning had been given that there was gas in it. A few days after it was abandoned, a ball was knocked into it, and a boy went to get it. He was overcome by gas and fell to the bottom. Plaintiff's son, observing his condition, went to his rescue and was himself overcome and died. The supreme court held that it was a question for the jury whether the city had been guilty of negligence, and also whether the deceased was justified in attempting the rescue.

In all cases, negligence toward the person rescued or the person making the rescue, after the attempt has begun, is essential ³⁴⁷ to recovery: *Saylor v. Parsons*, 122 Iowa, 679, 101 Am. St. Rep. 283, 98 N. W. 500, 64 L. R. A. 542; *Donahoe v. Wabash, St. L. & Pac. Ry. Co.*, 83 Mo. 560, 53 Am. Rep. 594. Nevertheless, the presumption that the rescuer is impelled by the dictates of humanity is of itself sufficient to send the case to the jury, unless it is apparent that, when he encountered the danger, he ought, as a prudent person under the same circumstances, to have known that he could not escape injury or death. The same presumption applies in an action upon an accident insurance policy which contains a stipulation against liability for injuries resulting to the insured from voluntary exposure to unnecessary danger: *Da Rin v. Casualty Co. of America*, ante, p. 709, 108 Pac. 649.

As has already been said, the charge is that the defendants negligently exposed Bracey to a danger of which he had no knowledge, to wit, permitted or requested him to go to the rescue thinking that the miners had been overcome by gases generated by the fire, and that he would expose himself to the danger of encountering these only; whereas they knew, or should have known, that he would on his way to them encounter peril from the spontaneous gases which had accumulated in the passageways from the abandoned workings. The inquiry here, therefore, is not whether the defendants were guilty in exposing the deceased to this danger, within the rule

declared by the authorities cited, but whether the cause of his death was that alleged; that is, "gases other than those generated and developed by the fire and of the existence of which he was then and there conscious." It may be conceded that they were guilty of gross negligence, both in sending the miners in to subdue the fire without ascertaining what the conditions were, and afterward in permitting the rescuers to enter in ignorance of them.

It is somewhat difficult to ascertain from the statements of the witnesses a clear understanding of the relations to each other of the various portions of the mine, and the method adopted to secure ventilation. As we understand the situation, the deposits of coal consist of several superimposed and nearly parallel veins descending into the earth from the outcrop on the side of a hill, at an angle of from sixteen to eighteen degrees. They vary in ³⁴⁸ thickness from five to fourteen feet, and are separated by strata of country rock varying from fifty to one hundred feet in thickness. They are mined through slopes driven into the hill, following the incline. From the slopes, at convenient distances, usually five hundred feet, and in a direction perpendicular to them, levels are driven in order to open up the bodies of the deposits. From the levels, and parallel with the direction of the slopes, are excavations called "rooms." The slopes consist of parallel entries, separated by a wall of coal; one being used for the purpose of hauling out coal and the other as an air passage. The slopes and levels are so connected by openings, either through the country rock or the intervening coal deposits, as to allow free passage of air currents. These are produced by a system of reversible fans which send the currents inward or outward, at the will of the operator, and are so adjusted in the direction of their revolution as to assist each other in maintaining a constant current, and keep the portion of the mine in which work is in progress free from gases. The veins are numbered from 1 to 6, beginning with the uppermost. At the time of the accident, fire had been burning for some days in two different rooms, one on one of the levels connected with the slope on vein No. 6, and one on level 4 on vein 4. The most convenient way of access to the point where the first was, was through slope No. 6. This portion of the workings was ventilated by one fan, known as "No. 6," on slope 6, assisted by another, designated as "No. 2," at the entrance to slope No. 2, between which and slope 6 there were open air passages. On the morning of the accident, work having been suspended because of the fire, a number of men were sent into the mine to subdue the one burning on slope 6. A short time afterward news was brought to the office of the company by some of them who had returned, that the others

had been overcome by gas and would die unless they were rescued at once. The news was also circulated in the town of Red Lodge. Employés of the company not on duty, of whom deceased was one, and relatives of some of the imperiled miners, gathered at the company's office with the employés who ³⁴⁹ had returned, and, having obtained lights, went immediately to the rescue. It does not appear that any of these were requested to go, but rather that all went willingly, the impulse governing them being the desire to save the men, if possible. The defendant Pettigrew joined with the rest, some dozen in all. The deceased was in company with the witnesses Freeman and Atherton, two other of the company's employés. When they reached the men, who were near the bottom of slope No. 6, Bracey was so affected by the gas that he was entirely overcome and died before help could reach him. Atherton and Freeman were both helped out by the others. Six of the men sent in to subdue the fire lost their lives.

The evidence is silent as to what inspection had been made by the company to ascertain the conditions before the miners were sent in to subdue the fire, or as to whether any information concerning them had been given to any of the rescuers. It tends strongly to rebut the conclusion, however, that the deceased died from inhaling gases other than those generated by the fire. On this point Atherton testified: "I don't know just where the gas accumulated from; whether it came from No. 2 entry that we was looking at, or any of these rooms cut through there. It might have come out of them, but I don't know. It came from the fire, I believe; but which way it came I don't know." McKenzie, another of the rescuers who was overcome and had to be helped out, testified: "The gases which were in the mine at the time I entered, at about 10 o'clock in the forenoon (the time of the rescue), were occasioned by a fire down in the third west entry, and the air, being forced from there out past the place where I was, carried the gas with it." This is all the evidence on the subject to be found in the record. The circumstances also tend strongly to show that the conclusion of these witnesses is the correct one, for it appears that the miners engaged on the day before in an attempt to subdue the fire had experienced no inconvenience from the presence of gas, and that the accumulations which occasioned the loss of life were due, either to the stopping of the fans during the preceding night, ³⁵⁰ or to the inefficient operation of them during the morning prior to the time work was commenced. Indeed, there is no foundation in the evidence for the inference that gases in dangerous quantities were spontaneously generated in the abandoned workings.

The plaintiff having alleged in her complaint that Bracey's death was due to the inhalation of gases other than those generated by the fire, and having failed to furnish evidence to establish, directly or indirectly, the specific cause of it thus alleged, the motion for nonsuit was properly granted. The divergence thus appearing between the cause alleged and the evidence adduced to establish it is such a variance that it amounts to a failure of proof, and brings the case within the rule that, unless the evidence furnishes substantial support for the cause of action alleged, the plaintiff has failed to make out his case, even though the evidence shows negligence in other respects: *Forsell v. Pittsburgh & Mont. Co.*, 38 Mont. 403, 100 Pac. 218; *Flaherty v. Butte El. St. Ry. Co.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416. The evidence must tend not only to show the negligence alleged, but also the causal connection between it and the injury: *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.

The judgment is affirmed.

Mr. Justice Smith and Mr. Justice Holloway concur.

Where One Person is Exposed to Peril of Life or Limb by the Negligence of another, the latter is liable for injuries received by a third person in a reasonable effort to rescue the person so imperiled, if the rescuer does not rashly or unnecessarily expose himself to danger. The law has so high a regard for human life that it will not impute negligence to an attempt to save it, unless made under such circumstances as to constitute rashness: See the note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 849; *Saylor v. Parsons*, 122 Iowa, 679, 101 Am. St. Rep. 283; *Pittsburg etc. Ry. Co. v. Lynch*, 69 Ohio St. 123, 100 Am. St. Rep. 658; *Chattanooga Light etc. Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844, and cases cited in the cross-reference note thereto.

SCHAEFFER v. MILLER.

[41 Mont. 417, 109 Pac. 970.]

QUASI CONTRACT—Implied Promise to Return Money.—

Where, pending negotiations for the purchase of real estate, the vendee makes a payment on the purchase price to the vendor's agent, who has no authority to accept it, and the negotiations fail before any contract is entered into, and the agent returns part of the money thus paid, the law implies a promise to return the balance, and this obligation is termed a quasi contract. (p. 748.)

QUASI CONTRACT.—The Mythical Creation of the Law, called a quasi contract, was adopted for the purpose of enforcing a legal duty by an action in form *ex contractu*, but in reality in the nature of a bill in equity. (p. 750.)

QUASI CONTRACT.—It was for the Purpose of Making Applicable the form of action in *assumpsit* that the common law created

the fiction of a promise in what is known as a quasi contract. (p. 750.)

LIMITATION OF ACTIONS—Quasi Contract.—Where, pending negotiations for the purchase of real estate, the vendee pays part of the purchase price to the vendor's agent, who has no authority to accept it, and the negotiations fail before any contract is entered into, and the agent returns part of the money thus advanced, an action to recover the balance is not upon a "contract" but upon an "obligation," within the meaning of statutes providing that an action on a contract must be begun within five years, but "an action upon an obligation or liability, not founded upon an instrument in writing, other than a contract, account or promise," must be commenced within three years. (p. 752.)

Carpenter, Day & Carpenter, for the appellant.

Walsh & Nolan and Clayberg & Horsky, for the respondent.

⁴¹⁸ **HOLLOWAY, J.** Immediately prior to June 20, 1905, the Mutual Benefit Life Insurance Company of New Jersey owned the Denver Block in the city of Helena. T. B. Miller, this appellant, was a special agent for the insurance company, and, through him, L. H. Schaeffer, the respondent, entered into negotiations for the purchase of the property. These negotiations were apparently proceeding so favorably that Schaeffer paid over to Miller \$5,000 as a part of the purchase price on the property; but about June 20th the negotiations failed before a contract had been entered ⁴¹⁹ into, and Schaeffer thereupon demanded the return of his money. Miller repaid him \$4,000, but refused to pay the balance, and this action was commenced to recover the \$1,000 remaining unpaid. The complaint was filed April 19, 1909. In addition to other defenses, the answer pleaded the bar of the statute of limitations. At the close of the plaintiff's case upon the trial in the district court, the defendant moved for a nonsuit, and specified as one of the grounds of the motion that the cause of action was barred by the provisions of subdivision 3 of section 6447, Revised Codes. This motion was denied. The trial resulted in a verdict and judgment in favor of the plaintiff, from which judgment the defendant appealed.

Upon substantially the same evidence as presented in this record, we held, in *Schaeffer v. Mutual Benefit Life Ins. Co.*, 38 Mont. 459, 100 Pac. 225, that Miller did not have any authority, actual or ostensible, to accept the \$5,000 pending negotiations for a contract of sale. The present action proceeds upon the theory that, since Miller did actually receive the money which belonged to Schaeffer, and the negotiations failed before any contract of sale was ever entered into, in equity and good conscience, Miller should return the entire amount of \$5,000. There is not any dispute as to the character of action or of the right of plaintiff to maintain it if brought within time. The action was brought more than

three years and less than five years after the money was paid over to Miller and a demand for its return made by Schaeffer. At common law this would be treated as an action of implied assumpsit for money had and received by the defendant to the use and benefit of plaintiff; and while our code has abolished the forms of action, the principles underlying them are frequently applied in determining the rights and remedies of litigants.

Prior to 1903 our statute of limitations provided that an action upon a contract, obligation or liability founded upon an instrument in writing must be commenced within eight years (section 512, Code of Civil Procedure of 1895); while an action upon a contract, account, promise, obligation or liability not ⁴²⁰ founded upon an instrument in writing must be commenced within three years (section 514). By section 513 certain other actions were required to be brought within five years. In 1903 sections 513 and 514 above were amended (Laws of 1903, page 292, chapter 128), and the amended sections were brought forward into the Revised Codes as sections 6446 and 6447, respectively. Section 6446 provides that an action upon a contract, account or promise not founded upon an instrument in writing must be commenced within five years. Section 6447 provides: "3. An action upon an obligation or liability, not founded upon an instrument in writing, other than a contract, account or promise," must be commenced within three years. The only question presented by this appeal is: Which of the above provisions is controlling in this action? If the former, the action was brought in time; if the latter, the action was barred at the time the complaint was filed.

The answer to the question above stated is to be found in the answer to the other question: Is this an action upon a contract, or upon an obligation? Respondent contends that it is an action upon a contract, within the meaning of that word as used in section 6446 above; on the contrary, the appellant contends that it is an action upon an obligation as that word is used in section 6447, and must have been brought within three years, and, as it was not, it is barred. There was not any agreement between Miller and Schaeffer that Miller should return the money if the negotiations failed, or at all. There was not any meeting of minds and not any consideration; therefore there was not any "contract," as that term is generally understood. But Miller received money which in equity and good conscience he ought to turn over to Schaeffer, and upon this fact alone the law implies a promise on his part to do so; and this obligation of his, created or implied by law, is termed by the courts and law-writers a quasi contract—a contract implied by law, or a constructive contract.

It is a pure legal fiction; it lacks two of the essential elements of a contract, as defined in sections 4965 and 4966 of the Revised Codes, and as generally understood. ⁴²¹ In treating of quasi contracts or contracts implied by law, as distinguished from contracts implied in fact, the supreme court of Pennsylvania, in *Hertzog v. Hertzog*, 29 Pa. 465, a leading case upon the subject, says: "In one case, the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other, it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty. We have, therefore, in law three classes of relations called contracts: (1) Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied. (2) Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract. (3) Express contracts."

In *Sceva v. True*, 53 N. H. 627, it is said: "Illustrations might be multiplied, but enough has been said to show that when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an actual contract is generally to be found either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when, in point of fact, there was none. Of course this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the obligationes quasi ex contractu of the civil law, which seem to lie in the region between contracts on the one hand, and torts on the other, and to call for the application of ⁴²² a remedy not strictly furnished either by actions ex contractu, or actions ex delicto. The common law supplies no action of duty, as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract, and no promise to support it."

Emphasis is laid by respondent upon the fact that at common law the action of *assumpsit* was employed to enforce redress for the breach of a quasi contract, and at first blush this might appear to be a reason of some cogency for asserting that the subject matter of such action must be a contract; but the fact is that the classification of civil actions under the common law, as those arising from (1) torts, and (2) contracts, was not sufficiently comprehensive to include an action arising from the mere breach of duty, such as is presented by the case before us, and, to prevent a failure of justice, the courts at common law accommodated this right of action to the form of action called "*assumpsit*," by creating the legal fiction of a promise where there was not any in fact. The right of action for a breach of duty had for its foundation the maxim "*Ex aequo et bono*," and because the common-law counts partook of the nature of equitable remedies, they were deemed most appropriate to this right of action, not because it was founded upon a contract, but because it was of an equitable nature; and this mythical creation of the law, called a quasi contract, was adopted for the purpose of enforcing a legal duty by an action in form *ex contractu* (15 Am. & Eng. Ency. of Law, 2d ed., 1078; *Hertzog v. Hertzog*, 29 Pa. 465), but in reality in the nature of a bill in equity (15 Am. & Eng. Ency. of Law, 2d ed., 1098). At common law, substantive law was largely an appendix or supplement to the law of procedure; and it was for the very purpose of making applicable the form of action in *assumpsit* that the common law created this fiction of a promise: 2 Page on Contracts, sec. 771.

Speaking of quasi contracts in 9 Cyc. 243, it is said: "These obligations, however, are not contract obligations at all in the ⁴²³ true sense, for there is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy. They are described by the term 'quasi' or 'constructive' contracts."

In *Moses v. Macferlan*, 2 Burr. 1005, which was an action in *indebitatus assumpsit* upon the common count for money had and received upon a quasi contract, Lord Mansfield, speaking for the court in approval of the form of action adopted, said: "This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono* the defendant ought to refund."

Of the application of the common counts to an action upon a quasi contract, the supreme court of Alabama, in *Barnett v. Warren*, 82 Ala. 557, 2 South. 457, remarks: "A suit for money had and received is in the nature of an equitable action, and is maintainable whenever one person has money which,

ex aequo et bono, belongs to another (3 Brickell's Digest, 51, secs. 10, 11, 13); and it is not always necessary that actual money shall have been received. If the property, or anything else, be received as the equivalent of money, by one who assumes to cancel or dispose of a property right, for which, by contract, or liability, legal or equitable, it is his duty to account to another, the latter may treat the transaction as a receipt of money, and sue for it as such."

In *Camp v. Tompkins*, 9 Conn. 545, the court said: "This action for money had and received is in [the] nature of a bill in equity, and the gist of the action is, that the party is obliged by the ties of equity and natural justice to refund the money."

In 2 Greenleaf on Evidence, thirteenth edition, section 117, it is said: "The count for money had and received, which in its spirit and objects has been likened to a bill in equity, may in general be proved by any legal evidence, showing that the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff." This text is quoted with approval in *Davis v. Krum*, 12 Mo. App. 279.

⁴²⁴ So that, after all, the fact that an action *ex contractu* has been utilized for the enforcement of rights growing out of quasi contracts is of little significance in attempting to determine whether such an action is in fact upon a contract. There is not any reason for applying the term "quasi contract" to the relationship existing between plaintiff and defendant in any of these cases. Had the courts and text-writers described the relationship by the simple term "duty," the profession and litigants would have been saved much confusion and needless annoyance. But the same legislature which adopted section 514, Code of Civil Procedure of 1895, above, also adopted sections 2090 and 2091, and sections 1920 and 1921, Civil Code of 1895 (sections 4965, 4966, 4892, and 4893, Revised Codes). These sections read as follows:

"Sec. 2090. A contract is an agreement to do or not to do a certain thing.

"Sec. 2091. It is essential to the existence of a contract that there should be: 1. Parties capable of contracting. 2. Their consent. 3. A lawful object; and 4. A sufficient cause or consideration."

"Sec. 1920. An obligation is a legal duty, by which a person is bound to do or not to do a certain thing.

"Sec. 1921. An obligation arises either from: 1. The contract of the parties; or, 2. The operation of law."

These sections are quoted literally from the Field New York Code of 1865. It is only reasonable to presume that the legislature which adopted the codes of 1895 used the term

“contract,” in section 514, as defined and analyzed by it in sections 2090 and 2091 above, and likewise used the term “obligation” as defined by it in sections 1920 and 1921 above. If this be true, and it is scarcely open to doubt, then there never was a contract between Miller and Schaeffer for the return of this money, and an action to enforce the return of it is not an action upon a contract as defined in the codes or as used in the statute of limitations. But the duty to return the money is the very foundation of the action, and the relationship of Miller to ⁴²⁵ Schaeffer is properly characterized by the term “obligation” or legal duty; and this present action is one to enforce a duty created by law from the very right and justice of Schaeffer’s demand, and is an action upon an obligation, not founded upon an instrument in writing, as that term is used in the statute of limitations. Such an action must be brought within three years from the time the cause of action accrues; and, as this action was not brought within the time limited by the statute, the cause of action was barred, and the court erred in refusing to grant the nonsuit. This conclusion does not conflict in the least with the decision of this court in *Galvin v. Mac M. & M. Co.*, 14 Mont. 508, 37 Pac. 366. The right of a litigant in certain cases to waive a tort and sue as in assumpsit is recognized by the authorities generally; but, by amending section 514 above, it can hardly have been intended by the legislature that such election of remedies should operate to give the plaintiff two years’ additional time within which to assert his right.

The plea of the bar of the statute of limitations is one recognized by law. Statutes of limitations are the creatures of legislation, and are enacted for the express purpose of being utilized, to the end that one may not be harassed by litigation after a reasonable time has elapsed, and proof, which might otherwise have been available, may have been lost. They are essentially statutes of repose. The defense having been interposed in this action, it should have prevailed.

The judgment is reversed, and the cause is remanded to the district court, with direction to set aside the judgment heretofore entered, and enter judgment in favor of the defendant for his costs.

Mr. Chief Justice Brantly and Mr. Justice Smith concur.

An Action of Assumpsit for Moneys had and Received is an equitable remedy existing in favor of one person and against another, when that other has received moneys either from the plaintiff or from a third person under such circumstances that in equity and good conscience he ought not to retain the same, and which, *ex aequo et bono*, belong to the plaintiff: *Merchants’ etc. Nat. Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586. See, also, *McDonald v. Metropolitan Life Ins. Co.*,

68 N. H. 4, 73 Am. St. Rep. 548; Harvey v. Denver etc. R. R. Co., 44 Colo. 258, 130 Am. St. Rep. 120.

Limitation of Actions—Implied Contract.—Suits against the directors of a corporation for injury suffered by it, through their negligence and mismanagement, fall within that clause of the statute of limitations providing the time within which actions may be brought upon contracts, because the relation of a director to a corporation implies a contract that he will use ordinary diligence in the discharge of the duties of his office, and an action for omission of such duty is an action for a breach of this implied contract: Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625.

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CASES
IN THE
SUPREME COURT
OF
OHIO.

**WESTERN UNION TELEGRAPH COMPANY v.
SULLIVAN.**

[82 Ohio St. 14, 91 N. E. 867.]

TELEGRAPH COMPANY—Damages for Failure to Deliver.—Since a telegraph company for failure to deliver a message is liable only for such damages as naturally result from the breach of its contract, special damages cannot be recovered unless for injuries of such a nature as the terms of the message, or some circumstances attending its transmission, would suggest as likely to result from such failure. *Bank v. Telegraph Co.*, 30 Ohio St. 555, approved and followed. (p. 756.)

TELEGRAPH COMPANY—Presumption of Negligence.—Although in an action against a telegraph company for damages resulting from an inaccuracy in the transmission of a message, the inaccuracy having been shown, the burden is upon the company to show that it was not due to its fault, no presumption can be indulged to sustain an allegation of the company's failure to make timely delivery of a message, when it does not appear that the addressee, or some one representing him, was at the place designated for delivery. *Telegraph Co. v. Griswold*, 37 Ohio St. 301, distinguished. (p. 757.)
(Syllabi by the court.)

Smith & Beckwith and George H. Fearons, for the plaintiff in error.

W. S. Thurstin and Seney & Thurstin, for the defendants in error.

¹⁴ SHAUCK, J. Sullivan and others brought suit in the court of common pleas to recover from the telegraph company special damages alleged to have been sustained by them as a result of its negligent failure to deliver a telegram. They alleged that they were the owners, Sullivan being the managing owner, of the steamer "David W. Rust," which in the season of 1905 was engaged in carrying freight on the Great Lakes and tributary and connecting rivers;

that on the second day of ¹⁵ December, when navigation was about to close, the steamer was at the Minnesota dock at the port of Buffalo about to sail light for her home port, Toledo. That on that day Sullivan having nearly completed arrangements for a cargo of coal to be carried by the steamer from Buffalo to Toledo, being twelve hundred tons, to be carried at the rate of fifty cents per ton, at 9:45 P. M. delivered to the telegraph company's agent at Toledo, written upon one of its blanks, the following telegram: "To Capt. Wm. J. Leaver, Steamer D. W. Rust, care Minnesota Dock, Buffalo, New York. Will wire you in the morning about coal. Collect. L. S. Sullivan." They allege that said dock was about a mile and a half distant from the telegraph company's Buffalo office where the telegram was received at 11:10 P. M., eastern time; that the purpose of the telegram was to hold the steamer at Buffalo until Sullivan could complete arrangements for a cargo of coal to be carried to Toledo, but that although the telegraph company's office was connected with the Minnesota dock by telephone, it negligently failed to deliver the telegram before 3:15 A. M. of the following day, when the steamer left the dock for Toledo without cargo, and that by reason thereof the plaintiffs were unable to communicate with the steamer respecting the cargo of coal, and it went to Toledo without cargo, the plaintiffs losing thereby the agreed amount to be paid for its carriage, for which they prayed judgment.

The telegraph company answering admitted that it received the telegram at its Toledo office and transmitted it to its Buffalo office as alleged, and ¹⁶ that its latter office was connected with the Minnesota dock by telephone. It denied all the other allegations of the petition. On the trial to the court and a jury, the plaintiffs offered evidence tending to show that by Sunday morning, December 3d, Sullivan had completed arrangements with the Toledo and Buffalo agents of a coal company for a cargo of coal to be brought by the steamer from Buffalo to Toledo as alleged, but that the same could not be communicated to the captain of the steamer because he had already left the port at Buffalo. To show the failure to deliver the telegram of the 2d of December, the plaintiffs introduced the following telegram from the company's Buffalo agent on the day following: "Yours 2nd. Steamer D. W. Rush left Minnesota dock about midnight 2nd before boy reached dock msg recd here 1110p." The plaintiffs also introduced the steamer's log containing the following entry: "December 3, 3:40 A. M. W. N. W. L. Left Buffalo. Snow." Plaintiff showed that the captain of the steamer had died before the trial, and rested without offering any other member of the crew or any further evi-

dence. The defendant offered no evidence. In the common pleas court a verdict in favor of the defendant was directed. The judgment following it was reversed by the circuit court and the cause was remanded for a new trial.

²⁰ The case is to be determined by the fact that the plaintiffs in the original case sued only for the special damages resulting from the failure to secure a cargo for the steamer on ²¹ her trip from Buffalo to Toledo, and the question whether a case is made which charges the telegraph company with legal liability for the special loss so occasioned. An intelligent test for such liability was stated in *Hadley v. Baxendale*, 9 Ex. 341. The doctrine in that case has been commended in very many cases, and has been repeatedly recognized as determining the law of this state in all cases to which it is applicable. It was stated and applied to a case quite like this in *First Nat. Bank of Barnesville v. Western Union Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485. The second proposition of the syllabus states the doctrine to be: "In case of failure to deliver a telegraphic message, the company is only liable for such damages as naturally flow from the breach of contract, or such as may fairly be supposed to have been within the contemplation of the parties, at the time the contract was made." That the phrases "such damages as naturally flow from the breach of the contract" and "such as may fairly be supposed to have been within the contemplation of the parties" are equivalent statements quite clearly appears from the opinion, in which it is said: "In considering what damages may be supposed to have been fairly within the contemplation of the parties, there was nothing in this dispatch to inform the telegraph company of the serious consequences that are now presented." It also appears from the conclusion reached upon the facts in that case. Considering the terms of the telegram delivered by the plaintiff in the present case for transmission to the captain of the steamer at Buffalo, and all the circumstances attending ²² its delivery, what was there to apprise the company that the loss of a cargo or other loss of like character might result from a failure to deliver the telegram? The evidence shows that the managing owner of the vessel had returned from Buffalo but a few hours before he deposited the message for transmission, and it may be that from conversations which he there had with him the captain would have understood, if he had received the telegram, that it referred to a cargo of coal of which he would be advised by telegram the following morning. With that understanding of the significance of the message, he would naturally have regarded it as equivalent to a direction to remain at the dock at Buffalo until he should receive the telegram which was to follow. But the rule by which the

liability of the company is to be tested requires that such significance should have been suggested to it by the message transmitted or by the circumstances of its transmission, or by other telegram. The message, "Will wire you in the morning about coal," suggested no such significance to the company. All of the terms of the message, and all of the circumstances disclosed, would have been answered by assuming it to be a telegram relating to coal for the bunkers of the steamer. Instead of suggesting an order to the captain to remain at the dock until morning, it was rather an assurance that he would remain there to receive the proposed message the next morning, whether the present message was delivered or not. Nothing in the terms of the message then sent, or in any preceding message, or in any circumstances, suggested to the company ²³ that the captain was likely to leave the dock, or that results like those for which indemnity is now sought were in any way involved.

Furthermore, presumption cannot be invoked to show that the company was at fault with respect to the delivery of the message. Whether it was competent or not, the steamer's log was introduced in evidence. It showed that it left Buffalo at 3:40 A. M., but is silent as to the time when it left the dock to which the message was addressed. That was made more definite by the telegram from the company's office at Buffalo to its office at Toledo stating that the steamer had left the dock at about midnight before the messenger arrived with the telegram which had been received at the office at 11:10. This was introduced by the plaintiffs perhaps for the purpose of showing the company's admission that the steamer had left the dock before the receipt of the telegram of the next morning. Although the plaintiffs introduced this evidence as to the time when the steamer left the dock, they would perhaps not have been precluded by it if they had produced evidence to show that the time of its leaving the dock was so much later as to leave ample time for the delivery of the message under all the circumstances. This they did not do. The record shows that the captain had died before the trial, but failure to call one of the mates, or a member of the crew, must be taken as an admission of the plaintiffs that they could not establish a later hour for the steamer's departure from the Buffalo dock than that fixed by the telegram which they had introduced.

²⁴ The obligation of the plaintiff in a case of this character to produce evidence to show the failure of the company to make a timely delivery of a message should be distinguished from the doctrine of *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500, where it was held that in an action for damages for the inaccurate transmission of a message, the inaccuracy having been

shown, the burden is upon the company to show that the mistake was not attributable to its fault. The presumption which was there indulged, after *prima facie* case had been made against the company, may not be indulged here for the purpose of making a *prima facie* case.

The judgment of the circuit court will be reversed and that of the court of common pleas affirmed.

Summers, C. J., Crew, Spear, Davis and Price, JJ., concur.

The Damages Recoverable Against a Telegraph Company for the Failure to transmit or deliver messages are discussed in the note to Kagy v. Western Union Tel. Co., 117 Am. St. Rep. 286. Where the terms of a telegraphic message and the circumstances known to the company when the message was presented for transmission were reasonably sufficient for the defendant to contemplate therefrom that the losses sustained by the plaintiff would probably result from a negligent transmission, it will be liable in damages to the amount of loss directly sustained by plaintiff from its negligence. And it is not essential that the particular loss sustained was contemplated, it being sufficient if the loss sustained should have been contemplated as a probable and proximate result of the negligence: Western Union Tel. Co. v. Milton, 53 Fla. 484, 125 Am. St. Rep. 1077; Western Union Tel. Co. v. Merritt, 55 Fla. 462, 127 Am. St. Rep. 169; Marriott v. Western Union Tel. Co., 84 Neb. 443, 133 Am. St. Rep. 633.

That a Presumption of Negligence Against a Telegraph Company arises in case of failure to deliver a message, or in case of long delay in its transmission, see Woods v. Western Union Tel. Co., 148 N. C. 1, 128 Am. St. Rep. 581; Kirby v. Western Union Tel. Co., 77 S. C. 404, 122 Am. St. Rep. 580; Shepard v. Western Union Tel. Co., 143 N. C. 244, 118 Am. St. Rep. 796; Western Union Tel. Co. v. Merrill, 144 Ala. 618, 113 Am. St. Rep. 66.

DETROIT, TOLEDO AND IRONTON RAILWAY COMPANY v. STATE.

[82 Ohio St. 60, 91 N. E. 869.]

CONSTITUTIONAL LAW—Offense Against Both State and United States.—The same act may constitute an offense equally against the United States and a state, subjecting the guilty party to punishment under the laws of each government. (By the editor.) (p. 762.)

CONSTITUTIONAL LAW—Interstate Commerce—Police Power.—The regulation of commerce among the states is within the exclusive jurisdiction of Congress, but a state statute, enacted in the exercise of its police power, not regulating or directly affecting interstate commerce or in conflict with federal regulations, but merely regulative of the instrumentalities of commerce, is not void. And when such state regulations do conflict with federal regulations, they are not void on the ground that the state has exercised a power exclusively in Congress, but because the constitution and the laws of the

United States made in pursuance thereof are the supreme law of the land. (By the editor.) (p. 762.)

RAILROADS — Automatic Couplers—Interstate Commerce.— Section 3365-27b, Revised Statutes of Ohio (98 Ohio Laws, 76), making it unlawful for any common carrier engaged in moving traffic by railroad between points within this state to haul, or permit to be handled or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, is a valid and reasonable exercise of the police power of the state; it does not directly regulate interstate commerce or conflict with regulations thereof enacted by Congress, but requires the use of the same kind of automatic couplers required by the act of Congress, and therefore is not void on the ground that it is in contravention of the exclusive power of Congress to regulate commerce among the states. (pp. 759, 763.)

RAILROADS — Automatic Couplers — Interstate Commerce.— A common carrier using a car in violation of the statute is not immune from the penalty therein provided because the car, or the railroad on which it was being hauled, is commonly used in interstate traffic, or because it was in a train containing cars loaded with interstate traffic. (pp. 760, 763.)

(Syllabi by the court except when stated to be by the editor.)

Alexander L. Smith and John Robbins, for the plaintiff in error.

U. G. Denman, attorney general, Freeman T. Eagleson and D. H. Armstrong, prosecuting attorney, for the defendant in error.

⁶⁵ SUMMERS, C. J. This action was commenced in the court of common pleas of Jackson county to recover a penalty for the violation of the statute making it unlawful for any common carrier engaged in moving traffic by railroad between points within this state "to haul, or permit to be hauled, or used on its line, any locomotive, car, tender or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," passed March 19, 1906, section 3365-27b, Revised Statutes (98 Ohio Laws, 75).

It is averred in the petition that the defendant hauled and used a car in this state for moving state traffic, not equipped as required by the statute. The defendant for answer pleaded two defenses: First, that it is a railroad corporation incorporated under the laws of the state of Michigan, and that it owns and operates a railroad from the city of Detroit in that state to the city of Ironton in the state of Ohio; that it was engaged in interstate commerce, and that all its locomotives and cars, including the locomotive and all cars in the train described in the petition, were frequently and commonly used and engaged in said interstate traffic. "That by reason of the premises all of the business of this

shown, the burden is upon the company to show that the mistake was not attributable to its fault. The presumption which was there indulged, after prima facie case had been made against the company, may not be indulged here for the purpose of making a prima facie case.

The judgment of the circuit court will be reversed and that of the court of common pleas affirmed.

Summers, C. J., Crew, Spear, Davis and Price, JJ., concur.

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Section 3365-27b, Revised Statutes of Ohio (98 Ohio Laws, 76), making it unlawful for any common carrier engaged in moving traffic by railroad between points within this state to haul, or permit to be handled or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, is a valid and reasonable exercise of the police power of the state; it does not directly regulate interstate commerce or conflict with regulations thereof enacted by Congress, but requires the use of the same kind of automatic couplers required by the act of Congress, and therefore is not void on the ground that it is in contravention of the exclusive power of Congress to regulate commerce among the states. (pp. 759, 763.)

RAILROADS — Automatic Couplers — Interstate Commerce.—

A common carrier using a car in violation of the statute is not immune from the penalty therein provided because the car, or the railroad on which it was being hauled, is commonly used in interstate traffic, or because it was in a train containing cars loaded with interstate traffic. (pp. 760, 763.)

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⁶⁵ SUMMERS, C. J. This action was commenced in the court of common pleas of Jackson county to recover a penalty for the violation of the statute making it unlawful for any common carrier engaged in moving traffic by railroad between points within this state "to haul, or permit to be hauled, or used on its line, any locomotive, car, tender or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," passed March 19, 1906, section 3365-27b, Revised Statutes (98 Ohio Laws, 75).

It is averred in the petition that the defendant hauled and used a car in this state for moving state traffic, not equipped as required by the statute. The defendant for answer pleaded two defenses: First, that it is a railroad corporation incorporated under the laws of the state of Michigan, and that it owns and operates a railroad from the city of Detroit in that state to the city of Ironton in the state of Ohio; that it was engaged in interstate commerce, and that all its locomotives and cars, including the locomotive and all cars in the train described in the petition, were frequently and commonly used and engaged in said interstate traffic. "That by reason of the premises all of the business of this

defendant involving the use and operation of its said railroad and equipment is subject to the exclusive power of the Congress of the United States to regulate commerce among the several states, which power has been exercised by said Congress in the several acts to regulate interstate commerce and carriers of interstate traffic, ⁶⁶ to wit." Then reference is made, among others, to the so-called safety appliance act of March 2, 1893, as amended April 1, 1896, and March 2, 1903. It is then averred that the state statute is in conflict with these acts of Congress, and is therefore void. The second defense is to the effect that the car in question was in a train of cars, including a number of cars being used in moving interstate traffic, and that it was, therefore, exclusively within the regulations of Congress. A general demurrer was filed to each defense and sustained, and a judgment for plaintiff entered. The circuit court affirmed and error is prosecuted here.

The admitted facts are, that the defendant is a common carrier operating a railroad in moving interstate and intrastate traffic, that the car in question was at the time complained of in use in moving state traffic, that the car and the railroad over which it was being hauled were commonly and usually used in interstate traffic, and that the car was in a train in which there were a number of cars loaded with interstate traffic.

Counsel for plaintiff in error contend, in effect, that the statute is void on the ground that Congress, under the authority conferred upon it by the constitution, article 1, section 8, to regulate commerce among the several states, having enacted regulations respecting automatic couplers on cars, upon railroads engaged in interstate traffic, the state is without power to legislate upon the subject, or to prescribe the kind of couplers for a car in use in hauling intrastate traffic, if the car is commonly used in interstate traffic, or is in a train, some of the cars of which are in use in interstate traffic, ⁶⁷ or is on a railroad engaged in interstate traffic. Or, to quote them, they say: "The questions are:

"1. Does the fact that the car in question was commonly and usually employed in interstate traffic, although it was at the particular time actually carrying intrastate traffic, subject it to the federal control in such wise as to take it out of the state control?

"2. Does the fact that it was part of a train containing other cars loaded with interstate traffic (and which are therefore subject to the federal act), have the effect to bring this particular car also within the operation of the federal act in such wise as to take it out of state control?

“3. Does the fact that the railroad was commonly and usually employed in interstate commerce and that defendant was engaged in business as an interstate carrier have such effect?” And their contention is that each question should receive an answer in the affirmative.

If the statute regulates interstate commerce, or enacts regulations in conflict with valid federal regulations of such commerce, it is invalid. In *Atlantic Coast Line R. R. Co. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. Rep. 121, 52 L. ed. 230, it is held that, “Any exercise of state authority, whether made directly or through the instrumentality of a commission, which directly regulates interstate commerce, is repugnant to the commerce clause of the federal constitution.”

The statute in question does not purport to be a regulation of interstate traffic, but is limited strictly to the moving of traffic from one point to another in the state, and it is evident from its various requirements as well as its title that it was ⁶⁸ passed in the exercise of the police power of the state to promote the safety in the state of employes and travelers upon railroads, and without any thought or intention of meddling with interstate commerce.

The original safety appliance act, so called, passed March 2, 1893, by Congress was entitled as follows: “An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.”

Section 2 of that act provides as follows: “That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.”

And by the amendment of March 2, 1903, it was further provided that the provisions and regulations of this safety appliance act “shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce and to all other locomotives, tenders, cars and similar vehicles used in connection therewith”: 32 U. S. Stats., p. 943; U. S. Comp. Stats. 1901, p. 3174; Supp. U. S. Comp. Stats. 1903, p. 367.

⁶⁹ Whether the original act of Congress, properly interpreted, applies to cars while not employed in interstate traffic, and whether the amendment in so far as it attempts to regulate cars while not so engaged in interstate traffic

does not transcend the powers of Congress, we need not consider.

In *Voelker v. Chicago etc. Ry. Co.*, 116 Fed. 867, in referring to the act of Congress of 1893, Shiras, District Judge, says: "Legislation on this matter of the use of automatic couplers was sought and obtained from Congress, as well as from the state legislature; so that the companies would not be afforded a loophole for escape from liability on the theory that the agencies used in interstate commerce are without the control of state legislation." And in the same case in the circuit court of appeals, before Sanborn, Thayer and Van Devanter, Circuit Judges (*Chicago etc. Ry. Co. v. Voelker*, 129 Fed. 522, 60 C. C. A. 226, 70 L. R. A. 264), Van Devanter, J., says: "The two statutes, federal and state, seem to have been enacted in pursuance of a common purpose to afford a remedy as broad as the mischief, and to remove the source or cause of the latter through the compulsory adoption and use of a new system of coupling and uncoupling which dispensed with the necessity of anyone going between, or at least entirely between, the cars."

Our statute does not conflict with the federal statute in the character of the coupler required, but requires the same kind of coupler, and was passed to promote the same object, though under a different power, and, while no doubt it was enacted to apply to cases assumed not to be covered by the federal statute, it is not unreasonable, and ⁷⁰ is not void merely because a failure to equip the car with automatic couplers would subject the railroad company to punishment under a state statute as well as under the act of Congress. "The same act or series of acts may constitute an offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each government": *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. Rep. 47, 33 L. ed. 287.

The regulation of the commerce among the states is within the exclusive jurisdiction of Congress, but it is well settled that a state statute, enacted in the exercise of its police power, not regulating or directly affecting interstate commerce or in conflict with federal regulations, but merely regulative of the instrumentalities of commerce, is not void; and when such state regulations do conflict with federal regulations, they are not void on the ground that the state has exercised a power exclusively in Congress, but because the constitution and the laws of the United States made in pursuance thereof are the supreme law of the land.

It is unnecessary to cite the cases by which these principles are established; they are cited in the following very recent cases upon which we base our decision. In *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. Rep. 485, 52 L. ed. 778, 14 Ann. Cas. 1101, where a statute of the state of Kansas making it

a misdemeanor to transport cattle into the state without inspection was upheld against the contention that it interfered with interstate commerce and also conflicted with a statute of the United States and the rules and regulations of the department of agriculture, it is held: "While the state may not legislate for the direct control of interstate ⁷¹ commerce, a proper police regulation which does not conflict with congressional legislation on the subject involved is not necessarily unconstitutional because it may have an indirect effect upon interstate commerce." In *Missouri Pacific Ry. Co. v. Larabee Flour-mills Co.*, 211 U. S. 612, 29 Sup. Ct. Rep. 214, 53 L. ed. 352, in which a peremptory writ of mandamus was allowed by the supreme court of Kansas, commanding one railroad company to transfer cars to and from a mill on another railroad, and which was affirmed, it is said by Mr. Justice Brewer: "The roads are, therefore, engaged in both interstate commerce and that within the state. In the former they are subject to the regulation of Congress; in the latter to that of the state; and to enforce the proper relation between Congress and the state, the full control of each over the commerce subject to its dominion must be preserved." Again he says (623): "Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the state all power in respect to regulations of a local character. This proposition cannot be sustained." Mr. Justice Moody, dissenting (624), says: "I venture to think that the weight of authority establishes the following principles: The commerce clause of the constitution vests the power to regulate interstate commerce exclusively in the Congress, and leaves the power to regulate intrastate commerce exclusively in the states. Both powers being exclusive, neither can be directly exercised except by the government in which it is vested. Though the state may not ⁷² directly control interstate commerce, it may often indirectly affect that commerce by the exercise of other governmental powers with which it is undoubtedly clothed. And this indirect effect may be allowed to operate until the Congress enacts legislation conflicting with it, to which it must yield as the paramount power: *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 28 Sup. Ct. Rep. 121, 52 L. ed. 230; *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. Rep. 485, 52 L. ed. 778, 14 Ann. Cas. 1101."

It follows that the questions propounded by counsel should receive a negative answer, and the judgment is affirmed.

Crew, Spear, Davis, Shauck and Price, JJ., concur.

The Constitutionality of State Statutes Affecting Interstate Commerce is the subject of a note to *People v. Wemple*, 27 Am. St. Rep. 547. The fact that a state statute in the nature of a police regulation to some extent affects interstate commerce does not render it unconstitutional. Thus a statute requiring persons engaged in selling steamship tickets, and in conjunction therewith receiving deposits of money to transmit to foreign countries, to give a bond for the faithful discharge of their duties, is not unconstitutional as conflicting with the commerce clause of the federal constitution: *Musco v. United Surety Co.*, 196 N. Y. 459, 134 Am. St. Rep. 851. And an ordinance limiting the speed of trains on an interstate railway which carries United States mail to ten miles an hour within the city limits is not invalid as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail: *Peterson v. State*, 79 Neb. 132, 126 Am. St. Rep. 651. As to the constitutionality of a statute requiring the inspection of livestock imported into the state, see *State v. Butterfield Livestock Co.*, 17 Idaho, 441, 134 Am. St. Rep. 263.

NICHOLSON v. FRANKLIN BREWING COMPANY.

[82 Ohio St. 94, 91 N. E. 991.]

CORPORATION—Notice of By-laws to Transferee of Stock.—One who acquires the stock of a corporation organized in another state, but having its principal place of business in the state where he resides, is deemed to know all restrictions which the laws of the first state, or by-laws of the corporation not inconsistent with them, impose upon the alienation of stock. (By the editor.) (p. 766.)

CORPORATION—Transfer of Stock—Motive of Transferee.—A corporation may not refuse to transfer stock because of the motive which may have prompted the transferee to acquire it. (By the editor.) (p. 767.)

CORPORATION.—By-laws of a Corporation, to be Valid, must not contravene the policy defined in the statute of its creation. (By the editor.) (p. 767.)

CORPORATION—Authority to Enact By-laws.—When statutes under which corporations are formed authorize them to make by-laws upon specifically named subjects, there is an implied denial of authority to make by-laws upon subjects not named. (By the editor.) (p. 767.)

CORPORATION—Statute Restricting Transfers of Stock.—A statute which expressly authorizes a corporation formed under it to adopt by-laws regulating the issuance and transference of shares in its capital stock and aiding in the promotion of its business gives validity to a by-law which requires a stockholder who desires to sell and transfer his stock, before doing so, to notify the directors of such desire and to give them a reasonable time to sell the stock to classes of persons designated in the by-laws because of the belief that their occupations would render them efficient promoters of the business of the corporation. (p. 768.)

CORPORATION—Statute Restricting Transfers of Stock.—A suit cannot be maintained against the corporation to compel it to register stock which a holder has attempted to transfer in violation of such by-law. (p. 768.)

(Syllabi by the court except when stated to be by the editor.)

Suit to compel the Franklin Brewing Company, a corporation of the state of Delaware, to accept the surrender of two certificates of its capital stock which the plaintiff had received by assignment and transfer of former owners thereof, and issue to him a new certificate therefor. The refusal to make the transfer was based on section 19 of the by-laws of the defendant corporation, which by-laws were adopted at the first meeting of the incorporators and subscribers to the capital stock held in Delaware. Section 19 reads as follows:

"Section 19. In case any member of this company desires to sell all or part of the stock held by him, he shall notify the secretary of this company in writing, stating the amount of stock he desires to sell and the market value of same, when this company shall have an option on said stock for thirty days following such notice. The directors in turn shall first offer it for sale to saloon-keepers who are not stockholders; second, to saloon-keepers who are stockholders, and, third, to stockholders who are not saloon-keepers. The meaning of the word 'saloon-keepers,' as applied in this section, is held to be all men actually engaged in the saloon business."

The following sections of the corporation laws of Delaware are pertinent as showing the authority of the corporation to adopt the above by-law:

"Section 2. To make by-laws, not inconsistent with the constitution or laws of the United States or of this state, fixing and altering the number of its directors for the management of its property, the regulation and government of its affairs, and for the certification and transfer of its stock, with penalties for the breach thereof not exceeding twenty dollars.

"Section 3. In addition to the powers enumerated in the second section of this act, every corporation, its officers, directors and stockholders shall possess and exercise all the powers and privileges contained in this act, and the powers expressly given in its charter or in its certificate under which it was incorporated, so far as the same are necessary or convenient to the attainment of the objects set forth in such charter or certificate of incorporation; and shall be governed by the provisions and be subject to the restrictions and liabilities in this act contained, so far as the same are appropriate to and not inconsistent with such charter or act under which such corporation was formed; and no corporation shall possess or exercise any other corporate powers, except such incidental powers as shall be necessary to the exercise of the powers so given."

"Section 12. The power to make and alter by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors. By-laws made by the directors under power so conferred may be altered or repealed by the directors or stockholders."

"Section 16. The shares of stock in every corporation shall be deemed personal property and transferable on the books of the corporation in such manner and under such regulations as the by-laws provide; provided, however, that no stock or bonds issued by any corporation organized under this act shall be taxed in this state when the same shall be owned by nonresidents of this state, or any foreign corporation. Whenever any transfers of shares shall be made for collateral security and not absolutely, it shall be so expressed in the entry of the transfer."

John J. Chester and James C. Nicholson, for the plaintiff in error.

Williams, Williams & Taylor, for the defendant in error.

¹⁰⁰ SHAUCK, J. There is no occasion to doubt that the defendant, in refusing to transfer the shares of stock acquired by the plaintiff, in view of the failure to give an option to the directors for thirty days in order that they might have opportunity to sell it to persons whose business would aid in promoting the welfare of the corporation, is strictly within section 19 of its by-laws. The question of doubt in the case concerns the validity of the by-law and its binding obligation upon the plaintiff. Separate analysis of the very numerous cases cited in the briefs of counsel is impracticable and unnecessary. A few generalizations will meet the requirements of most of the cases and materially narrow the field of inquiry. The corporation being organized under the laws of the state of Delaware, although its principal place of business is in Ohio, where the plaintiff resides and where these transactions in stock were conducted, he had actual knowledge that he was acquiring the stock of a Delaware corporation, and he is deemed to know all restrictions which the laws of that state or by-laws not inconsistent with them imposed upon its alienation: *Relfe v. Rundle*, 103 U. S. 222, 26 L. ed. 337; *Hammond v. Hastings*, 134 U. S. 401, 10 Sup. Ct. Rep. 727, 33 L. ed. 960. Effective ¹¹⁰ regulations of the transfer of stock in a corporation must be prescribed in statutes or in by-laws of the corporation which are not inconsistent with the statutes. A corporation may not refuse to transfer stock because of the motive which may have prompted the transferee to acquire it, this being upon the well-established ground that however important may be the motive which prompts one to the commission of a wrong, the motive which prompts him to the exercise of a legal right can never be the subject of judicial inquiry.

By-laws of a corporation, to be valid, must not contravene the policy defined in the statute of its creation, and this ren-

ders it entirely unnecessary to consider further the cases in which it has been held that corporations formed under the national banking laws may not provide for liens upon their stock to secure the debts of their stockholders, since the laws provide expressly that they may not loan money upon the security of their stock. When statutes under which corporations are formed authorize them to make by-laws upon specifically named subjects, there is an implied denial of authority to make by-laws upon subjects not named.

In very many cases it has been held that a by-law imposing a restrictive regulation upon the transfer of stock is invalid unless it is expressly authorized by statute. Quite uniformly when that conclusion is reached it is placed upon the ground that such regulations impose a restraint upon the alienation of property and that they are therefore inimical to public policy. It does not appear to have been deemed necessary in these ¹¹¹ cases to demonstrate that the right to alienate property should be more highly regarded than the right to make contracts respecting it. By the assumption that it should be, a task of much obvious difficulty has been avoided. In a few cases the opposite conclusion has been reached and supported by reasons of much strength. In *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271, a by-law differing in no essential respect from that relied on by the defendant here was enforced, although it was wholly without express statutory sanction. The court did not consider whether the by-law was technically valid so as to impress upon property in the stock of the company a restricted alienability, but placed the decision upon the ground that the terms of the by-law became a contract between the corporation and the subscriber for its stock. In the later case of *Barrett v. King*, 181 Mass. 476, 63 N. E. 934, which arose out of the refusal of the Continental Brewing Company to enter a transfer of its stock, the refusal being for noncompliance with a by-law not distinguishable from this, the rights of the parties were determined by the same view.

What may be the effect of a by-law of this character upon the transferability of stock when the question is not affected by any provision of the statute under which the corporation is formed, we need not determine in the present case. The different conclusions with respect to that question result from different views of the policy involved. To define and establish rules of public policy is a recognized function of legislation. The statute of the state of Delaware, under which this corporation was ¹¹² formed, expressly authorized it to make by-laws "for the management of its property, the regulation and government of its affairs, and for the certification and transfer of its stock." It also provides expressly that "the

shares of stock in every corporation shall be deemed personal property and transferable on the books of the corporation in such manner and under such regulations as the by-laws provide." The third section of the act further provides generally that the corporation shall have such powers not inconsistent with law as may be necessary or convenient to the attainment of the objects of the corporation. Certainly power to regulate transfers of stock could not properly be regarded as power to prohibit the transfer, and it may be that in the interpretation of acts conferring such power it would be the duty of courts to see that prohibition is not accomplished under the guise of regulation, and that restrictions would not be permitted if foreign to the purpose for which the corporation is formed. The by-law here called in question contains no suggestion of a purpose to prevent the alienation of stock nor to restrict it beyond reasons suggested by a consideration of the welfare of the corporation and the express provisions of the statute. It interposes no permanent impediment to the transfer, providing only for an option in the directors for thirty days as a reasonable opportunity to them to dispose of stock to persons deemed desirable as holders. The statute having recognized the lawfulness of the purpose for which the corporation is formed, and having empowered it to make by-laws in furtherance of that purpose, ¹¹⁸ expressly including the issuance and transfer of stock within the subjects for regulation by by-laws, we find no reason for saying that the by-law is invalid.

Judgment affirmed.

Summers, C. J., Crew, Spear, Davis and Price, JJ., concur.

The Duty of Corporations to Transfer Stock on their books is the subject of a recent note to *Mundt v. Commercial Nat. Bank*, 136 Am. St. Rep. 1027.

Compelling the Issue of Corporate Stock is the subject of a note to *State v. Jumbo Extension Min. Co.*, 133 Am. St. Rep. 723.

HENRY v. DOYLE.

[82 Ohio St. 113, 91 N. E. 990.]

EXECUTOR—Suit Against by Legatee—Demand.—In a suit brought under Revised Statutes, section 6211, by a legatee or other distributee against an executor or administrator, it is necessary to allege and prove a demand upon, and neglect or refusal by, the defendant before the commencement of the action. (p. 770.)

EXECUTOR—Suit Against by Legatee—Amount Due.—In such an action a general finding of a balance in the hands of the executor or administrator and an order to distribute the same according to law is not a sufficient foundation for the action; but the specific amount, if any, due to the plaintiff must have been first fixed by a court of competent jurisdiction as provided by law. (p. 770.)

EXECUTOR—Approval of Account—Conclusiveness.—When an executor or administrator has filed in the probate court an account of final distribution, and the same has been approved and confirmed by the court and the executor or administrator discharged from the trust, such account is conclusive unless impeached for manifest error, or for fraud within four years after the discovery of the fraud. (p. 770.)

(Syllabi by the court.)

H. H. Henry and Howard A. Couse, for the plaintiff in error.

Rogers & Rowley, for the defendants in error.

¹¹⁸ DAVIS, J. The plaintiff in error, plaintiff below also, insists that he has properly brought this action against an executor on his bond under Revised Statutes, section 6211, which is as follows: "Such suit may also be brought by a legatee, after he shall be entitled to the payment of his legacy, and by the widow, or other distributee, to recover his or her share of the personal estate, after an order of the court ascertaining the amount due to him or her, if the executor or administrator shall neglect to pay the same when demanded."

The petition does not contain any averment of a demand upon the executor, unless it is contained in the allegation that he "has heretofore neglected and refused, and he now refuses, to pay and account for the same, contrary to the condition of the bond"; nor does the petition contain an averment that the amount claimed has been ascertained by an order of the court, unless it be included in a general allegation that, in settling the executor's final account, the court found in his hands a gross sum, "for distribution, which said court ordered to be distributed according to law, and according to the statute in such case made and provided."

The statute seems to require an actual demand upon the executor or administrator, as a precedent condition to bringing an action by a legatee or ¹¹⁹ distributee. A mere neglect to pay an amount due to the distributee is not enough.

The statute is clear that such an action is authorized when the executor or administrator neglects to pay an ascertained amount "when demanded." In a related section (Revised Statutes, section 6195), which provides in part the manner in which an order of distribution may be enforced, the language is still more explicit; for it declares that "if such executor, administrator or guardian shall neglect or refuse to pay when demanded," etc. The petition was therefore defective in not showing one of the jurisdictional facts, which are necessary to confer the right to sue.

Another condition precedent to the bringing of such an action is the ascertainment of the amount due to the distributee. A general finding of a balance in the hands of an executor or administrator, and an order to distribute it according to law, does not determine either the persons entitled under the law nor the amount to which each is entitled: *First Nat. Bank of Cadiz v. Beebe*, 62 Ohio St. 41, 56 N. E. 485. Difficult, and sometimes intricate, questions arise in ascertaining who are distributees, or how and in what proportions the fund is to be distributed according to law. Accordingly the tribunals and the mode of procedure for ascertaining the amount due to the distributees, in case of doubt or contention, are provided in Revised Statutes, sections 6195 to 6203, inclusive. An executor or administrator may, if he thinks it proper to do so, voluntarily pay out the distributive fund, trusting to be exonerated on his final distributive account; but he cannot be compelled ¹²⁰ to do so until the claimant has established his right under the forms of the statutes. The plaintiff, therefore, has shown no right to recover in this action.

This executor filed an account of final distribution of the funds in his hands, and the same was approved, confirmed and recorded, more than four years before the commencement of this action; and the executor was thereupon discharged from the trust. By Revised Statutes, section 6190, he and his sureties are forever exonerated, unless such account shall be impeached for fraud or manifest error. This final distributive account can only be directly attacked and opened up by a proceeding for that purpose within four years after the discovery of fraud relating to it: *Rev. Stats., sec. 4982*. Nothing which would impeach the validity of this final account and discharge appears in the record; and therefore it alone is a sufficient defense to this action.

The judgment of the circuit court and that of the court of common pleas are affirmed.

Summers, C. J., Crew, Spear, Shauck and Price, JJ., concur.

When a Probate Court has Passed All Orders fixing the administrator's final liability to the heirs, and has ordered the amount found due to be paid to them, the administrator's refusal to obey such order on demand is a violation of his trust, which authorizes suit against the sureties on his bond, before his final discharge: *Stewart v. Morrison*, 81 Tex. 396, 26 Am. St. Rep. 821.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY v. BURR & JEAKLE.

[82 Ohio St. 129, 92 N. E. 27.]

TRIAL—Misconduct in Argument—Withdrawal of Statements. In an action against a railroad company to recover damages for the destruction of plaintiff's property by fire, alleged to have been communicated thereto by sparks emitted from one of the defendant's locomotives, plaintiff's counsel in argument to the jury stated that "within thirty days after the occurrence of this fire counsel for the defendant made an offer of settlement, and that offer was repeated as late as the day of the commencement of this trial," which statement, upon objection being made thereto, counsel for plaintiff stated he would withdraw, and the court directed the jury to disregard the same. When it appears from the record that under all the evidence adduced in the case the question of defendant's negligence and consequent liability is a very close question of fact, a judgment entered upon a verdict in favor of the plaintiff should be reversed notwithstanding counsel's attempted withdrawal of his improper statements and the admonition of the court to the jury to disregard them, unless it clearly appears from the record that such improper statements did not influence the verdict rendered. (p. 773.)

(Syllabus by the court.)

Action against the Toledo, St. Louis and Western Railroad Company to recover damages for the destruction of a saw-mill by fire communicated by sparks from one of the defendant's locomotives. There was a verdict against the railroad company.

Charles A. Schmettau, W. W. Campbell and Clarence Brown, for the plaintiff in error.

Donovan & Warden and James P. Ragan, for the defendants in error.

132 CREW, J. The only error assigned in this case which need be especially considered in this opinion is that of the alleged misconduct of counsel in the argument of the case to the jury. Upon the argument of this cause in the court of common pleas one of the counsel for plaintiffs stated to the jury, among other things, "that within thirty days after the occurrence of this fire Mr. Schmettau, as counsel for the de-

fendant, made an offer of settlement, and that offer was repeated as late as the day of the commencement of this trial." To this statement the defendant by its counsel then and there excepted. And thereupon, to quote from the record, "counsel who had made the statement stated to the jury that he withdrew the statement objected to," and the court then instructed the jury as follows: "Gentlemen of the jury, it becomes my duty to say to you on this question that there is absolutely no evidence in this case that either party ever wanted to settle or that any attempt was ever made to settle; and I will say to you further, as a matter of law, that if the parties had gotten together in an effort to settle this case, the law wouldn't permit such effort to settle to be given to the jury in evidence; it is ¹³³ your duty to disregard absolutely the whole of any statement by any counsel to the effect that any effort was made to settle this case or any other case." And thereupon the argument proceeded. That the statements thus made by counsel transcended the bounds of legitimate argument and were grossly improper is both obvious and conceded, but it is claimed that any prejudicial effect which such statements may have had was removed or cured by the subsequent action of court and counsel. This conclusion, we think, by no means follows, nor does it affirmatively appear in this case that such conclusion is justified by the facts. While it is true that courts of last resort have frequently, though not uniformly, held the rule to be that the prejudice, if any, resulting from the misconduct of counsel in argument to the jury may be eliminated or cured by the prompt withdrawal of the objectionable statements made by counsel, accompanied by an instruction from the court to the jury to disregard such statements, yet this rule, so far as our examination of the authorities has disclosed, is recognized and applied by the courts in those cases only where it is made to appear by the record from a consideration of the character of the statements made that their prejudicial effect has probably been averted by such withdrawal and instruction. As remarked by Shauck, J., in *Cleveland etc. R. R. Co. v. Pritschau*, 69 Ohio St. 438, 100 Am. St. Rep. 682, 69 N. E. 663: "It is due to differences in the character of the misconduct rather than to differences of opinion in reviewing courts that it has in some cases been held that the effect of the misconduct may be eliminated by instructions, ¹³⁴ and in others that it cannot be." When we consider, in the present case, that there was no direct evidence establishing the origin of this fire, and that upon the whole of the evidence adduced on the trial the question of defendant's negligence and consequent liability was at best a very close question of fact involved in much uncertainty and doubt, the harmful and extremely prejudicial effect of a state-

ment by counsel to the jury that soon after the fire the railroad company had offered to settle the loss, and that such offer had been renewed on the very day the trial commenced, becomes at once perfectly apparent. And the attempted withdrawal of these statements from the jury was, we think, wholly impotent to rid them of the mischievous inference that they were nevertheless true, and was utterly ineffectual to dislodge or remove from the minds of the jurors the harmful impression which such statements were calculated, and obviously intended, to produce. No other rational conclusion can be reached in this case than that plaintiff's counsel by the making of such statements intended thereby and in that way to get before the jury a fact which he was not entitled to, and one which from considerations of public policy the law forbade should be mentioned on the trial, and this for the sole and obvious purpose of inducing in the minds of the jury the impression or belief that the railroad company in making such offer of settlement had, indirectly at least, confessed and admitted its liability. Manifestly this was the purpose of counsel's statements, and we think it impossible to say in this case that such was not their effect. While it should perhaps be said that, after ¹³⁵ objection made, court and counsel did all in their power to counteract and overcome the effect of these improper and prejudicial statements, yet the mischief had been done, the poison had been injected, and that which thereafter occurred was not, in our judgment, a sufficient antidote. It is the policy of the law to encourage the settlement of legal controversies, and hence it does not permit an offer of compromise to be given in evidence as an acknowledgment or admission of the party making it, and this salutary rule, which is grounded upon considerations of public policy, just as imperatively forbids that the fact that such offer was made shall be mentioned or commented upon by counsel in argument to the jury, and when it is, unless it shall clearly appear from the record in the particular case that the verdict of the jury was not affected thereby, the misconduct is such as to require in the due administration of justice that a new trial be granted therefor. The view that misconduct of counsel such as is complained of in this case is sufficient to warrant and require the granting of a new trial, unless it be made to appear that the verdict of the jury was not in any manner influenced thereby, is fully supported by the several cases cited in the brief of counsel for plaintiff in error and by many others.

As this case must be remanded for new trial, there is perhaps one further assignment of error we should notice briefly. On the trial of this cause in the court of common pleas counsel for the railroad company requested the following instruc-

tion, which the court refused to give: "The laws of Ohio expressly permit a railroad company ¹³⁶ to operate its engines during the months of December, January and February without using a spark-arresting device, and if, therefore, you find that the defendant's engine was, at the time of the fire, equipped with and using such a device, that was merely a voluntary precaution against fire taken by the defendant, and which the law did not require of it. The jury are, therefore, not concerned with the questions whether the spark-arrester was or was not of the best pattern, or was or was not in repair except as the fact that it was of the best pattern and was in good repair, if proved, may tend to show that the engine so equipped did not and could not have started the fire." This instruction, we think, contains a correct statement of the law. It was, under the issues and evidence in this case, a pertinent instruction, and should therefore have been given to the jury. Inasmuch, however, as it affirmatively appears by answers to the special interrogatories submitted to the jury, at the request of counsel for the railroad company, that defendant's locomotive, at the time of the fire, was equipped with a proper spark-arresting device, and that said spark-arrester was then in good repair, the refusal to charge as requested was not, we think, in view of what was said in the general charge upon that subject, such prejudicial error as to require a reversal on that ground.

Judgments of the circuit court and of the court of common pleas reversed, and cause remanded to the latter court for a retrial according to law.

Spear, Davis, Shauck and Price, JJ., concur.

Misconduct of Counsel in Argument is the subject of a note to McDonald v. People, 9 Am. St. Rep. 559. Recent cases on this question are Bliss v. Wolcott, 40 Mont. 491, 135 Am. St. Rep. 636; Phillips v. Chase, 201 Mass. 444, 131 Am. St. Rep. 406; Sullivan v. Seattle Electric Co., 51 Wash. 71, 130 Am. St. Rep. 1082; McDuffee's Admr. v. Boston & Maine R. R., 81 Vt. 52, 130 Am. St. Rep. 1019; Neff v. City of Cameron, 213 Mo. 350, 127 Am. St. Rep. 606. Where a particular line of argument is improper and is objected to, it is discretionary with the trial judge to direct counsel to cease to pursue such argument, or to permit him to proceed, and then by instructions protect the rights of the parties: Commonwealth v. People's Express Co., 201 Mass. 564, 131 Am. St. Rep. 416. Error cannot be assigned upon misconduct of counsel in argument, where the court declares it improper and it is not further pursued, and the opposing counsel, evidently satisfied with such course, makes no request for further instructions to the jury: Samberg v. Knights of the Modern Maccabees, 158 Mich. 568, 133 Am. St. Rep. 396.

Objection to Improper Remarks Made by Counsel must be made at the time the statement is made, or within a reasonable time thereafter, and must be brought to his attention, as well as to that of the court: Bond v. Bean, 72 N. H. 444, 101 Am. St. Rep. 686. If, on objection to remarks made by counsel, the court "quietly" cautioned

him not to make improper remarks, it is the duty of opposing counsel, if he is not satisfied, to request the court to instruct the jury to disregard such remarks, or to ask for a more emphatic reprimand: *Miller v. Nuckolls*, 77 Ark. 64, 113 Am. St. Rep. 122. If a trial court, on objection made, fails to suppress improper conduct of counsel in the presence of the jury, as by making statements of fact, insulting witnesses, and the like, without cause therefor appearing in the case, a judgment in his favor must be reversed, unless it affirmatively appears that by instructions from the court or retraction by counsel, the prejudicial tendency of his misconduct has been averted: *Cleveland etc. R. R. Co. v. Pritschau*, 69 Ohio St. 438, 100 Am. St. Rep. 682.

Misconduct of Counsel Other Than in Argument is the subject of a note to *Cleveland etc. R. R. Co. v. Pritschau*, 100 Am. St. Rep. 689.

STATE v. COLLINGSWORTH.

[82 Ohio St. 154, 92 N. E. 22.]

HOMICIDE.—The Violation of a Penal Ordinance of a municipality, as a result of which violation death ensues, is not an unlawful killing within the provisions of section 6811, Revised Statutes, which defines the crime of manslaughter. (pp. 777, 778.)

(Syllabus by the court.)

Webber, McCoy, King & Game, for the exceptions.

Edward C. Turner and John A. Connor, against the exceptions.

¹⁵⁶ By the COURT. The grand jury of Franklin county presented an indictment against Dell Collingsworth, of which the following is a copy:

“INDICTMENT FOR MANSLAUGHTER.

“The State of Ohio, Franklin County, ss.:

“In the court of common pleas, Franklin county, Ohio, of the term of January, in the year of our Lord one thousand nine hundred and nine.

“The jurors of the grand jury of the state of Ohio, duly elected, impaneled, sworn and charged to inquire of crimes and offenses committed within the body of Franklin county, in the state of Ohio, in the name and by the authority of the state of Ohio, upon their oaths do find and present that at the time hereinafter mentioned the city of Columbus, Ohio, had adopted and there was in force in said city the following ordinance:

“ ‘Whoever shall ride or drive any animals in any highway, thoroughfare or public place in this city quicker than or beyond a moderate gait, or shall not slacken the pace of such animal or animals in approaching any crosswalk, upon which

any person may be in the act of passing, or in the act of approaching or leaving a street-car, or shall ride or drive any such animal so as to cause such ¹⁵⁷ animal, or any vehicle thereto attached, to come in collision with or strike any other object or other person, or shall leave any such animal standing in any public place without being fastened or so guarded as to prevent its running away, or shall turn any such animal loose in any thoroughfare, or shall hitch or fasten any such animal to any tree or tree-box without the consent of the owner, or shall hitch or fasten any horse or other animal to any lamp-post or water hydrant, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than five nor more than fifty dollars, or be imprisoned not more than thirty days, or both.'

"And that at the time hereinafter mentioned one James Brady was then and there walking upon a certain highway, to wit, Buttles avenue, in said city of Columbus.

"And the jurors of the grand jury aforesaid do further find and present that Dell Collingsworth, late of said county of Franklin, on or about the thirtieth day of December, in the year of our Lord one thousand nine hundred and eight, within the county of Franklin aforesaid and within the corporate limits of said city of Columbus, did drive a certain horse with a vehicle attached to said horse so that said horse and the vehicle thereto attached unlawfully and in violation of said ordinance did then and there come in collision with and strike and wound the said James Brady while the said James Brady was so walking upon the said Buttles avenue as aforesaid, from which said wounds so inflicted by the said horse and vehicle so driven by the said Dell Collingsworth as aforesaid, the said James ¹⁵⁸ Brady then and there died. And so the jurors of the grand jury aforesaid, upon their oaths as aforesaid, do say that the said Dell Collingsworth, in the manner and by the means aforesaid, did then and there unlawfully kill one James Brady then and there, being contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Ohio.

"KARL T. WEBBER,

"Prosecuting Attorney, Franklin County."

The accused demurred to the indictment, but the demurrer was overruled, and on a plea of not guilty the case proceeded to trial by jury. During the progress of the trial, the state offered in evidence the ordinance adopted by the city of Columbus and which is copied in said indictment. The accused objected to the introduction of the ordinance, which objection the court sustained. To this decision the state excepted. As this ruling was fatal to the cause sought to be made by the state, the court instructed the jury to return a verdict of acquittal, which was done. The prosecuting attorney took a bill of exceptions containing the points decided

and obtained leave to file the same in this court, under section 7305, Revised Statutes, to obtain the opinion of this court upon the questions decided.

We have an imperfect record of the proceedings below, but the indictment discloses that the state predicated the charge of manslaughter upon the violation of a municipal ordinance. Or, to put the proposition in another form, it is alleged that the unlawful act committed by the accused, which ¹⁵⁹ resulted in the death of Brady, was the violation of said ordinance.

The present statute defining manslaughter provides that, "Whoever unlawfully kills another, except as provided in the last three sections, is guilty of manslaughter, and shall be punished," etc. Before the section assumed its present brief form, the crime of manslaughter was defined thus: "That if any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter, and on conviction thereof, be punished," etc.

In addition to what this court said in *Johnson v. State*, 66 Ohio St. 59, 90 Am. St. Rep. 564, 63 N. E. 607, 61 L. R. A. 277, we think it is sufficient to say that the unlawful act being committed which results in the death must be an act prohibited by law, as distinguished from an act forbidden by an ordinance of one of the municipalities of Ohio. It would seem that the case just cited decides the question before us and leaves little to be said in justification of the decision of the trial court. There are many municipal corporations in this state, and each may have its ordinances, appropriate to its local needs, and therefore there cannot be any uniformity in such local laws, if they should be entitled to the name of laws. Many of the counties of the state contain several municipal corporations. What may be an unlawful or prohibited act in one may be lawful in another, and so throughout the state. We are not permitted to say that what may constitute an essential element of manslaughter in one city ¹⁶⁰ or village need not be present in the ordinances of other cities or villages of the state. If the act of killing a person which ensues from violating a municipal ordinance constitutes manslaughter, then we have a law of a general nature which perhaps is not of uniform operation throughout even Franklin county. Neither is it of uniform operation throughout the various municipalities of the state. The unlawful act contemplated as an essential element of manslaughter must be uniformly unlawful throughout the state. Otherwise, what might be that crime in Columbus might not be such in Dayton, Toledo, Cleveland, or any other city or village in the state.

While the ordinance excluded by the court in the case under consideration may be a wise public regulation for Columbus, its vitality is expended in punishing persons who violate its provisions according to the scope of the penalties therein prescribed. It may be that there is need for action by our general assembly to provide a general law to cover cases similar to this, but until it answers the call, the courts are powerless in the premises.

In our judgment, the trial court committed no error in excluding the ordinance, and the exceptions to its rulings are overruled.

Summers, C. J., Crew, Spear, Davis, Shauck and Price, JJ., concur.

For Authorities Bearing upon the Question involved in the principal case, see the notes to *Johnson v. State*, 90 Am. St. Rep. 571; *Westrup v. Commonwealth*, 124 Am. St. Rep. 322.

FILMORE v. METROPOLITAN LIFE INSURANCE COMPANY.

[82 Ohio St. 208, 92 N. E. 26.]

LIFE INSURANCE—Killing of Insured by Beneficiary.—The beneficiary in a life insurance policy cannot recover thereon where the death of the assured is caused by the intentional and felonious act of such beneficiary. (p. 780.)

LIFE INSURANCE—Killing of Insured by Beneficiary.—In an action to recover upon a policy of life insurance brought by the person named therein as the beneficiary, an answer by the insurance company alleging that the plaintiff murdered the assured states a defense, such an averment, in legal effect, being tantamount to the allegation that the killing charged was intentional and felonious. (p. 780.)

(Syllabi by the court.)

James Johnson, Jr., and C. S. Olinger, for the plaintiff in error.

Martin & Martin, for the defendant in error.

²¹¹ CREW, J. The plaintiff in error, Elmer G. Filmore, as the beneficiary under a policy of life insurance issued to Emma Filmore, his wife, by defendant in error, the Metropolitan Life Insurance Company, brought suit against said company in the court of common pleas of Clark county, Ohio, to recover the sum of two hundred and thirty-nine dollars, with interest thereon from September 3, 1906, which sum he alleged in his petition was due him as such beneficiary under the policy of insurance so issued by said company. For answer to plaintiff's petition the insurance company pleaded two defenses, the first of which was a general denial, and the

second was in words and figures following, to wit: "For a second cause of defense to the petition, this defendant says that on the third day of September, 1906, ²¹² the said plaintiff murdered his wife, Emma Filmore, in the city of Springfield, county of Clark, state of Ohio; that on the twenty-fifth day of October, 1906, he was indicted by the grand jury of said county for manslaughter on account of the killing of his said wife, and on the thirty-first day of December, 1906, he was convicted of said crime, and on February 25, 1907, he was sentenced by the court of common pleas to six years' hard labor in the Ohio penitentiary, at Columbus, Ohio, where the said plaintiff is now confined. Defendant says that plaintiff having caused the death of the said assured, as herein set forth, he is estopped from asserting any claim as beneficiary under said policy. Defendant, having fully answered, prays to be hence dismissed with its costs." To this defense a demurrer was interposed by the plaintiff, Elmer G. Filmore, on the ground that the facts therein stated were insufficient in law to constitute a defense. This demurrer was overruled by the court of common pleas, and the plaintiff not desiring to plead further, judgment was entered dismissing his petition. This judgment of dismissal was subsequently affirmed by the circuit court, and the plaintiff in error now asks that this judgment of affirmance be reversed by this court. The sole question here presented is as to the legal sufficiency, against a general demurrer, of this second defense as pleaded in defendant's answer. It is conceded by counsel for plaintiff in error to be the well-settled and established rule of law that a beneficiary under a policy of life insurance is without right to recover thereon where the death of the insured has been intentionally caused ²¹³ by the act of such beneficiary, but it is contended in the present case that the second defense of defendant's answer is lacking in essential allegation, and is fatally defective, because it contains no direct or sufficient averment that the killing of the assured by Elmer G. Filmore, the beneficiary under said policy, was an intentional killing. That such objection is purely technical, and in the present case wholly without merit, is apparent, we think, from a consideration of the character and legal effect of the matter pleaded and the allegations made in said second defense. One of the express averments found in this second defense is, that the plaintiff, Elmer G. Filmore, murdered his wife, Emma Filmore, who was the assured in the policy of insurance upon which he was seeking to recover, and while it is true that neither the circumstances of the killing nor the constituent elements of the crime thus charged are pleaded with the particularity that would be necessary in an indictment charging the same crime, it is equally true that in an answer in a civil action such particularity of statement is not required, but it

is sufficient if, in such pleading, the matter constituting the defense be stated "in ordinary and concise language": Rev. Stats., sec. 5066. Murder, being specifically defined by statute in Ohio, is a term or word of technical significance and determinate legal meaning. Hence, the averment in an answer in a civil suit that the plaintiff therein murdered his wife is not the averment of a mere conclusion, but is the allegation of a determinate and issuable fact, which, if ²¹⁴ denied, could not be supported by proof merely of an unintentional or involuntary killing, for while in this state, under our Criminal Code, there are two degrees in the crime of murder, first and second, the purpose or intent to kill is made by statute an essential element of each, except only in the case of death caused from maliciously placing an obstruction upon a railroad track, etc.: Rev. Stats., sec. 6890. Wherefore it follows that the allegation in the second defense of defendant's answer in this case that the plaintiff, Elmer G. Filmore, murdered his wife, is tantamount to an allegation that he intentionally killed her, and the term "murder" employed therein by the pleader to designate and define the plaintiff's act itself necessarily imports that such killing was unlawful and felonious. And as is said by Mr. Justice Field in *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. Rep. 877, 29 L. ed. 997: "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired." In the case of *Schreiner v. High Court of Illinois Catholic Order of Foresters*, 35 Ill. App. 576, cited and relied upon by counsel for plaintiff in error as supporting their contention in the present case, the court also clearly recognizes the principle applicable to all contracts of insurance, that the insured or beneficiary cannot under such contract receive indemnity for a loss that he himself has intentionally brought about, the second paragraph ²¹⁵ of the syllabus in that case being as follows: "There can be no recovery in an action founded upon intentional wrong. The beneficiary in an insurance policy cannot recover where the death of assured has been intentionally caused by his act." For the reasons hereinbefore stated we are of opinion that in the case at bar the allegation of defendant's second defense that the plaintiff murdered his wife should be construed as pleading an intentional killing, and, therefore, as sufficient against a general demurrer. The view we have taken as to the legal effect of this averment renders unnecessary a consideration of the other averments of said second defense.

Judgment affirmed.

Spear, Davis, Shauck and Price, JJ., concur.

If the Beneficiary in a Life Insurance Policy Kills the Insured, he cannot recover the insurance, but this does not release the insurance company from the payment of the insurance money to anyone. It is held in *Schmidt v. Northern Life Assn.*, 112 Iowa, 41, 84 Am. St. Rep. 323, that the insurance money forms a part of the estate of the insured, and may be recovered by his administrator as though no beneficiary had been designated. And in *Supreme Lodge etc. v. Menkhausen*, 209 Ill. 277, 101 Am. St. Rep. 239, it is held that the heirs of an insured member of a benefit society, who is murdered by the named beneficiary, are entitled, when named by statute as within the class of eligible beneficiaries, to recover such insurance, nothing to the contrary appearing in the contract of insurance, or in the state law. The killing of the assured by an insane beneficiary, under such circumstances as would make the killing murder if the beneficiary were sane, does not forfeit the latter's right to recover the insurance money: *Holdom v. Ancient Order of U. W.*, 159 Ill. 619, 50 Am. St. Rep. 183.

LINDSAY v. RUNKLE.

[82 Ohio St. 325, 92 N. E. 489.]

PARTITION—Right of Trustee in Bankruptcy to Maintain.—

A trustee of the estate of a bankrupt selected or appointed under the provisions of the national bankruptcy act is without legal capacity under the statutes of Ohio to bring and maintain a suit for the partition of real estate in which such bankrupt is a tenant in common with others. (pp. 784, 785.)

(Syllabus by the court.)

Joseph W. Adkins and George W. Lindsay, for the plaintiff in error.

Clarence Curtain, for all the defendants in error, except William H. Runkle.

325 PRICE, J. On the twenty-ninth day of September, 1908, the plaintiff in error filed in the court of common pleas of Pickaway county his petition in which he prayed for the partition of certain real estate in which the bankrupt, William H. Runkle, was a tenant in common with the defendants in error.

Omitting description of the several tracts of land, that part of the petition important in the consideration of this case is as follows:

“The plaintiff says that he is the duly appointed, qualified and acting trustee in bankruptcy of the estate of William H. Runkle, a bankrupt; that it is to the best interest of the said estate that this proceeding be brought, and that he has a legal right to and is seised in fee simple and entitled to possession as such trustee of William H. Runkle, a bankrupt of the undivided one-fourth part of the following described real estate

situate in the county of Pickaway, in the state of Ohio, and in the townships of Madison and Walnut, and being," etc. Here follows a description of five different tracts ³²⁸ of real estate, some of them containing but a few acres.

The petition alleges that William H. Runkle, the bankrupt, is the son and heir at law of Henry M. Runkle, deceased, and that the personal property of the deceased "is sufficient to pay all the debts and claims against his estate." It is also alleged that Saloma Runkle is the widow of the deceased and entitled to dower in said premises, and that the other defendants, now defendants in error, are tenants in common in said premises with said bankrupt, each entitled to one-fourth part of the premises subject to said dower.

The prayer of the petition is to have the interest of said bankrupt set off to him in severalty, and "that the dower of said Saloma Runkle be assigned to her, and that subject thereto, that partition be made, and his interest set off to him in severalty if the same can be done without manifest injury to the property, but if his interest cannot be so set off without injury to the value of said property, that same may be appraised and sold, and for such other relief as may be provided for in law and equity."

The defendants demurred to the petition on two grounds: 1. That the plaintiff has not a legal capacity to sue; 2. That the petition does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and the plaintiff not desiring to amend the petition, the same was dismissed at costs of the plaintiff.

The latter prosecuted error in the circuit court for the reversal of said judgment, but the same, on final hearing, was affirmed.

³³³ The plaintiff in error, as trustee of William H. Runkle, a bankrupt, holds that position under certain provisions of the bankruptcy act whereby the creditors of the bankrupt may elect a trustee, or on failure to so act, the court of bankruptcy may appoint the trustee. If the trustee elected by a majority of the creditors is an incompetent or unsuitable person, the bankruptcy court may disapprove of the selection and another may be appointed by the court after such creditors have failed to select a suitable person, and when the trustee so created has accepted and become duly qualified as required by the statute, he is invested ³³⁴ with the title of the bankrupt to his estate, real and personal, of whatever character, not exempt under the law. This is so by virtue of the statutes relating to the subject and not by virtue of any direction or will of the bankrupt.

Without considering all the particular steps to be taken or observed by the trustee in discharge of his duties, it is sufficient here to notice some of the consequences of the procedure.

By clause 2 of section 47 of the bankruptcy act, it is made the duty of the trustee to reduce to money the property of the estate, under the direction of the court, and by clause 6 he is required to keep regular accounts showing all amounts received and from what source. The provisions of section 70 which relate to sales of property are as follows: "All real and personal property shall be appraised by three disinterested appraisers; they shall be appointed by and report to the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value. The title to property of a bankrupt estate which has been sold as herein provided shall be conveyed to the purchaser by the trustee."

In section 58 (bankruptcy act) it is provided that creditors shall have at least ten days' notice by mail of all proposed sales of property, etc.

Another provision of the act requires that all sales shall be by public auction unless otherwise ordered by the court. There are provisions as to sale of property encumbered by lien; giving the ³³⁵ court, on proper petition by the trustee, the power to order sale, subject to or free of liens as may be considered best, by the court. The trustee is carefully instructed by the bankruptcy act as to his powers and duties, and in discharge of many of his duties he is under the control of, and answerable to, the court of bankruptcy.

We need not further occupy this field of investigation, but we have gone far enough to see that the jurisdiction and powers of the court of bankruptcy are peculiar to that court, made so by the law creating and regulating its jurisdiction, and we are now to determine the standing and rights of such trustee when he enters the state courts claiming to be a tenant in common asking partition of real estate.

He comes to the state court as a stranger to its jurisdiction, although he may resort to it to enforce his rights in certain cases. He says in his petition that he belongs to another jurisdiction, and gives the sign by which he may be known, viz., he is trustee of a tenant in common who is a bankrupt. He does not disclose in his petition that the court of bankruptcy had ordered or authorized him to come into the state court, for any purpose, nor does he ask the state court to order a sale in either of the ways pointed out by the statute under which he was appointed and qualified.

Is he a tenant in common, or is he but the trustee of a tenant in common? He is invested with the title of the bankrupt, not as a purchaser, or under other form of contract, but solely by operation of law and for a special purpose, that he

may convert the estate into money with which to pay the debts of the bankrupt.

³³⁶ He may, in the bankruptcy proceedings, and according to the law on that subject, sell the undivided interest of the bankrupt in the lands, and convey such interest to the purchaser, who may thus become a tenant in common with the owners of the other interests, and that path appears to be free from doubt or obstruction.

But what confronts the trustee as he asks partition in the state court? The suit must be entertained and conducted under the laws of the state. What would the trustee do or say, in case one or more of the tenants in common should answer and charge that the bankrupt tenant in common had received and enjoyed the rents and profits of the estate for years and ask an accounting for the same? Would he have to consult the bankruptcy court as to his duty in such case? If the dower of a widow is to be assigned, as is required in this case, it must be done under the state law. If the commissioners appointed to make partition "are of opinion that the estate cannot be divided without manifest injury to the value thereof, they shall return that fact to the court with a just valuation of the estate, whereupon if the court approve the return, and one or more of the parties elect to take the estate at such appraised value, the same shall be adjudged to him or them, upon his or their paying to the other parties their proportion of the appraised value thereof according to their respective rights," etc.

This right of election is vested by law in each of the tenants in common, but could not be exercised by the trustee, without using the estate otherwise in his hands to make the necessary payments to other cotenants.

³³⁷ If no such election is made, "the court may, at the instance of a party, make an order for the sale thereof at public auction by the sheriff who executed the writ of partition, or his successor in office": Rev. Stats., sec. 5764. Section 5765 provides: "But the estate shall not be sold for less than two-thirds of the appraised value thereof as returned by the commissioners." Here would be a conflict between the state and bankruptcy courts, for we have observed that it is provided in section 70b of the bankruptcy act that "all real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by and report to the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."

The court mentioned is the bankruptcy court.

The sale in the partition case is governed by prescribed rules which, as we see by comparison, are in plain conflict with the provisions for sale in the bankruptcy proceeding, and the trustee seems insistent in promoting and maintaining that conflict. We know of no method of blending these jurisdictions in order to have partition made that will be just and equitable to the widow and all the tenants in common as their rights may appear.

It is not our duty to entertain the suit of the trustee when it is inevitable that a conflict of jurisdiction will arise between the state and federal courts. The trustee may sell the estate of the ³³⁸ bankrupt without partition, as before observed, with results less harmful than a complication of questions and interests likely to follow such an action for partition.

We still think the trustee in bankruptcy is not a tenant in common as recognized in partition proceedings, but is but a trustee of a tenant in common.

The foregoing reasons are sufficient to sustain the judgment of the lower court, and its judgment is affirmed.

Summers, C. J., Crew, Spear, Davis and Shauck, JJ., concur.

A Trustee in Bankruptcy, Having Legal Title With No Beneficial Interest in undivided property and no duties with reference to the property requiring partition for the benefit of a cestui que trust, is not, in general, such a tenant in common as authorizes him to sue for partition. The federal bankruptcy statute contains no express authority to a trustee in bankruptcy to sue for partition of the property of the bankrupt, the title to which is by the law vested in him for the purpose of paying the debts of the bankrupt, and the nature of the trustee's power and duties does not necessarily make the right to sue for partition exist by implication. A sale of the bankrupt's interest may be made without partition, and this may be sufficient for debt paying purposes: *Hobbs v. Frazier*, 56 Fla. 796, 131 Am. St. Rep. 179.

STOUT v. STOUT.

[82 Ohio St. 358, 92 N. E. 465.]

PARTITION—Estate of Decedent.—The Administrator is ordinarily not a proper party in a partition suit brought by heirs. (By the editor.) (p. 788.)

PARTITION—Estate of Decedent—Payment of Debts.—The right of an administrator to subject the lands of his intestate to the payment of the debts of the estate is superior to the right of the heirs at law to have partition of such lands. (p. 789.)

PARTITION—Estate of Decedent—Sale for Debts.—So soon as the administrator has ascertained that the personal estate in his hands will be insufficient to pay all the debts, etc., of the estate, it is his duty to forthwith apply to the probate or common pleas court for

authority to sell the lands for the payment of such debts, and in such case the heirs at law can prevent a sale and have partition of the lands only by giving bond for the payment of debts, etc., as provided by section 6146, Revised Statutes. (pp. 788, 789.)

(Syllabi by the court except when stated to be by the editor.)

Carl W. Lenz, Frank A. Collins and Wilson & McBride, for the plaintiffs in error.

Worley & Wiggins, for the defendants in error.

³⁵⁸ SPEAR, J. Richard Stout, a resident of Highland county, died intestate December 16, 1907, seised of certain real estate situate partly in Highland and partly in Brown county. He left Anna B. Stout his widow and other parties in the court below and in this court his heirs at law. The next day after the decease of the father, viz., December 17, 1907, William R. Stout and Cornelius R. Stout filed in the court ³⁵⁹ of common pleas of Highland their petition for partition, making the widow and heirs defendants. The petition averred that the personal property of the estate was sufficient to pay all debts of the estate. Later, to wit, February 8, 1908, a supplemental petition was filed averring that Anna B. Stout had been appointed administratrix of Richard Stout, deceased; that she claimed some interest or right in and to the real estate and making her a party defendant as administratrix.

December 24, 1908, Anna B. Stout, as administratrix, filed an answer averring her appointment as such January 7, 1908; averring, also, that the personal estate of Richard Stout was wholly insufficient to pay the debts and costs of administration; and that the total value of the personalty was only two thousand one hundred and sixty dollars and fifty-two cents and that valid debts of the decedent amounting to over four thousand three hundred and four dollars and eighteen cents had already been presented for allowance and allowed, and six hundred and fourteen dollars and seventeen cents more had been presented but not yet allowed; that Richard Stout died December 16, 1907, and that on March 18, 1908, she brought suit in the probate court of Highland county, making necessary parties and asking an order to sell real estate to pay said debts, which suit has been heard on the pleadings and evidence and is now in the hands of the court for final decree. No person interested in the estate has given bond to her as such administratrix, as provided by law, for the payment of the debts of said estate, and said claims are valid claims against said estate. The jurisdiction of the probate court attached March 18, 1908, and the court of common pleas has no jurisdiction of this case.

Upon hearing of a general demurrer to the ³⁶⁰ answer of Anna B. Stout, as administratrix, the court of common pleas

overruled the demurrer, and thereupon upon trial held that the plaintiffs in that court had no cause of action and dismissed their petition. This judgment was affirmed by the circuit court. Error is prosecuted here by William R., Cornelius R., and Samuel A. Stout. The administratrix also, apparently out of abundant caution, filed a cross-petition asking affirmative relief in the partition case. To this a general demurrer interposed by plaintiffs was sustained by the court of common pleas. No complaint is made to this action in the common pleas by either party, and that incident need not be further referred to.

The question at issue is in a narrow compass. It is whether or not, upon the decease of a resident of Ohio who dies intestate, being seised of real estate situate in this state, and owing debts, the heirs at law may have partition of the real estate as against the claim of the administrator to subject the land to the payment of debts of the estate without giving bond to pay debts, etc., as required by section 6146, Revised Statutes. Both courts below answered this question in the negative. We think they answered it correctly.

It is true that the title to the land of the deceased ³⁶¹ intestate passes to the heirs at law. It is also true that the administrator has no concern therewith except upon a condition to be considered later. The right to partition is controlled by statute. Chapter 9 of title 1, division 7, Revised Statutes, prescribes the procedure. Tenants in common and coparceners are given the right of partition and are made subject to that right. The parties are to be the tenants in common, coparceners, or other persons interested in the land. The right thus given is not an unlimited right, but is subject to certain specified restrictions. One of those restrictions is that where the title came from an inhabitant of this state, partition shall not be ordered within one year from the date of the death of the intestate unless the petition shall set forth and it be proved that all the debts and claims against the estate have been paid, or secured to be paid, or that the personal property of the deceased is sufficient to pay the same. This provision is a recognition of the universal rule that the lands of a decedent are subject to the payment of his debts. It is unnecessary to cite authorities to sustain this proposition, since it runs through all the legislation and all the decisions of the courts bearing on the subject, and the sections of statute respecting partition must be construed in all cases in the light of this principle. It does not follow from this, however, that the administrator is a proper party in a partition suit. As a general proposition he is not. Within the meaning of the statute he is not a "person interested therein." A widow, or one holding a lien, would come under that desig-

nation. Had there been in the present case no debts to be paid, ³⁶² it would be entirely plain that the administratrix could not, on any conceivable ground, be a proper party, and it would seem just as clear that she could not be dragged in by the false statement in the petition as to debts. In other words, if there were no debts in excess of the personalty to be paid, the administratrix could not possibly have any interest in the land, while if there were such debts, the partition suit commenced the day after the decease of the intestate was simply an impertinence. Special provisions as to the rights of the administrator with regard to sale of land to pay debts will be cited later on. Not being a proper party in the partition case, the common pleas, notwithstanding the service of summons on the administratrix and her appearance, acquired no power to adjudicate against her in that suit, and committed no error in refusing to do so. It is true that more than a year from the decease of the intestate had elapsed before, by the answer of the administratrix, the court was advised of the condition of the estate as to debts. But this fact cannot be of significance, inasmuch as the provision as to one year, found in section 5756, Revised Statutes, is merely negative, and by no means implies that a sale might be ordered after the expiration of one year, notwithstanding it were made to appear, as it was in this case, that the debts of the estate exceeded the amount of personal property. There is force, too, in the suggestion that the proper inference as to the limit of one year is that a partition suit ought not to be commenced to apart lands of one who was a resident of this state earlier than one year after the decease of the intestate.

³⁶³ The foregoing conclusion is strengthened by a consideration of the sections heretofore referred to as bearing on the right and duty of the administrator to ask authority to sell real estate to pay debts. Upon it being ascertained that the personalty is insufficient to pay the debts, the procedure provided by sections 6136 to 6174, Revised Statutes, operates upon the res as well as upon the parties interested, and gives to the administrator the absolute right to subject the lands in the way prescribed unless advantage is taken by those interested by the interposition of a bond. The first section above cited in absolute terms requires the executor or administrator so soon as he shall ascertain that the personal estate will be insufficient to pay all the debts, etc., to apply to the probate or common pleas court for authority to sell the real estate, and then follow, in subsequent sections, minute provisions for the proper conduct of such sales. This absolute requirement is not abridged by any clause of any of the sections following. It is true, as urged by counsel for plaintiffs in error, that provision is made by sections 6173 and 6174 for the appropriation to the payment of debts of the proceeds arising from

sales in partition proceedings where deficiency of assets is found to exist, but this falls very far short of a provision supplanting an application by the administrator for an order to sell by a suit by the heirs in partition. Indeed, the last clause of the last-cited section distinctly neutralizes the proposition claimed. That clause is: "Provided, that nothing herein contained shall be so construed as to prohibit any executor or administrator ³⁶⁴ from proceeding to sell land belonging to such estate to pay any debts, when the same has been sold on partition or otherwise, or the proceeds of such sale fully distributed." It is inconceivable to ascribe to the lawmakers a purpose to authorize a suit in partition by heirs, the result of which would be to simply complicate the affairs of the estate, while at the same time the administrator is given authority, as is given by the clause above quoted, to sell to pay debts notwithstanding the sale in partition and the proceeds of the sale fully distributed.

The action by the administratrix commenced March 18, 1908, in the probate court for authority to sell the real estate for payment of debts, was strictly in accordance with the requirements of statute and with her duty in the premises. All the parties in the partition suit were parties in that suit, and it was brought in a court having adequate jurisdiction to work out full relief to all. The partition case was primarily to apportion the lands among the heirs, and only incidentally to effect a sale on one contingency. As the land is subject to the payment of debts, the right to subject it to sale for that purpose is the superior right. Both cannot prevail. Necessarily the minor one must give way. Therefore, the parties in the partition suit were without legal right or power to compel the administratrix to abandon her proceeding to sell real estate to pay debts brought in a form provided by statute for that purpose, a court which could afford to all parties full and complete relief. It follows, therefore, that the probate court acquired jurisdiction, as ³⁶⁵ well of the subject matter as of the parties, at the commencement of the action by the administratrix, within one year after the decease of Richard Stout, and was proceeding to work out the rights and interests of the parties. Necessarily the case supplanted the partition case in the common pleas, and that court was justified in so holding and deciding.

Judgment affirmed.

Summers, C. J., Crew, Davis, Shauck and Price, JJ., concur.

Partition Involving the Property of Decedents whose estates have not been settled or distributed is the subject of a note to *Smith v. Smith*, 119 Am. St. Rep. 586. Partition in connection with the distribution of the estates of decedents is the subject of a note to *Buckley v. Superior Court*, 41 Am. St. Rep. 140.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

OGILVIE v. WESTERN UNION TELEGRAPH COMPANY.
[83 S. C. 8, 64 S. E. 860.]

TELEGRAPH COMPANY—Evidence of Mental Anguish.—In an action by a mother for the negligent delay of a telegram that her son has been injured, her testimony that her “suspense was terrible,” and her husband’s testimony that “it was pretty bad; she was all to pieces; I never saw her like that before in my life,” does not show that her suffering was beyond what the average mother would feel in her situation, and its admission does not violate the rule excluding testimony as to the plaintiff’s peculiar or abnormal fears and apprehensions. (p. 791.)

TELEGRAPH COMPANY—Delay in Delivering Message—Evidence.—In an action against a telegraph company for delay in transmitting a telegram, evidence as to the receipts of the railroad and express companies at the delivery station, where the agent attends to the business of the railroad, express, and telegraph companies, and that his work was too much for one man, is not wholly irrelevant. (p. 791.)

TELEGRAPH COMPANY—Mental Anguish of Mother.—The regret or disappointment of a mother in being delayed, through negligence in the transmission of a telegram, in reaching and ministering to her son who has been injured, may be so keen or intense as to be properly charged as mental anguish. (p. 792.)

TELEGRAPH COMPANY.—The Reasonableness of the Office Hours of a telegraph company is properly referred to the jury when there is a dispute as to the facts. (p. 793.)

TELEGRAPH COMPANY—Punitive Damages for Delay.—The unexplained delay of a telegram at a relay office from 4 o’clock in the afternoon to 10 o’clock the next morning, affords sufficient evidence to take the question of punitive damages to the jury. (p. 793.)

Geo. H. Fearons, Nelson & Nelson and Efird & Dreher,
for the appellant.

Graham & Sturkie, contra.

(790)

*** JONES, C. J.** The defendant-appellant seeks to reverse a judgment for five hundred dollars in favor of plaintiff for alleged negligent and wanton failure to deliver the following message, filed by Jeremiah Smith with defendant's agent at Conway, South Carolina, and addressed to the plaintiff at Lexington, South Carolina:

“Daggett badly cut with saw; flesh wound; not necessarily fatal; both come.”

Daggett referred to in the message was plaintiff's son. The message, as alleged, was filed with the defendant for transmission about 4 o'clock P. M. on Saturday, November 12, 1904, and was not delivered until about 10:30 o'clock A. M. on November 13, 1904, resulting in delaying plaintiff in reaching her son for about twenty-six hours, and thereby causing her to suffer great grief and mental anguish.

Appellant's first contention is that the court erred in allowing plaintiff, after stating that she suffered great mental anguish, to further state that her "suspense was terrible," and in permitting plaintiff's husband to testify as to his wife's condition after the receipt of the telegram, "It was pretty bad; she was all to pieces; I never saw her like that before in my life." It is objected that ¹⁰ the testimony violated the rule stated in *Willis v. Western Union Tel. Co.*, 69 S. C. 537, 104 Am. St. Rep. 825, 48 S. E. 538, 2 Ann. Cas. 52, excluding testimony as to the claimant's peculiar or abnormal fears and apprehensions, but we do not so hold. There was no attempt to show that plaintiff's suspense and suffering were beyond what the average normal mother would feel in her situation, and in instructing the jury the court was careful to apply the rule in the *Willis* case and restrict recovery to the suffering of an ordinary person under the circumstances.

Error is alleged in admitting evidence as to the income of the railroad and express companies at the Lexington station. Defendant's witness, Hartley, had testified that he attended to all the business at Lexington of the railroad, express and telegraph companies, and that on Saturday, November 12th, he was very busy and in the warehouse most of the time, and had no help. On cross-examination he testified that the work was too much for one man to do and that he ought to have had help, and was further allowed to testify as to the income of the railroad and express companies at that point as bearing upon the question of the amount of work the agent had to do. The testimony was not wholly irrelevant, as it had some relation to the question whether the failure of defendant's agent at Lexington to receive and deliver the message on November 12th could be excused because of reasonable demands upon his time and attention by his associated employments. On this same line defendant was allowed to show that the income

from the telegraph business did not exceed ten dollars per month. It is not reasonable to suppose that the jury may have estimated the amount of damages against the defendant by reference to the income of strangers to the suit.

It is alleged that the court erred in not giving the jury without modification defendant's sixth request, as follows: "A telegraph company, under the mental anguish act, is not liable for mental anguish which was merely incidental ¹¹ to its failure to deliver a message, and, in an action such as this, the defendant is charged with the suffering, if any, which the failure to deliver the message may reasonably be expected to produce, when its contents are considered, not with the suffering due to a peculiar temperament, but that of an ordinary human being. And, under the mental anguish act, the plaintiff in this case cannot recover for any feeling of disappointment, annoyance or vexation which she may have felt by reason of the failure to promptly deliver the message in question."

The court charged the first sentence of the request, but refused to charge the last sentence, and instead charged as follows: "That means the failure to deliver must cause the suffering, and the test is what the jury think that a person of ordinary feeling, the usual ordinary feeling in this case; I charge you that feeling that you conclude a mother, the ordinary mother, that the ordinary mother should have under similar circumstances; you cannot take the way of a person of a very excitable temperament or impulsive disposition on the one hand, or one of very callous disposition on the other; the test you go by is what, in your judgment, a person of ordinary feeling under similar circumstances, what feeling they had, or should have suffered—suffered under similar circumstances."

It is contended that the modification was not in harmony with the construction of the statute given in *Johnson v. Western Union Tel. Co.*, 81 S. C. 235, 128 Am. St. Rep. 905, 62 S. E. 244, 17 L. R. A.; N. S., 1002. The court in that case was considering the application of the statute with respect to relatives not connected with the subject of the message by close family ties, and, therefore, not likely to sustain the mental anguish contemplated by the statute. The present case involved the mental suffering of a mother with respect to her son. Her regret or disappointment in being delayed in reaching and ministering to him may have been so keen or bitter or intense as to be properly charged as mental anguish. The charge given sufficiently covered the issue.

¹² The appellant requested the court to charge the jury: "That closing the telegraph office at Lexington on Saturday afternoon at 6:30 and opening next morning at 9:30 is rea-

sonable office hours, and the company is not required by law to receive a message at Lexington between 6:30 P. M. Saturday and 9:30 A. M. Sunday." The court modified the request by charging: "That it is for the jury to say whether the closing of the telegraph office at Lexington on Saturday afternoon at 6:30, if it was closed, and you are to say whether closed, and opening the next morning at 9:30, if opened at all, were unreasonable office hours or not, and if you do decide that they were reasonable office hours, then the telegraph company would not be required by law to receive a message at Lexington between 6:30 P. M. Saturday and 9:30 A. M. Sunday; you are to be the judges." Appellant contends that this was error on the ground that the reasonableness of office hours is a question of law for the court, when there is no dispute as to the facts. Conceding this to be correct, the court committed no error, as there was testimony that the regular office hours at Lexington were from 7:00 A. M. to 7:00 P. M., and the court could not assume the facts to be as declared in the request.

It is finally contended that the court erred in submitting the question of punitive damages to the jury. While it appears that the message was promptly transmitted from Conway to Augusta, Georgia, the relay office, there was no explanation whatever as to the long delay of the message at the Augusta office, from 4 o'clock P. M. Saturday to 10 A. M. Sunday morning. By many decisions in this state it has been held that a long unexplained delay in transmitting and delivering telegrams affords some evidence of a reckless or wanton disregard of duty. It is true the agent at Lexington made commendable effort to deliver the message on its receipt by him at 10:06 Sunday morning,¹³ but this was unavailing in view of the long and unexplained delay in transmitting from the Augusta office.

The exceptions are overruled and the judgment of the circuit court is affirmed.

Right to Recover Against a Telegraph Company for Mental Anguish due to the negligent delay in the transmission or delivery of a message is discussed in the note to Kagy v. Western Union Tel. Co., 117 Am. St. Rep. 305. Mental anguish and wounded feelings, alone and unaccompanied by personal injury, which naturally and proximately arise from a contract to transmit and deliver a telegraphic message furnish ground for the recovery of damages, limited, however, to certain degrees of relationship: Western Union Telegraph Co. v. Saunders, 164 Ala. 234, ante, p. 35, and cases cited in the cross-reference note thereto.

A Telegraph Company may Establish Reasonable Office Hours for the transmission and delivery of telegrams, and the reasonableness thereof is ordinarily a question for the court and not for the jury: Western Union Tel. Co. v. Gillis, 89 Ark. 483, 131 Am. St. Rep. 115.

ROSS v. LIPSCOMB.

[83 S. C. 136, 65 S. E. 451.]

MUNICIPAL BONDS—Submitting Propositions Separately to Voters.—In submitting to the voters the question of issuing bonds for three different purposes, the failure to specify the amount to be used for each purpose and to submit the different propositions separately, renders the election illegal and the bonds invalid. (p. 799.)

CONSTITUTIONAL QUESTION—When will not be Decided.—Generally a court will not pass upon a constitutional question and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. (p. 802.)

CONSTITUTIONAL LAW—Who cannot Question Statute.—A party invoking the provisions of a statute is not in a position to raise the question of its constitutionality. (p. 802.)

MUNICIPAL BONDS—Money in Which Payable.—Section 2008 of the Code of Laws provides that municipal bonds may be made payable in any legal tender money of the United States. (p. 803.)

The petition referred to in the opinion follows:

“1st. That the petitioners, W. H. Ross, as mayor, and W. O. Johnson, W. L. Settlemyer, T. H. Littlejohn, K. S. Lipscomb, B. A. Holmes and Gus Abernathy, as aldermen, compose the town council of the town of Gaffney, South Carolina.

“2d. That the respondents, J. N. Lipscomb, B. G. Clary and E. R. Cash, are the duly constituted board of public works of the town of Gaffney, South Carolina.

“3d. That in the duties prescribed by law and devolving upon the town council of Gaffney, it is the duty of said town council, when a majority of the freeholders of the town of Gaffney shall petition for an election to be held to vote bonds for the purpose of establishing sewerage, waterworks, and electric lights, one or all, to order an election for the said purposes in the manner prescribed by law.

“4th. That on March 5, 1909, a petition, signed by a majority of the freeholders of the town of Gaffney was duly presented to the town council, asking for an election to be ordered to vote one hundred and twenty-five thousand dollars bonds for the extension of the electric light and waterworks and the installation of a sewerage system for the town of Gaffney. Said petition is made a part of this petition and is marked Exhibit ‘A,’ except that the names signed thereto are omitted.

“5th. Pursuant to said petition an election was duly ordered to be held in Gaffney, South Carolina, on March 31, 1909, for the purpose of ascertaining whether or not the town council of Gaffney, South Carolina, shall issue not more than one hundred and twenty-five thousand dollars in bonds for the extension of the electric lights, waterworks and the installa-

tion of a sewerage system for the town, which said order is made a part of this petition and marked Exhibit 'B.'

"6th. That a notice of such election was duly published as required by law, as shown by the affidavit of W. E. Peeler, which is made a part of this petition and is marked Exhibit 'C.' The notice of said election is made a part of this petition and is marked Exhibit 'D.'

"7th. That pursuant to said notice and order an election was duly held, as provided by law, on March 31, 1909, in which election a majority of the votes cast by the qualified electors in said town were in favor of the issuance of said bonds, as shown by the certificate of the managers of the election, which is made a part of this petition and marked Exhibit 'E.'

"8th. That thereafter, pursuant to the result of said election, an ordinance was duly passed by the town council of Gaffney authorizing and directing the town council to issue coupon gold bonds to the amount not exceeding one hundred and twenty-five thousand dollars, bearing five per cent interest per annum, and running forty years, optional after twenty years, etc., as shown by a copy of said ordinance, which is made a part of this petition and is marked Exhibit 'F.'

"9. The certificate of Geo. E. Hood is made a part of this petition and is marked Exhibit 'G.'

"10th. That under the law it is the duty of the board of public works to sell the said bonds so issued by the town council of Gaffney and at once carry out the purposes for which the said bonds were issued, as shown by reference to an act of the General Assembly of South Carolina, approved the 19th of February, 1907, being No. 389, and an act of the General Assembly of South Carolina, approved the fourteenth day of February, 1908, being No. 563 of the 25th Statutes of South Carolina, also section 2008 in volume 1 of the Code of Laws of South Carolina, 2009, 2010.

"11th. That said board of public works, although the law requires them to sell the said bonds and to apply the proceeds to the carrying out of the purposes for which the same had been issued by the town council of Gaffney, have failed and refused to sell the same and to enter upon the establishment of the objects for which said bonds were issued, in violation of their plain legal duties.

"Wherefore, your petitioners pray that an order be issued by this court requiring the said board of public works to sell the said bonds and to do the other acts required of them by law."

The answer is:

"1st. They admit all of the material allegations set forth in the petition so far as the facts therein stated are concerned,

but deny that said election was held pursuant to law, and allege that the said bonds are void and unsalable for the following reasons: (1) That under and by virtue of an act of the General Assembly of the state of South Carolina, approved the fourteenth day of February, 1908, being No. 563 of volume 25 of the Statutes of South Carolina, the said election was irregular and invalid in the following particulars: That in section 6 of said act it is provided that, 'Whenever it may be deemed advisable by the said board to issue bonds to extend the electric light plant or waterworks in the town of Gaffney, or to secure additional water supply for the said town of Gaffney, the said town council of Gaffney shall submit the question of issuing bonds for the extension or the improvement of the said electric light plant or waterworks, one or both, to an election of the qualified electors of the town of Gaffney, first giving notice of such election by publishing in the newspaper published in Gaffney, once a week for at least four weeks, a notice of such election, setting forth the amount of bonds to be voted upon and the term of years which said bonds are to run, said election to be ordered in the discretion of the said board of public works, or upon the petition of one-third of the number of freeholders of the town of Gaffney, and under the law governing municipal elections. That if a majority of the electors voting at such election shall vote to issue bonds for the purpose of extending or improving the electric light plant or the waterworks plant, it shall be the duty of the town council of Gaffney to issue, or cause to be issued, such bonds; and when so issued the board of public works shall sell, or offer for sale, the same, after due advertisement, and use the moneys arising from the sale of such bonds for the purposes for which said bonds were voted, and for no other purpose, provided that no bonds issued shall run for a period of less than twenty years, nor for a period of more than forty years; shall not be sold for less than par or bear a rate of interest higher than five per cent per annum, which interest may be payable semi-annually.' Section 7 of the same act provides that whenever the said board of public works deem it desirable or upon a petition of one-third of the freeholders of the town of Gaffney petitioning for an election for a sewerage system, and setting forth the amount of bonds to be voted for, an election shall be ordered, etc.

"That said election and the bonds issued in pursuance thereof are invalid and unsalable, in that the proposition submitted to the voters did not separately state the items nor the amount of bonds to be issued for the extension of the electric lights, for the extension of the waterworks, and for the installation of a sewerage system. That each of said prop-

positions should have been submitted separately to the voters in order that they might express their choice fairly upon each issue so made. That by combining the three objects in one, and submitting the whole question of issuing bonds as a single proposition, the voters were compelled to accept all or vote against all, and did not have a fair opportunity of expressing their choice upon each of the propositions, which should have been submitted separately. That by reason of the foregoing facts, the said board of public works refused to sell said bonds.

“Wherefore, the respondents pray that the petition be dismissed.”

The reply is:

“1st. That the petitioners are informed and believe that there is no statute or law in the state requiring each of the propositions submitted in said election to be submitted separately.

“2d. That the almost unanimous vote in said election shows conclusively that the proposition as submitted was assented to and indorsed by the qualified voters of the town.

“3d. That the act of the General Assembly upon which the respondents rely, in so far as the same applies to elections for the purpose of voting bonds for electric lights, waterworks and sewerage, is unconstitutional, null and void, in that the original act was approved February 19, 1907, and is numbered 389 of volume 25 of the Statutes of South Carolina, the title of which act reads as follows: ‘An Act to Create a Board of Public Works for the Town of Gaffney, and to Define Their Powers and Duties and Compensation.’ That said act was amended and re-enacted by an act approved the fourteenth day of February, 1908, the title of which is as follows: ‘An Act to Amend an Act Entitled an Act to Create a Board of Public Works for the Town of Gaffney, and to Define Their Powers and Duties and Compensation, so as to Limit the Amount of Indebtedness and to Declare Valid All Obligations Made by the Board of Public Works, to Provide for the Election of Successors to Members of the Present Board of Public Works.’ That said act violates section 17 of article 3 of the constitution of 1895, in that it relates to more than one subject which is not included in the title and is not germane to the title of said act, in that said act goes beyond the purposes expressed in the title and attempts to provide a scheme and plan for the ordering and holding of elections by the town council for the purpose of voting bonds, which said scheme or plan is no part of the powers, duties and compensation of the board of public works; nor is the same related in any way to the election of successors to the members of the present board of public works.

"4th. Further, that said act is in contravention of article 2, section 13, of the constitution of 1895, which provides that in authorizing the said election in any incorporated city or town in this state for the purpose of bonding same, the General Assembly shall prescribe as a condition precedent to the holding of said election a petition from a majority of the freeholders of said city or town as shown by its tax-books, with which provision section 2008, volume 1, Code of Laws of South Carolina, is consistent, while that said act relied upon by respondent is inconsistent in that said act provides that such election shall be ordered whenever it may be deemed advisable by the said board as shown by section 6 of said act, and whenever the said board of public works deem it advisable, or upon a petition signed by one-third of the freeholders of the town of Gaffney, all of which provisions are contrary to the constitution.

"Wherefore, the petitioners pray for relief prayed for in the petition herein."

Butler & Hall, for the petitioner.

J. C. Jeffries, contra.

¹⁴² GARY, J. This is an application to the court, in the exercise of its original jurisdiction, for a writ of mandamus, requiring the respondents to sell certain bonds, amounting to one hundred and twenty-five thousand dollars, for the extension of the electric ¹⁴³ lights and waterworks and the installation of a sewerage system for the town of Gaffney.

The questions at issue will appear by reference to the petition, the amended answer and the reply, which are set out in the report of the case.

The first ground of objection interposed by the respondents is, "that said election, and the bonds issued in pursuance thereof, are invalid and unsalable, and that the proposition submitted to the voters did not separately state the items, nor the amount of the bonds to be issued, for the extension of the electric lights, for the extension of the waterworks, and for the installation of a sewerage system."

The sixth section of the act of 1908 (which is set out in the answer of the respondents) requires that the amount of the bonds to be voted upon shall be set forth in the notice of the election to be held for the purpose of determining whether bonds shall be issued to extend the electrical light plant or waterworks in the town of Gaffney or to secure additional water supply for said town. And in the seventh section of said act it is likewise required that the amount of the proposed bonds shall be set forth in the notice of the election upon the question of issuing bonds for the purpose

of establishing and building a system of sewerage for the said town.

The intention of the legislature was that there should be separate and distinct statements as to the amount of the bonds for electric lights and waterworks, and as to the amount of those for establishing a sewerage system; and that the question of issuing bonds for the extension of the electric lights and waterworks presented an entirely different proposition from that of issuing bonds for establishing a sewerage system.

Therefore, the failure to give notice of the amounts respectively of the proposed bonds and the failure to submit ¹⁴⁴ the different propositions separately to the voters rendered the election illegal and the bonds invalid.

But even if the manner in which the different propositions were submitted to the voters is considered apart from the statute, the same result would follow.

In the well-considered opinion in the case of *Rea v. City of Lafayette*, 130 Ga. 771, 61 S. E. 707, it was ruled that when several distinct and independent propositions for the issuing of bonds by the municipality are submitted to the qualified voters of the town or city, provision should be made in the submission for a separate vote upon each. That they cannot be lawfully combined as a single question. In that case the purpose declared in the resolution and notice was "to determine the question whether said city will issue bonds in the aggregate sum of forty thousand dollars, said sum to be expended as follows, to wit: For the purpose of establishing and maintaining a system of waterworks, twenty-five thousand dollars; for the purpose of establishing and maintaining a system of electric lights, ten thousand dollars; for the purpose of improving and extending the public school of said city and providing adequate accommodations for school patrons and children of said city, five thousand dollars."

Mr. Chief Justice Fish in delivering the opinion of the court used this language (page 708): "There may be in a given community such a strong sentiment in favor of incurring a public debt for a particular purpose—for instance, as providing adequate and suitable accommodations for the public schools—that by combining a proposition of this popular character with one to create a public debt for a wholly different purpose, which would not, as an independent measure, commend itself to the unbiased judgment of the voters, the unpopular proposition may obtain the requisite number of votes to insure its adoption. On the other hand, the sentiment against the last-mentioned proposition might be so strong as to cause the voters to ¹⁴⁵ defeat the one in favor of the public schools, although if standing alone it would have received their hearty support. To present both propositions

in a single submission, thus rendering the success of the one dependent upon the success of the other, or the defeat of the one dependent upon the defeat of the other, is clearly unfair to the voters, and not at all conducive to a free and untrammelled expression of public sentiment as to the merits of either. And when the number of separate and distinct questions to be combined and embraced in a single submission increased, there is a corresponding increase in the unfairness of the mode of submission and of the chances that no true expression of the will of the people can be obtained. Another evil which might result from holding such a practice to be lawful is that a popular and meritorious measure might be purposely foredoomed to defeat by making its success dependent upon the adoption of some other measure known to be obnoxious to the people."

Mr. Justice Stockton, delivering the opinion of the court in *McMillan v. Lee County*, 3 Iowa, 311, said: "The law, in our opinion, has provided no such mode of submitting these questions to the vote of the people. The evils which might be permitted to grow up under such a system are so obvious and apparent that any extended discussion of the question by us would be superfluous. It may be sufficient to suggest that if it were allowed measures in themselves odious and oppressive might, by means of it, become fastened upon a county which in no other way could have obtained the number of votes requisite to insure their adoption but by being connected with some other proposition which commended itself to the favor and suffrages of the people by its inherent merits and popularity. They must be adopted or rejected together. After the same manner a measure desirable and necessary, to a people of a county may, when offered for their adoption, be rejected by their votes and fail to become a law by reason ¹⁴⁶ of its connection with some other measure or measures unpopular and uncalled for. In either case there is an evil. An unpopular measure may be forced upon an unwilling people, or a necessary and desirable one may be denied them in spite of their wishes. It is sufficient for us to say that the law, in our opinion, intended to provide for no such system of contradictions. A measure wise and salutary in itself needs no adventitious assistance to recommend it to the suffrages of the people, or to insure its adoption by them. It may demand that its enactment into a law shall be made to depend upon their sanction alone. A pernicious measure is not entitled to such assistance, and should be permitted to stand or fall by its own inherent merits or defects."

In *Lewis v. Bourbon County Commrs.*, 12 Kan. 186, Mr. Justice Brewer thus stated the rule: "It may be conceded that two or more questions may be submitted at a single elec-

tion, provided each question may be voted on separately so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together, to stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission. By it several interests may be combined and the real will of the people overslaughed. By this combination an unpopular measure may be tacked onto one that is popular and carried through on the strength of the latter. A necessary matter may be made to carry with it some private speculation for the benefit of a few. Things odious and wrong in themselves may receive the popular approval because linked with propositions whose immediate consummation is deemed essential. It is against the very spirit of popular elections that aims to secure freedom of choice, not merely between parties, but also in respect to every office to be filled and every measure to be determined. A voter at a state election would be shocked to be told that because he voted for a person named for governor on one ticket he ¹⁴⁷ must vote for all other persons named thereon, or that voting for one person he was to be understood as voting for all. He would feel that his freedom of choice was infringed upon. None the less so it is by such a submission as this."

The principle is thus announced in *Tolson v. Police Jury*, 119 La. 215, 43 S. E. 1011, reported in that valuable publication, *American and English Annotated Cases*, volume 12, page 847: "The railway company agreed to divide the proposed tax with the public schools in the proportion stated in the petition; and this agreement was incorporated in the ordinance ordering the election, and in the notice of the election. The effect of this was that the taxpayers were not afforded an opportunity of voting for or against the railroad tax, but were compelled to vote upon a hybrid proposition, part railroad and part school tax. It can hardly be necessary to say that a vote cast for such a proposition is not a vote for or against a railroad tax within the intendment of the above-quoted article 270 and of the statute carrying it into effect. These laws clearly contemplate that the distinct proposition—for or against the particular tax in question—shall be submitted to the voters. If the voter cannot vote against the railroad without at the same time voting against the public schools, or vice versa, he is not allowed a free exercise of his judgment. That mode of taking a vote is known in ordinary legislation as 'log-rolling,' and is utterly condemned. Our constitution expressly forbids the legislature from having recourse to it, and a fortiori cannot the police jury use it in consulting the taxpayers upon any tax proposition? After a vote has been taken upon such a double-barreled proposi-

tion, there is no certainty that a majority of the voters have united upon either of the two taxes. Non constat, in the instant case, that a majority of the voters would have favored the railroad tax if the school interest had not been enlisted in its favor." See, also, the note to that case.

¹⁴⁸ In the note to *Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400, reported in 2 American and English Annotated Cases, page 367, is the following statement of the rule: "It is well established that a proposition submitted to the voters of a municipal corporation, as to the issuance of bonds by the municipality, must not combine two propositions so that both propositions have to be answered by one expression of the vote, because a voter might thereby be induced to vote for both propositions when he would have voted for only one if the question had been submitted singly." (Citing numerous authorities.)

The petitioners in their reply have attacked the constitutionality of the act of 1908, hereinbefore mentioned, but this question cannot be considered, for the following reasons:

(1) Because the petition must be dismissed for the reason already stated. The rule is thus stated in Cooley's Constitutional Limitations, at page 163, second edition, and quoted with approval in the case of *Ex parte Florence School*, 43 S. C. 11, 20 S. E. 794: "Neither will a court, as a general rule, pass upon a constitutional question and decide a statute to be invalid unless a decision upon that very point becomes necessary to the determination of the cause. . . . In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record presents some other and clear ground upon which the court may rest its judgment and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such a question will be unavoidable."

(2) Because section 2009 of the Code of Laws provides that in the town of Gaffney the board of public works shall consist, ex officio, of the mayor, treasurer and clerk of the town council. This provision is still of force, unless repealed by the act of 1908. If that act is unconstitutional, ¹⁴⁹ then the respondents are not the lawfully constituted board of public works of Gaffney, and are, therefore, without power to perform the duties which the petitioners are seeking to require them to exercise. A party invoking the provisions of a statute is not in a position to raise the question as to its constitutionality: *Port Royal Co. v. Hagood*, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841; *Ex parte Florence School*, 43 S.

C. 11, 20 S. E. 794; Moore v. Napier, 64 S. C. 564, 42 S. E. 997; State v. Morris, 67 S. C. 153, 45 S. E. 178; State v. Cain, 78 S. C. 348, 58 S. E. 937.

The next ground urged against the validity of the bonds is because the town council had no authority to provide that the bonds should be payable in gold. Section 2008 of the Code of Laws provides that such bonds may be made payable in any legal tender money of the United States.

As to the eighth ground of objection set out in the answer of the respondents, we deem it only necessary to state that it is plainly untenable.

It is the judgment of this court that the petition be dismissed with costs.

Mr. Chief Justice Jones and Messrs. Justices Woods and Hydrick concur in the result upon the ground first considered in this opinion.

The Validity of Municipal Bonds as Affected by Noncompliance with the law in holding the election when the question of issuing the bonds is submitted to the voters is considered in the notes to Jones v. City of Camden, 51 Am. St. Rep. 844; De Voss v. City of Richmond, 98 Am. Dec. 671. Where the law provides that the system or plan proposed in the acquisition of a public improvement shall be submitted to the people for ratification, a submitting ordinance is insufficient which gives no further information than to recite the advisability of purchasing an existing water system and issuing bonds to pay therefor in a certain sum, but not setting out the plan or system, nor stating the time the bonds are to run, the rate of interest, or the manner of payment: Hansard v. Green, 54 Wash. 161, 132 Am. St. Rep. 1107.

BREON v. MILLER LUMBER COMPANY.

[83 S. C. 221, 65 S. E. 214.]

PROCESS—Service by Publication on Nonresident.—Proceedings for the service of summons by publication on a nonresident before attachment of his property are void. (p. 804.)

PROCESS—Exemption of Nonresident Attending Suit.—A nonresident who comes into the state for the sole purpose of attending, as a party defendant and a witness, a reference in a pending suit, is exempt from service of summons in another action. (p. 805.)

PROCESS—Service on Nonresident Officer of Corporation.—Service of summons on a domestic corporation may be effected by serving its president, a nonresident, while he is temporarily within the state for the purpose of attending as a party defendant and a witness in a reference being held in another suit. (p. 807.)

J. F. Carter and W. H. Townsend, for the appellants.

J. O. Patterson & Son and Bates & Simms, contra.

²²³ GARY, J. The following statement appears in the record:

"This is an appeal from an order of the Honorable John S. Wilson, Circuit Judge, presiding in the second circuit in the above-entitled action, made at chambers, in Bamberg, South Carolina, on the twelfth day of November, 1908, refusing two motions, made separately, by the defendants, the Miller Lumber Company and Henry I. Wilson, to set aside the service of the summons in the above-entitled action, which had been made upon each of them, respectively, as follows: On the Miller Lumber Company on or about September 29, 1908, by service, after order for service by publication, on R. C. Gourley, its secretary, without the state of South Carolina, and in Punxsutawney, in the state of Pennsylvania; and on the twentieth day of October, 1908, on Adam Miller, its president, in Barnwell, South Carolina, and on Henry I. Wilson, a nonresident of the state of South Carolina, on or about the twenty-ninth day of September, 1908, in Big Run, Jefferson county, Pennsylvania, and on the twentieth day of October, 1908, in Barnwell, South Carolina. Each of said defendants having appeared separately, specially and only for the purpose of their respective motions. The two motions were, for the convenience of counsel, heard together."

The complaint upon which the summons was issued seeks the recovery of damages against the defendants for the sum of four hundred and seventy-nine thousand two hundred and fifty-nine dollars and eighty-two cents.

The first question that will be considered is, whether the service of summons, made upon the defendant, Henry I. Wilson, without the state of South Carolina, and within the state of Pennsylvania, in September, 1908, after and pursuant to the order for service by publication, was either void or voidable.

This question is concluded by the case of *Little v. Christie*, 69 S. C. 57, 48 S. E. 89, in which the court ruled ²²⁴ that proceedings for the service of summons by publication on a nonresident before attachment of his property are null and void.

The next question for consideration is, whether the service of summons, made on Henry I. Wilson, a nonresident of this state and only temporarily within this state for the sole purpose of attending, as a party defendant and a witness, a reference being held at Barnwell, South Carolina, on the 20th of October, 1908, under an order of the court, in another action pending therein, for the foreclosure of a mortgage on specific property, situate within this state, while in attendance on such reference, should have been vacated and set aside.

Section 847 of the Code of Laws is as follows: "No person shall be arrested while actually engaged in or attending

military or militia duty, or going to, or returning from the same, nor while attending, going to, or returning from any court, as party or witness or by the order of the court, except for treason, felony or breach of the peace; but in such case process may be served, without actual arrest of body or goods."

In the case of *Cooper v. Wyman*, 122 N. C. 784, 65 Am. St. Rep. 731, 25 S. E. 947, it was held that a nonresident who comes into the state, for the sole purpose of attending a litigation, either as suitor or witness, is exempt from service of civil process during his coming, his stay, and a reasonable time for returning.

The court in that case used the following language: "As stated in many of the cases, this settled rule is based upon high considerations of public policy, not upon statutory law, since it is the public interest, that suitors and witnesses from other states, who cannot be compelled to attend our courts, may not be deterred from voluntarily appearing by fear of being served with process in other actions; their presence, if obtainable, being calculated to enable the courts to more thoroughly educe the truth of the matters ²²⁵ in litigation: *Baldwin v. Emerson*, 16 R. I. 304, 27 Am. St. Rep. 741, 15 Atl. 83. In some few of the earlier cases it was questioned whether the privilege was not restricted to witnesses, but all the later and better considered cases embrace parties as well as witnesses, more specially since the change, which enables parties to be examined as witnesses: *Matthews v. Tufts*, 87 N. Y. 568; *Juneau Bank v. McSpedan*, 5 Bliss. 64, Fed. Cas. No. 7582. No one is hurt by this exemption, since, if it did not exist, the nonresidents would not come here and service of summons on them could not be made anyway: *Sherman v. Bundlach*, 37 Minn. 118, 33 N. W. 549; *Ballinger v. Elliott*, 72 N. C. 596. The exemption covers the time of their coming, stay, and reasonable time for returning, *eundo, morando et reduendo*; but the exemption is strictly restricted to those instances in which the person claiming it is in this state for the purpose of attending the litigation as a party or as a witness, and for no other purpose whatever. If he is here for any other cause besides attendance upon the suit, the ground of the exemption ceases, and he is subject to service of process. There is also an exemption where there is an action, brought against a plaintiff, for maliciously bringing the very action which he comes to the state to prosecute: *Mullen v. Sunborn*, 79 Md. 364, 47 Am. St. Rep. 421, 29 Atl. 522, 25 L. R. A. 721. The exemption, being long and universally recognized, and not being statutory, could only be repealed by an express statute, which no state has passed."

The foregoing states clearly the well-established rule of law, which is fully sustained by the numerous authorities

cited in the argument of the appellant's attorneys, and those collected in eighteen pages of small type in the notes to *Mullen v. Sanborn*, 79 Md. 364, 47 Am. St. Rep. 421, 29 Atl. 522, 25 L. R. A. 721.

His honor, the circuit judge, therefore erred in refusing to set aside the service of the summons on said defendant.

The next question that will be considered is, whether the service of summons made on the Miller Lumber Company, a domestic corporation of this state, by serving Adam ²²⁶ Miller, its president, a nonresident of this state, and only temporarily within this state for the sole purpose of attending, as a party plaintiff and a witness, a reference being held in Barnwell, South Carolina, on the twentieth day of October 1908, under an order of the court of common pleas, in another action pending in that court, for the foreclosure of a mortgage on specific property within this state, while in attendance on such reference, should have been vacated and set aside.

The appellant's attorneys rely upon the case of *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101, and quote the following language from Mr. Justice Reed, who delivered the opinion of the court: "Nor do I think the fact that the witness, upon whom service was made, was not himself the defendant in the action in which the process was issued, but was an officer of the corporation defendant, deprives him of the privilege of immunity of service. Corporations, while distinct entities, act, and are acted upon, only through their officers or other agents. Any service of process in its character personal must be upon an officer or agent. When a person happens to be an agent or officer, a service upon whom is a service upon a corporation in a foreign jurisdiction, service upon him in his representative character is quite as likely to be inimical to the rule of privilege as if the service was made in an action brought against the officer personally. The interest of the officer in the corporation which he represents would naturally deter him from a course of conduct which would operate to the prejudice of his corporation. The repugnance of an officer to having his corporation drawn into litigation, in a foreign jurisdiction, would be quite as likely to keep him at home as if it was merely the danger of service in a personal action."

That case, however, has no application, for the reason that both the corporation and its representative were nonresidents, ²²⁷ while in the case under consideration the corporation is domestic.

The plaintiff herein is not seeking any relief whatever against Adam Miller, in his individual capacity, and a judgment in personam cannot be recovered against him.

If the service of the summons on Adam Miller should be set aside, it would inure to the benefit of a domestic corpora-

tion, which is not entitled to the privilege, and exemption from service of civil process accorded to nonresidents.

Section 155 of the code provides that the summons shall be served by delivering a copy thereof as follows: "If the suit be against a corporation, to the president, or other head of the corporation, secretary, cashier, treasurer, a director or agent thereof."

Whatever doubt may exist as to the right to serve the summons on the president outside the state, when he is a nonresident, the code clearly contemplates service of the summons on the president, if within the state, even though he be a nonresident and in attendance upon court either as a suitor or witness.

It would lead to great injustice if the officers of a domestic corporation had it in their power to render inoperative the provisions of section 155 of the code.

His honor, the circuit judge, therefore, properly refused to set aside the service of the summons on Adam Miller.

It is the judgment of this court that the order of the circuit court be reversed as to Henry I. Wilson and affirmed as to the Miller Lumber Company.

The Exemption of Witnesses and Parties to an Action from Service of Process is the subject of a note to *Worth v. Norton*, 76 Am. St. Rep. 535. Such exemption is in derogation of the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him, and therefore the privilege should not be extended beyond the reason of the rule upon which it is founded: *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 134 Am. St. Rep. 886. According to *Guynn v. McDanel*, 4 Idaho, 605, 95 Am. St. Rep. 158, a nonresident is not exempt from service of summons upon him in a civil suit against him while in attendance upon a court within the state as plaintiff in a suit therein. But according to *Martin v. Bacon*, 76 Ark. 158, 113 Am. St. Rep. 81, a person cannot be lawfully served with civil process while he is attending on a court in a state other than that of his residence, either as a party or a witness, or while going to or returning therefrom. In *Murray v. Wilcox*, 122 Iowa, 188, 101 Am. St. Rep. 263, it is decided that a nonresident defendant in a criminal prosecution attending the courts of the state for the purpose of his trial is exempt from the service of civil process while coming and departing, as well as while actually in attendance at court.

Service of Process upon an Agent of a Foreign Corporation while he is temporarily in the state is discussed in the note to *Abbeville etc. Co. v. Western etc. Co.*, 85 Am. St. Rep. 910. It is decided in *Greenleaf v. People's Bank*, 133 N. C. 292, 98 Am. St. Rep. 709, that the managing officer of a nonresident corporation while in the state for the sole purpose of attending a judicial sale of land to which his corporation is a party is not exempt from service of summons in an action against such corporation.

SMITH v. NELSON.

[83 S. C. 294, 65 S. E. 261.]

LOST CHECK.—A Suit in Equity will Lie to recover upon a lost check. In decreeing a recovery the court will protect the defendant by a provision for indemnity. (p. 811.)

LOST CHECK.—Where the Payee of a Check Indorses and mails it to a third person in payment of a debt, but the check is lost and is never delivered to such person, and the drawer of the check withdraws all his funds from the bank, the payee may sue the drawer as upon a lost check. (p. 813.)

Mitchell & Smith, for the appellant.

Nath. B. Barnwell and Jno. C. Millar, contra.

295 ALDRICH, A. J. In this case the plaintiff served a complaint on the 20th of April, 1907, to which the defendant interposed a demurrer.

The demurrer was heard before the Honorable G. W. Gage, presiding judge, at the November term, 1907, and upon the hearing he made an order, dated 30th of November, 1907, sustaining the demurrer, on the ground that the complaint was in an action at law, but that the plaintiff's remedy was in equity; that he was entitled to sue in equity and have a decree which might protect the defendant and award the plaintiff his demand. While the demurrer was sustained, the order permitted the plaintiff to amend the complaint as he might be advised within twenty days after the filing of the order. The plaintiff complied with this order without serving any notice of intention to appeal at that time, and served the following amended complaint:

"1. That heretofore, to wit, on or about the eighth day of January, 1906, this plaintiff sold and delivered to the said above-named defendant a number of cattle, the property of **296** the plaintiff, numbering about twenty-six head, for the sum of two hundred and fifty-nine dollars and thirty-two cents, which said sum of money the defendant agreed and promised to pay to the plaintiff for the said cattle.

"2. That the defendant gave to the plaintiff, in conditional payment of the same, a check upon the Columbian Banking and Trust Company for the said sum of two hundred and fifty-nine dollars and thirty-two cents, payable to the order of the plaintiff, which check the plaintiff indorsed over, payable specially to the order of a party in Georgia whom plaintiff owed on his part for the purchase of said cattle, and deposited an envelope containing said check in the postoffice addressed to the said party in Georgia, but that the said check was, as plaintiff is informed and believes, lost in the mails and never delivered to the said party in Georgia and was never at any time received by him.

"3. That the defendant was duly notified of the same and asked to give a check in place of the one so lost, or to pay for the said cattle, and full and ample security was offered to him to secure him against any possibility of loss from the said check being thereafter found and presented for payment, but the defendant has constantly refused to give any second check or to pay the same, and that the whole amount of said sum of two hundred and fifty-nine dollars and thirty-two cents is still due and owing.

"4. That subsequently to the giving of the said check the said defendant, as plaintiff is informed and believes, drew out and used and converted to his own purposes all his money then on deposit in the said Columbian Banking and Trust Company, so that there was nothing for the said check to be effectual upon even if same had been discovered and presented.

"5. That the plaintiff is still willing to, and continues ready to, enter into such bond or security as the court may order to indemnify the defendant and secure him against any possibility of loss from the said check being found and ²⁹⁷ presented for payment, and to do such other acts as may seem to the court necessary to completely guard and indemnify the defendant against any possible loss by reason of the said check.

"6. That defendant has refused and still refuses to accept any indemnity for security against said check, and has refused and still refuses to give plaintiff another check in lieu of the one so lost or to pay the amount due to plaintiff for the sale and delivery of said cattle as aforesaid."

Thereupon the defendant gave notice that he would move for an order to strike out the complaint as amended under the order of Judge Gage on the following grounds, viz.:

"1. Because said complaint served as an amended complaint has not been amended so as to conform with the order of Judge Gage, dated November 30, 1907, sustaining defendant's demurrer and permitting plaintiff to serve an amended complaint.

"2. Because said amended complaint does not state a cause of action in equity on behalf of plaintiff as required by the order of Judge Gage permitting an amended complaint to be served.

"3. Because said amended complaint is substantially a restatement of the complaint which was dismissed on demurrer herein by Judge Gage by order dated November 30, 1907."

The motion came on to be heard before the Honorable D. E. Hydrick, presiding judge, at the February term, 1908. who, after hearing the motion, granted the same, and

ordered the complaint served herein as an amended complaint to be stricken from the files and the suit dismissed.

From this order of Judge Hydrick this appeal has been taken, upon the following exceptions:

"1. Because his honor erred in holding and deciding that 'the action is at law and that the plaintiff has a remedy; he may sue in equity and have a decree which may protect the defendant and award the plaintiff his demand.'

²⁹⁸ Whereas, it is respectfully submitted that there is no difference in form between legal and equitable actions under the code, and his honor should have held that the complaint in this action states facts sufficient to constitute a cause of action in equity and entitling the plaintiff to equitable relief.

"2. Because his honor erred in sustaining the demurrer to the complaint upon grounds which were not made or argued by the defendant and not taken or mentioned in the demurrer or the grounds and specifications of demurrer.

"3. Because his honor erred in sustaining the demurrer to the complaint upon the ground assigned that 'the check is outstanding, is negotiable, may fall into bona fide hands and be demanded of the defendant.' Whereas, his honor should have held that the complaint on its face states a good and sufficient cause of action and shows on its face that the plaintiff is entitled to recover upon giving to the defendant suitable indemnity to secure him against the possibility of the check being found by anyone and presented for payment.

"4. The plaintiff excepts to the decree of his honor, Judge Hydrick, dated May 16, 1908, striking out the amended complaint and dismissing the suit, it being alleged that said decree is erroneous upon the following grounds: 'Because his honor, Judge Hydrick, erred in striking out the amended complaint and dismissing the suit, in that such decree overruled and was inconsistent with the order of Judge Gage, which declared that the plaintiff had a remedy and might sue in equity, whereas, his honor, Judge Hydrick, ignoring the said order, held that the plaintiff had no remedy and dismissed the suit, and that his honor should have construed the order of Judge Gage and permitted the plaintiff to amend.

"5. Because his honor, Judge Hydrick, in striking out said amended complaint and dismissing the suit, was in error, in that the amended complaint complies in all respects with ²⁹⁹ the order of Judge Gage permitting it to be amended and supplies every supposed defect as indicated in said order.

"6. Because his honor, Judge Hydrick, erred in striking out the amended complaint and dismissing the suit, whereas, the amended complaint states facts sufficient to constitute a

cause of action as permitted and indicated by the order of Judge Gage, and his honor should have so held.

“7. That his honor, Judge Hydrick, erred in summarily dismissing the suit, and should have held that the complaint as amended discloses on its face a good and sufficient cause of action, and shows on its face that the plaintiff is entitled to recover upon giving to the defendant suitable indemnity to secure him against the possibility of the check being found by anyone and presented for payment.”

The first three exceptions relate to the order made by his honor, Judge Gage. The point is made by the respondent that these exceptions cannot be considered by the court, inasmuch as the plaintiff having made no objection to the order of Judge Gage within ten days after it was filed, and having attempted to comply therewith and accepted the benefits of such order, has waived the right of appeal.

The main question, however, comes up upon the appeal from the order of his honor, Judge Hydrick, for if his honor, Judge Hydrick, erred in striking out the amended complaint and dismissing the suit, and the amended complaint does state a sufficient cause of action, then it will be unnecessary to consider the exceptions to the prior order of Judge Gage.

The question, then, for decision is, Does the complaint as amended state a good cause of action, entitling the plaintiff to equitable relief? The complaint alleges that the plaintiff had sold to the defendant a number of cattle for two hundred and fifty-nine dollars and thirty-two cents. That the defendant gave the plaintiff in conditional payment of the same a check upon the Columbian Banking and Trust Company, payable to the order of plaintiff, which check the plaintiff indorsed over payable specially to the order of a ³⁰⁰ party in Georgia, whom plaintiff owed on his part for the same cattle; that plaintiff deposited the check in the postoffice properly addressed to the party in Georgia, but the said check, as plaintiff is informed and believes, was lost in the mails and was never delivered to the said party in Georgia, and has never at any time been received by him.

The allegation of the complaint, therefore, is, that the check which was given in payment for the cattle had been lost and never used, and the complaint upon the whole must be construed to be a suit upon a lost check.

The authorities in this state are conclusive to the effect that a suit will lie upon a lost note, and that in such case, when the suit is upon a lost note, the proper course is for the loser to go into equity, when by a decree of the court sufficient indemnity can be required to relieve the defendant from the danger of being made liable a second time: *Whitesides v. Wallace*, 2 Speers, 193; *Davis v. Benbow*, 2 Bail. 427; *Chew-*

ning v. Singleton, 2 Hill Eq. 371; Wardlaw v. Heirs of Gray, Dud. Eq. 85.

The principles of these cases will apply equally to other lost negotiable instruments, including checks.

It follows from the decisions in this state that there is no doubt that an action in equity will lie to recover upon a lost note or check, and that in such case in decreeing a recovery the court will protect the defendant by a suitable provision for indemnity.

The respondent raises the ground that these authorities do not apply, inasmuch as it appears upon the face of the complaint that the check which is the subject of the action was assigned and transferred to a party in Georgia, and that the plaintiff is not the real party in interest and had no title to the check.

If the check were in existence, and in the hands of a third party, duly indorsed over to him, such third party, as the final holder, would have a right of action against both the plaintiff as indorser and the defendant as the maker of ³⁰¹ the check. The plaintiff, however, as payee, would also have a right of action against the defendant as maker. They would both be liable to the holder of the check, but the defendant, as the original maker, would continue liable to the plaintiff as original payee or as indorser until the debt represented by the check was settled. The rule is precisely the same as exists between the maker and the successive indorsers, according to succession, on an inland bill of exchange or a promissory note: 2 Daniel on Negotiable Instruments, 4th ed., secs. 1651, 1652. Each indorser being liable to all subsequent indorsers as the maker is liable to all indorsers. Any indorser who is called upon by the holder to pay can enforce the liability against the maker. The liability of the maker being forced for the benefit of the actual holder at the time of the trial.

So, also, if the check, which was delivered to the plaintiff, had been by him actually indorsed over and delivered to a third party, and was in the possession of such third party, it would operate as an equitable assignment pro tanto of the funds of the drawer in the bank so as to permit the holder to sue the bank for the recovery of such funds as were in the bank whenever it received notice of the check, to the extent of the check: Loan & Sav. Bank v. Farmers' & M. Bank, 74 S. C. 210, 114 Am. St. Rep. 991, 54 S. E. 364.

The case presented is in a different class. The complaint alleges that the check is lost, that it never has been received by, and is not in the possession of, the party in Georgia to whom it was addressed. This is a part of the plaintiff's allegations, and at the time of the trial it may be incumbent on him to sustain it by the proper proof. Assuming, however,

that it be true, as alleged in the complaint, that the check has been lost and has never been received, and is not now held by the party in Georgia, does the mere fact of having mailed it to such party divest the original holder of his interest so as that he is not able to sue the drawer upon it? We hold that if the check was lost and never delivered to ³⁰² the party to whom it was addressed, and the plaintiff still remained responsible for its amount to the party in Georgia, whom he intended to pay thereby, that the original holder has title in himself and can sue upon the check as a lost check.

The case of Savannah National Bank v. Haskins, 101 Mass. 370, 3 Am. Rep. 373, is exactly to the point, and the reasoning of the case commends itself to us. The case of Mitchell v. Byrne, 6 Rich. 171, is not applicable to the present case. In that case the bills of exchange paid by Moon in Liverpool were paid simply for the honor of the plaintiff, Mitchell & Co., and Moon himself stated that he had accepted and paid the bills of exchange of plaintiff only for the honor of the plaintiffs, and looked to them solely for repayment. He did not look at all to Booth, who was the original party upon whom the bills had been drawn by Mitchell & Co. We cannot hold that although the holder of a bill paid for the honor of the drawer holds it as indorser with all the rights against the parties to the bill which indorsing can confer, yet there is nothing to prevent the holder surrendering the bill to the party for whose honor the bill was paid and relinquishing to him all the holder's rights in the instrument, and that such being Moon's intention, Mitchell & Co. remained creditors of Booth as holders of the bills. In the present case the plaintiff substantially occupies the same position that was occupied by Mitchell & Co. in the case of Mitchell v. Byrne, 6 Rich. 171. The original debt was due to the plaintiff in this cause as it was due to Mitchell & Co. in Mitchell v. Byrne. In neither case had that debt been actually paid. In the present case the check given for its payment has been lost, and the defendant has himself withdrawn from the bank on which the check was drawn the funds on which the check was to operate. In the Mitchell v. Byrne case the bills of exchange drawn on Booth had been accepted by Booth, and his acceptance dishonored at maturity, and they ³⁰³ were then taken up by Moon to protect the commercial honor of Mitchell & Co.

The court practically held that because Moon had taken up the bills to protect Mitchell & Co.'s honor that did not release Booth, who had dishonored his acceptance and who still remained liable to Mitchell & Co. on the original debt, Mitchell & Co. being responsible over to Moon. So, in the present case the plaintiff is still liable over to the party in Georgia for the cattle. The loss of the check cannot operate

to give the cattle to the defendant for nothing, and the defendant still remains liable to the original payee, the plaintiff.

As the plaintiff in the present case occupies the position of Mitchell & Co. in Mitchell v. Byrne, 6 Rich. 171, so the defendant Nelson occupies the relative positions of Booth. Both Nelson and Booth are the parties primarily liable on the instruments, Nelson on his check and Booth on his acceptance, and the reason of the rule is that the party primarily liable to the original creditor should remain so until there is payment or satisfaction in some way to the original creditor.

The defendant can suffer no loss by meeting his obligations, as the complaint alleges the willingness of the plaintiff to give (as it is the duty of the court to require) such indemnity as to the court shall seem proper, to properly secure and indemnify the defendant from any loss or damage by reason of being again asked to make good the lost check.

We also fail to see how the defendant can be entitled to rely upon the claim that the mailing of the check to the party in Georgia operated to assign to such party the funds in the bank to the extent of the check, in the face of the fact as alleged in the complaint, and which must be taken as admitted on this hearing, that the defendant, after the issue of the check, drew out of the bank all the money that the check was supposed to be drawn upon, and assigned and converted ⁸⁰⁴ the same to his own use. He therefore has now in his own possession the very money which he claims to have been assigned in the bank by reason of the check, and there is nothing in the bank which the check can operate on as an assignment.

We hold that the complaint does set out a good cause of action in equity in favor of the plaintiff against the defendant, and it is accordingly adjudged that the judgment below be reversed, and that the cause be remanded to the court of common pleas for Charleston county for further proceedings in accordance with this judgment.

Actions on Lost Instruments are considered in the note to Matthews v. Matthews, 94 Am. St. Rep. 465. If the payee of a check loses it before presenting it to the bank on which it was drawn, his remedy is not by an action against the bank, but by an action against the drawer of the check. The loss of the check excuses the holder from presenting it to the bank for payment: First Nat. Bank v. McConnell, 103 Minn. 340, 123 Am. St. Rep. 336. See, also, Moore v. Durnan, 69 N. J. Eq. 828, 115 Am. St. Rep. 635.

MERCK v. MERCK.

[83 S. C. 329, 65 S. E. 347.]

DEEDS—Reservation of Life Estate.—A deed in the usual form, except that after the description it recites, "this deed is not to go into effect until after my death," conveys a fee with reservation of a life estate. (p. 817.)

EVIDENCE—Declarations of Grantor.—Evidence that one who has conveyed land gave a mortgage on it to secure attorney fees in an expected attack on his title, that he rented the land to a tenant, and that his tax returns show that he sold a part of the land, although incompetent as declarations in his own favor by a grantor, becomes competent to discredit his testimony that he procured his deed by fraud or theft. (p. 818.)

DEED—Impeachment of Deed by Parties to It.—In a case between third persons, a grantor or grantee in a deed, under which one of the parties claims, is a competent witness to impeach it. (p. 821.)

VENDOR AND VENDEE—Fraud in Procuring Deed—Bona Fide Purchaser.—Where a deed is duly executed, but is fraudulently procured by the grantee, a subsequent purchaser for value without notice will be protected against the grantor and his heirs. (p. 821.)

DEED—Fraud in Procuring—Estoppel.—An instruction that if a deed was surreptitiously taken from the grantor, and without his knowledge or consent placed upon record, it was not delivered and therefore is not valid, is erroneous in leaving out of consideration his negligence and consequent estoppel, if such issue is made. (p. 822.)

DEED—Delivery—Control During Life.—It is essential to the delivery of a deed that it should pass beyond the control of the grantor. If he retains the custody and control during his life, the instrument cannot have effect as a deed at his death. (p. 823.)

Breazeale & Long, J. E. Boggs and Cothran, Dean & Cothran, for the appellants.

Jas. P. Carey, contra.

331 **WOODS, J.** The plaintiffs, as heirs at law of Blumer Merck, brought this action for the partition of a tract of land, containing one hundred and fifty-six acres, alleged in the complaint to have been the property of Blumer Merck at the time of his death. The defendant Lawrence C. Merck is a son of Blumer Merck, and the defendants Ella Burton, B. Stewart and K. Stewart are the children of Parthena Stewart, who predeceased her father, Blumer Merck. W. B. Mann was made a party defendant as the grantee of the interest of Lawrence C. Merck, alleged in the complaint to be one-eighth. Mann alone answered the complaint, alleging that none of the other parties to the action have any interest in the land, and that he is the owner thereof in fee simple. On the trial of the issue of title thus made the jury found a verdict in favor of the defendant Mann, and the circuit judge subsequently made a decree in accordance with the verdict.

The title of Blumer Merck to the land was admitted, and Mann claimed title from him through the following successive conveyances: (1) deed from Blumer Merck to his son, the defendant Lawrence C. Merck, dated January 4, 1902; (2) deed from Lawrence C. Merck to M. F. Hester, dated September 4, 1905; (3) deed from M. F. Hester to A. J. Boggs of an undivided half interest, dated November 27, 1905; (4) deed from M. F. Hester and A. J. Boggs to W. B. Mann, dated December 3, 1906. The ³³² cause depends on the validity of the deed from Blumer Merck to Lawrence C. Merck. If that deed was valid, then the defendant Mann had a good title to the entire land when the action was brought. The plaintiffs attacked the deed, alleging it to be invalid for these reasons: (1) That it was never delivered; (2) that if delivered, the delivery was in the presence of only one witness; (3) that the consideration mentioned in it was never paid; (4) that it could not have effect as a deed, because it showed on its face that it was not to take effect until after the death of Blumer Merck; (5) that it was procured by M. F. Hester and Lawrence C. Merck from Blumer Merck when he was so feeble of mind and body as to be incapable of transacting ordinary business, for the purpose of defrauding the heirs of Blumer Merck of their inheritance. In support of this fifth allegation, it was alleged that Lawrence C. Merck conveyed to M. F. Hester in pursuance of the scheme of fraud, and that the defendant W. B. Mann had notice when he purchased that the deed to Hester was fraudulent and void, and that plaintiffs would deny its validity on account of the alleged fraud.

If the deed from Blumer Merck shows on its face that it was not to take effect until his death, then it was ineffectual as a conveyance and the defense would have no foundation. The primary issue, then, is on the construction of the deed. It is in the usual form of a conveyance of land with the warranty clause, except that it contains after the description of the property the sentence: "This deed is not to go into effect until after my death."

We shall not enter into a discussion of the numerous authorities cited in the argument, because there are two cases decided in this state which are conclusive. In *Alexander v. Burnett*, 5 Rich. 189, the words used in the deed were: "It is clearly and unequivocally understood that the aforesaid deed of gift is to be of no effect whatever until ³³³ I, the aforesaid J. B., depart this life." This is the conclusive reasoning of Judge Evans in delivering the opinion of the court: "Now, what rule of law interferes so as to prevent us from giving to this paper, as a deed, the same construction as was given in *Jaggers v. Estes*, 2 Strob. Eq. 343, 49 Am. Dec. 674, and *Duke's Exrs. v. Dyches*, 2 Strob. Eq. 353, to vest a present

title in Anne Burnet, subject to the right of Johnson to the use and enjoyment during his life? The words of restriction will thus have all the effect which I suppose was intended, viz., to reserve to himself the use and control during his life, and, until that event, was to have no effect so as to give any right of possession. To give it the effect of changing entirely the legal import of all the words which he had before used would be a very strained and unnatural interpretation, such as is not required to give effect to any conceivable intention which he could have had, unless we suppose he was entirely ignorant of the meaning of words; that when he said, 'I have given, granted, bargained and sold,' he meant only 'I give and bequeath'; when he said, 'I warrant,' he meant nothing; when he said, 'This deed of gift,' he meant 'this will,' or that he meant to vest no present title when he delivered the deed and the negro along with it, which were essential to a deed, but wholly unnecessary to a will."

In *Williams v. Sullivan*, 10 Rich. Eq. 217, Mrs. Sullivan, in a paper having the form of an absolute conveyance with warranty, gave to John Sullivan, his heirs, etc., "the following negro property at my death, namely, Lucy and her six children, together with their increase." The court held that the title to the property passed on execution of the paper; the right of use and possession only being postponed until the death of Mrs. Sullivan. So in this case there can be no doubt that Blumer Merck intended to execute a legal instrument, conferring upon Lawrence C. Merck the right to the possession and enjoyment of the land after his death. He could only do this by deed or will. It is certain from the language used that he meant to make ³³⁴ a deed, not a will. It does not strain the meaning of the words, "this deed is not to go into effect until after my death," to construe them in connection with the whole paper, as expressing the intention of the grantor to say: "I do mean to make a good deed of conveyance to Lawrence C. Merck, but I hold back from him for myself the beneficial rights of possession and enjoyment of the land while I live."

The deed was properly construed by the circuit judge as in form a conveyance of the fee to the grantee with the reservation of a life estate to the grantor. All exceptions alleging error on this point in the refusal to direct a verdict and in the charge to the jury must be overruled.

At the beginning of the trial Blumer Merck's ownership of the land up to 1902, his death, and the allegations of the complaint as to the names of his heirs were admitted. Thereupon the plaintiffs proved Blumer Merck's possession at the time of his death, and closed their case. The court then held that the defendant Mann must develop his case in full on all

the issues presented. Thus he was required to introduce not only his evidence tending to prove the execution of the deed from Blumer Merck to Lawrence C. Merck, but also to meet in advance the evidence of plaintiff on the issue of fraud. Anticipating that Lawrence C. Merck would testify for defendants that he and Hester had conspired to defraud his father and his brothers and sisters by stealing the deed from the old man and having it recorded, the defendant Mann introduced as evidence of Lawrence C. Merck's assertion of title in himself, (a) a mortgage of the land, given by him to T. J. Mauldin to secure a note for attorney's fees for defending an attack he expected his brothers and sisters to make on his title; (b) a contract made by him with Hester for the rent of the land; (c) his receipt for rent given after the death of Blumer Merck; (d) his tax return for 1906, showing that he had sold one hundred and thirty-five acres of the land to M. F. Hester. All this was objected to as incompetent. It might have been the ³³⁵ duty of the circuit court to have this testimony stricken out, as declarations in favor of his own title by a grantor, under whom Mann claimed, if the plaintiffs had not introduced and relied on the testimony of Lawrence Merck, to the effect that he had procured the signing of the deed by fraud, and had subsequently stolen it from his father's trunk to have it recorded. When this evidence was offered by the plaintiff, the evidence objected to became competent to discredit Lawrence C. Merck's testimony as to his own turpitude.

The fifth exception is as follows: "The presiding judge erred in holding that as L. C. Merck had executed a warranty deed of the premises to the person through whom W. B. Mann claimed title, he was estopped from testifying to any matter calculated to impeach the deed from Blumer Merck to him, and in ruling that the testimony of L. C. Merck tending to show that the deed was not signed in the presence of two witnesses and that it was never delivered to him was incompetent." The ruling of the circuit judge no doubt rested on the authority of *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70. In that case the court said: "Upon the same principle, a grantor, after conveying land, with full covenant of warranty, should not be heard as a witness to impeach, disparage or restrict the title which he has by his solemn deed conveyed." We are inclined to think that the plaintiffs had the benefit of the testimony of Lawrence C. Merck on this point; and assuming the ruling of the court to be erroneous, the record is not convincing that there was such material injury to the plaintiff as would warrant the court in ordering a new trial on that ground alone. But as there must be a new trial on other grounds,

and as this question may be important on the second trial, it will be considered.

The question is, whether a grantee of land, who afterward conveyed to another, is a competent witness in an ³³⁶ action between his grantee and a third party to testify to facts tending to prove the invalidity of his own deed. The authorities holding that in such circumstances the grantee is not competent all go back to the case of *Walton v. Shelley*, 1 Durn. & E. 298, where it was held, "a person is not a competent witness to impeach a security that he has given, though he is not interested in the event of the suit." Separate concurring opinions were delivered by Lord Mansfield and Justices Willes, Ashhurst and Buller, all resting the rule on public policy. It is not surprising that an adjudication on a point of evidence strongly expressed by such high authority should receive for a time recognition outside of England. In the English courts, however, this case, decided in 1785, was expressly overruled in 1797 by the case of *Jordaine v. Lashbrooke*, 7 Durn. & E. 602. In this state the question was fully considered in *Croft v. Arthur*, 3 Desaus. Eq. 225, and *Knight v. Packard*, 3 McCord, 71, and the doctrine of *Walton v. Skelley*, 1 Durn. & E. 293, expressly repudiated. In delivering the opinion of the court in *Knight v. Packard*, 3 McCord, 71, Judge Nott remarks that when *Walton v. Shelley*, 1 Durn. & E. 298, was decided, the line of distinction between competence and credibility had not by any means been distinctly drawn, and then states the argument in favor of the competency of the evidence in this forcible manner: "The great objection that a person shall not be permitted to develop his own shame appears to me to be founded on mistaken principles. It is not a question whether a party shall be permitted to take advantage of his own wrong, but whether a witness may not be required or permitted to disclose a fraud, although he may have been party to it. How far such a circumstance may go to affect the credit of the witness is a distinct question. I am not aware of any rule of law which renders a witness incompetent on account of his having committed a fraud, unless he has been convicted in a court of justice of perjury or some infamous crime. A witness may be competent and yet unworthy of credit. The objection ³³⁷ ought therefore to go to his credibility and not to his competency."

The case of *Knight v. Packard*, 3 McCord, 71, was followed in *Lightener v. Martin*, 2 McCord, 214, *Simmons v. Parsons*, 1 Bail. 62, and other cases. Those cases which involve usury are not cited, because it might be thought that without respect to the principle here involved, the maker of the usurious contract would be competent to testify to usury in

the contract, under the term of act of 1777 (4 Stat. 363), which made testimony of the maker of the contract competent on that point.

In *Reeves v. Brayton*, 36 S. C. 385, 15 S. E. 658, Chief Justice McIver in delivering the opinion of the court uses this language: "The precise question, therefore, is whether, in a case between third persons, a grantor in a deed, under which one of the parties claim, is a competent witness to impeach the execution of such deed. While there is, or has been, some conflict of authority in England and some of the American states as to this question, we think it has been settled here that such testimony is competent: *Knight v. Packard*, 3 McCord, 71; *Simmons v. Parsons*, 1 Bail. 62."

It is not easy to believe that the great chief justice, so familiar with the decisions of the court, and so strong in his adherence to the principles adjudged by them, meant by the language used in *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70, that *Reeves v. Brayton*, 36 S. C. 385, 15 S. E. 658, and all the decisions upon which that case rested should be overruled. Had it been his intention to recommend that to the court, there would certainly have been some direct discussion of these cases. Yet this is the language used in *Garrett v. Weinberg*: "The rule is well settled that the declarations of a grantor, made after he has parted with the possession of the thing sold, in disparagement of his title, are not competent against his grantee or those claiming under him: *Kittles v. Kittles*, 4 Rich. 422; *Renwick v. Renwick*, 9 Rich. 50; *Hobbs v. Beard*, 43 ~~338~~ S. C. 370, 21 S. E. 305. Upon the same principle, a grantor after conveying land with full covenant of warranty should not be heard as a witness to impeach, disparage or restrict the title which he has by his solemn deed conveyed. It seems to us, therefore, that there was error on the part of the circuit judge in receiving the testimony of John S. Moore, tending to contradict his deed, by showing that while he had conveyed the entire interest in the land to Mr. Moise, he was only entitled to and only had a right to convey an undivided one-third interest." The probable explanation of the apparent inconsistency between *Reeves v. Brayton* and *Garrett v. Weinberg* is that in *Garrett v. Weinberg* the witnesses, who were the grantors in the deed in question, were allowed to testify that the deed purporting to convey the whole land was intended to convey only one-third. Such testimony was incompetent on the principle that parol testimony from any source is not competent to contradict a written statement. No doubt that which was prominent in the mind of the court was that the witnesses could not testify that a deed which expressed the conveyance of the entire land was meant to convey only a one-third interest. Quite a different princi-

ple is involved in the admission of evidence which tends to show that a paper in form of a deed was never one in fact, for want of delivery; or if a deed, that it should be annulled for fraud or mistake.

As to this principle, the rule of reason and of general authority is that stated by Chief Justice McIver in *Reeves v. Brayton*, 36 S. C. 385, 15 S. E. 658, namely, that in a case between third persons a grantor or a grantee in a deed, under which one of the parties claims, is a competent witness to impeach such deed. 'Nothing can be added to the conclusive reasoning of Judge Nott in *Knight v. Packard*, 3 McCord, 71. But one illustration may make the principle more evident, and show how the exclusion of such testimony would deny to the courts an important means of investigation, especially in cases of fraud. A's ³³⁹ creditors attack his deed to B as fraudulent. A repents and is willing to testify that the deed was without consideration. To deny the creditors the benefit of his testimony would certainly be unjust. It would be indeed a strange state of the law that a third party could testify that A, while still in possession of the land, had admitted to him the existence of facts constituting fraud (*McCord v. McCord*, 3 S. C. 577; *Richardson v. Mounce*, 19 S. C. 477), and that A himself could not testify directly to the facts constituting the fraud. The fifth exception is sustained.

We can see no ground for the position taken in the sixth exception, that the title of Mann, regarded as that of a subsequent purchaser for value, would be defeated by the fraud in the deed from Blumer Merck to Lawrence C. Merck, even if acquired by Mann without notice of the fraud. The instruction was given that legal execution and delivery were necessary to the validity of the deed from Blumer Merck. There can be no doubt that if this deed was duly executed, a subsequent purchaser for value would be protected against Blumer Merck and his heirs, though the deed from him might have been procured by fraud: *Black v. Childs*, 14 S. C. 312. This is true as a general proposition of law, and if the plaintiffs wished a further instruction, as to whether facts were known to Mann sufficient to put him on inquiry, they should have submitted a request covering that point.

The seventh exception assigns error in the exclusion by the circuit judge of the "testimony of L. C. Merck to the effect that when Blumer Merck sold a part of the land in question covered by his deed to L. C. Merck, Blumer Merck recognized the land as still his own, and did not ask L. C. Merck's consent to the sale."

These questions and answers appear in the evidence of Lawrence C. Merck: "Q. Were you present when he sold

four acres to Rice? A. He told me to make the trade with Rice. We did the talking and he asked me who was to ³⁴⁰ make the papers, and I told him the old man, and he went and talked to him. Q. Did he or not ask you to consent to it? A. No, sir."

The answer was objected to, and the court held it incompetent, but it was before the jury and no motion was made to strike it out. In addition to this, the witness testified, without objection, that he witnessed the deed from his father to Rice, that he was not consulted about it, that he took the message from the old man to Rice that he could have the land. There is no foundation for the exception.

On the question of delivery, the plaintiffs submitted the following request: "Even if properly executed, the deed does not have effect as a deed unless it be shown that it was duly delivered by Blumer Merck to L. C. Merck or to someone for him. If Blumer Merck never parted with or intended to part with possession of the deed; if he retained possession of it, placed it away with his papers and never delivered it to L. C. Merck or to anyone for him; if while it was in Blumer Merck's possession it was surreptitiously taken away from his place of safekeeping without his knowledge or consent and placed on record; I charge you that under these circumstances the law declares that the deed has not been delivered, and is, therefore, invalid." This is correct, as a general statement of the law: *Carrigan v. Bird*, 23 S. C. 89; *Johnson v. Johnson*, 44 S. C. 364, 22 S. E. 419; 1 *Devlin on Deeds*, sec. 267; 9 *Am. & Eng. Ency. of Law*, 155. Counsel for defendant now insists, however, the request was properly refused, because it left out of view the question of estoppel from negligence. His argument is, that Blumer Merck and his heirs might have been estopped from disputing Mann's title by negligence on his part in making a deed complete on its face, and lacking only delivery to make it a good conveyance, and then leaving it where the grantee, named in the paper, could easily take it, and thus induce others to accept him as the real owner of the land; and that, therefore, Mann's title might ³⁴¹ be good even if the deed of Blumer Merck had never been delivered. Neither the requests nor the charge of the circuit judge indicate that the issue of negligence was made on the trial, and it may be unfair to appellants to say it should have been incorporated in this request. But it was earnestly pressed in the argument that the issue of negligence was made on the trial as arising out of the evidence. That being so, the request above quoted was not sound with the question of negligence left out of view.

The plaintiffs submit the following extract from the charge is unsound as a legal proposition because it is too

broad as applied to the issues made in this case: "If a man makes a deed and lays it down, and intending that the grantee shall take it as a conveyance to the property, and he takes it from where the grantor placed it, that is as much a delivery in law as if he had actually delivered the deed to the grantee. A deed may be signed and witnessed and delivered at some future time. It may be executed and put away for the purpose of being delivered at some future time, and if it is, and the man puts it at some particular place, intending for the grantee to take it away at some future time, or upon the happening of some future event, and that happens, and the grantee takes it then, that is a delivery of the paper in all intents and purposes of the law." The instruction stated the law correctly, except that it would make valid a deed signed by the owner of the land and kept in his control with the intention that delivery should take place after the grantor's death. It is essential to delivery that the deed should pass beyond the control of the grantor. If the grantor retains the custody and control during his life, the paper cannot have effect as a deed at his death. The principle is quite plain, and the numerous authorities supporting it will be found cited in 1 Devlin on Deeds, sections 279 and 279a, and in other text-books. One of the material issues here was whether Blumer Merck signed the deed without delivery, intending that it ³⁴² should be retained in his custody and control until his death, and only then delivered to Lawrence C. Merck. Indeed, there is no other possible future event suggested by the evidence which Blumer Merck could have had in view as fixing the time of delivery. The instruction, therefore, was equivalent to saying to the jury that there was a good delivery if Blumer Merck signed the deed without delivering it, and kept it in his own house with the intention that it should be taken at his death by Lawrence C. Merck. This, as we have seen, is not a correct statement of the law.

The judgment of this court is, that the judgment of the circuit court be reversed and that this cause be remanded to that court for a new trial.

Mr. Justice Gary dissents.

A Deed Duly Executed and Recorded, Which "Conveys and Warrants" certain land, and then provides that it shall be of no effect until after the death of the grantor, and then to be in full force, conveys a present interest in the land, but postpones its enjoyment and is not void as a testamentary disposition: *Wilson v. Carrico*, 140 Ind. 533, 49 Am. St. Rep. 213, and see note thereto. A transfer of title in fee, subject to a life estate in the grantor, is effected by a deed delivered by him to a third person, with instructions for its delivery to the grantee at the grantor's death, provided the delivery is absolute and the instrument is placed beyond the power of the grantor to recall or control in any event: *Moore v. Trott*, 156 Cal. 353, 134 Am. St. Rep. 131, and see cases cited in the cross-reference note thereto.

What Constitutes a Delivery of a Deed is the subject of a note to *Brown v. Westerfield*, 53 Am. St. Rep. 554.

Fraud in Obtaining Possession of a Deed as affecting the title of subsequent purchasers: See *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193; *Jackson v. Lynn*, 94 Iowa, 151, 58 Am. St. Rep. 386.

Delivery of Deeds in Escrow is treated in the note to *Wilkins v. Somerville*, 130 Am. St. Rep. 910.

CAMPBELL v. SEABOARD AIR LINE RAILWAY.

[83 S. C. 448, 65 S. E. 628.]

CARRIER—Contract of Passenger With Sleeping-car Company. A railroad company is not relieved of any of the duties which it owes to a passenger by reason of his making a separate contract with a sleeping-car company for special accommodations. The sleeping-car company may, by its contract, impose upon itself some of the obligations that the railroad company undertakes in its contract of carriage, but that does not release the railroad company. The only effect of the contract is to give the passenger the benefit of the care and protection of both companies. (p. 826.)

CARRIER.—A Passenger by Going into a Pullman Car and taking a berth does not release the railroad company from any of its duties as a carrier. (p. 827.)

CARRIER—Liability for Acts of Pullman Employés.—With respect to those matters embraced in a contract of carriage, which the railroad company depends upon the employés of a Pullman company to perform, the employés are agents of the railroad company. (p. 827.)

CARRIER—Notice to Passenger of Arrival at Station.—One of the duties embraced in a contract of carriage is to give the passenger reasonable notice of arrival at his destination. Where he takes a Pullman berth, the railroad company, in relying on the conductor and porter of the sleeping-car to give such notice, adopts them as its agents and is liable for their default. (p. 828.)

CARRIER—Liability for Acts of Pullman Porter.—A railroad company is liable for the act of the porter on a Pullman car in awakening a passenger and putting her off at the wrong station. (p. 828.)

CARRIER—Putting Off Passenger at Wrong Station.—Where the employés of the Pullman company by mistake put a passenger off at the wrong station, and there is evidence tending to show a willful failure to stop the train and allow her to get on again after the discovery of the mistake, the question of punitive damages against the railroad company is for the jury. (p. 828.)

Lyles & Lyles, S. G. Mayfield, J. Aldrich Wyman and Edward L. Craig, for the appellant.

J. W. Thurmond, Geo. B. Timmerman and J. F. Carter, contra.

450 WOODS, J. The facts in this case are substantially the same as those in *Entzminger v. Seaboard A. L. Ry.*, 79 S. C. 151, 60 S. E. 441. The testimony on the part of the

plaintiff tended to prove the following facts: Mrs. Campbell boarded the passenger train of the defendant, Seaboard Air Line Railway, on the night of December 24, 1906, at Jacksonville, Florida, and took a berth on the Pullman sleeping-car. Knowing that the train would reach Denmark, her destination, in the early morning, Mrs. Campbell asked the conductor of the train, as well as of the Pullman car, to awake her in time to dress and leave the car at Denmark. She was awakened by the porter of the Pullman car very early in the morning, while it was still dark, and was told that Denmark was the next station; and when the train stopped she was put off at Govan, a station seven miles from Denmark. Mrs. Campbell perceived the mistake just as the train was moving off and gave the alarm to a fellow-passenger, Entzminger, who was in the same predicament. He rushed forward and cried out to the porter, standing on the steps, to stop the train. W. A. Hays, who was acting as station agent, attempted to stop the train by signaling with his lantern; the Pullman conductor perceived the situation and tried to give the alarm by pulling the bell cord; and the Pullman porter told the conductor of the train the mistake as soon as he could get to him, when the train had gone about three-quarters of a mile. Being thus left at Govan, Mrs. Campbell and Entzminger hired a conveyance and drove through the country to Denmark. The day was very cold, and Mrs. Campbell was made sick by the exposure. The action is for actual and punitive damages, resulting from her sickness and suffering. The verdict and judgment were for the plaintiff, and defendant appeals.

On the call of the cause for trial, defendant's counsel moved to strike the cause from the calendar "on the ground ⁴⁵¹ that the complaint does not contain the proper indorsement, in that the nature of the issue and the docket upon which the same should be placed is not indorsed thereon." The exception alleging error in the refusal of this motion cannot be considered, for the reason that there is nothing in the record to show that the complaint was not properly indorsed.

The refusal of the circuit judge to withdraw from the jury the cause of action for punitive damages, by ordering a nonsuit or directing a verdict, was in accordance with the opinion and judgment of this court in *Entzminger v. Seaboard A. L. Ry. Co.*, 79 S. C. 151, 50 S. E. 441, on similar facts, and the point needs no further consideration. It is important to observe, however, that in that case the liability of the defendant for compensatory damages was admitted.

There was no error in refusing to instruct the jury that the recovery must be limited to two dollars, the sum paid by the plaintiff for the conveyance from Govan to Denmark. It

is true the plaintiff would not be entitled to recover damages for the suffering resulting from the drive through the country, if by the exercise of due care she could have reached her destination without the exposure: *Carter v. Southern Ry.*, 75 S. C. 355, 55 S. E. 771; *Jones v. Western Union Tel. Co.*, 75 S. C. 208, 55 S. E. 318; *Key v. Western Union Tel. Co.*, 76 S. C. 301, 56 S. E. 962; *Berley v. Seaboard A. L. R. R.*, 83 S. C. 411, 65 S. E. 456; *Shearman & Redfield on Negligence*, sec. 741; *Indianapolis etc. R. R. v. Birney*, 71 Ill. 391; *Georgia R. R. etc. v. Eskew*, 86 Ga. 641, 22 Am. St. Rep. 490, 12 S. E. 1061; *International etc. R. R. v. Addison*, 100 Tex. 241, 97 S. W. 1037, 8 L. R. A., N. S., 881. Had the defendant requested a charge to that effect, it would have been error to refuse it. Indeed, it is by no means clear that there was any evidence tending to show that the plaintiff was warranted in incurring the exposure of the long ride on a bitter cold day, without sufficient wraps. There was a lodging-house at Govan, where she might have waited for the next train, or at least until she could have procured wraps to ⁴⁵² protect her from the cold. But if it be assumed that the exposure was unnecessary and taken without due care, in view of the admission of damages to the amount of two dollars, and of the evidence warranting a recovery for punitive damages, the circuit judge could not properly instruct the jury, as requested by defendant's counsel, that the recovery must be limited to two dollars. The plaintiff, under the evidence, had a right to have submitted to the jury the question of punitive damages in connection with the admitted damages.

The remaining question made by the objections to the testimony, by motion for nonsuit, and by the request to charge, is whether the Pullman company was solely liable for all damages suffered by the plaintiff, to the exemption of the defendant railway company. A railroad company is not relieved of any of the duties which it owes to a passenger by reason of the passenger making a separate contract with a sleeping-car company for special accommodations. The sleeping-car company may, by its contract, impose upon itself also some of the obligations that the railroad company undertakes in its contract of carriage; but that does not release the railroad company. The only effect of such a contract is to give the passenger the benefit of the care and protection and liability of both companies.

There is, it is true, at least one duty ordinarily undertaken by sleeping-car companies, not embraced in the railroad's usual contract of carriage—the duty of providing a sleeping berth. Accordingly, in *Taber v. Seaboard A. L. Ry.*, 81 S. C. 317, 62 S. E. 311, it was held that a railroad company, under its ordinary contract of carriage, is not liable for the failure of the porter of a sleeping-car company to make down

a berth for which the passenger had paid the sleeping-car company. The court says: "Conceding that the porter was negligent, or even willfully disregarding of plaintiff's request in this matter, the defendant company is not liable, ⁴⁵³ in the absence of evidence connecting it with the special contract of the Pullman company. The delict, if any, was a breach of duty by the Pullman company, since it appertained peculiarly to the contract of that company to furnish berth accommodations as distinguished from the defendant's contract of safe and comfortable transportation." This case is sound, because it rests upon a very broad and obvious distinction as to a special comfort for the passenger, furnished by a separate company, which the fare for carriage paid to the railroad company does not cover. But there is no ground whatever for the position that a passenger by going into a Pullman car and taking a berth releases the railroad company from any of its duties as a carrier. The railroad company carries Pullman cars in connection with its own, and in this, and in other ways, shows that so far from objecting to their use it means to encourage and invite its passengers to use them. When, in pursuance of such invitation, the passenger takes the Pullman car, he is still entitled to the service of the railroad employés in all matters which relate to his safe and comfortable transportation to his destination. Obviously, the railroad company cannot lawfully withdraw its own employés from this service and substitute and rely upon the employés of another company to perform the service, as persons acting apart from itself. On the contrary, it is quite plain that when it relies on such persons to perform its own public duties, it adopts them as its agents, and is responsible for their failure to perform the service to which the passenger is entitled as a part of his contract of carriage. Hence, with respect to those matters embraced in the contract of carriage, which the railroad company depends upon the employés of the Pullman company to perform, such employés are the agents of the railroad company. This conclusion is in accord with the current of authority: *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Dwinelle v. New York etc. Ry. Co.*, 120 N. Y. 117, 17 Am. St. Rep. 611, 24 N. E. 319, 8 L. R. A. 224; *Airey v. Pullman* ⁴⁵⁴ P. C. Co., 50 La. Ann. 648, 23 South. 512; *Louisville etc. R. R. v. Ray*, 101 Tenn. 1, 46 S. W. 554; *Pullman Co. v. Hoyle (Tex.)*, 115 S. W. 315; *Louisville & N. R. R. Co. v. Church*, 155 Ala. 329, 130 Am. St. Rep. 29, 46 South. 457; *Calhoun v. Pullman Co.*, 159 Fed. 387, 86 C. C. A. 387, 16 L. R. A., N. S., 575; *Pullman Co. v. Lutz*, 154 Ala. 517, 129 Am. St. Rep. 67, 45 South. 675, 14 L. R. A., N. S., 906.

One of the duties embraced in the contract of carriage is to give the passenger reasonable notice of arrival at his des-

tion: *Ford v. Southern Railway*, 75 S. C. 286, 55 S. E. 448. Ordinarily this is sufficiently done by calling out the stations as the train approaches them. But where a passenger takes a berth to sleep, with the knowledge and consent of the carrier, it would be absurd to hold a call in the passenger coach reasonable notice to him. In such case the railroad company, when it relies on the conductor and porter of the sleeping-car to give reasonable notice, adopts them as its agents and is liable for their default. It follows that when the porter of the Pullman car assured the plaintiff that she had arrived at Denmark, her destination, and induced her to leave the car at Govan, the railroad company was responsible for any legal damages which resulted from this breach of duty to the plaintiff.

This conclusion disposes of the point under discussion, but there is another view equally conclusive. The plaintiff's case depended mainly, not on the mere mistake of having the plaintiff to leave the car at Govan, but on the evidence tending to show a willful failure to stop the train and allow her to get on again after the discovery of the mistake. As the train was in the control of the agents of the defendant, for any breach of duty in this respect the defendant was liable. For this reason, if there was no other, the motions for a nonsuit and for the direction of a verdict for defendant were properly refused.

There is no foundation for the seventh exception. The circuit judge explicitly charged that there could be no recovery for mental suffering unaccompanied by bodily pain or injury.

⁴⁵⁵ The judgment of this court is that the judgment of the circuit court be affirmed.

Mr. Justice Hydrick was disqualified in this case.

The Liability of a Railroad Company to Passengers Riding in Pullman Cars is considered in the note to *Louisville etc. R. R. Co. v. Church*, 130 Am. St. Rep. 38-44. As to whether Pullman car employes are agents of the railroad company, for whose acts toward passengers it is liable, see *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 117, 17 Am. St. Rep. 611; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417, 8 Am. St. Rep. 538; *Evansville etc. R. R. Co. v. Athon*, 6 Ind. App. 295, 51 Am. St. Rep. 303.

As to the Duty of a Carrier to Awaken a Passenger a Reasonable Time before reaching his or her destination, see *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477, 59 Am. St. Rep. 910; *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 23 Am. St. Rep. 356; *Seaboard Air Line Ry. v. Rainey*, 122 Ga. 307, 106 Am. St. Rep. 134. A sleeping-car company is liable for carrying a passenger beyond his place of destination, and may be subjected to exemplary damages where the place and manner of putting the passenger off of the car are attended with circumstances of aggravation: *Pullman Car Co. v. Lutz*, 154 Ala. 517, 129 Am. St. Rep. 67.

LYLES v. WESTERN UNION TELEGRAPH COMPANY.

[84 S. C. 1, 65 S. E. 832.]

TELEGRAPH COMPANY—Mental Anguish.—Where Negligence in delivering a telegram of the shipment of the body of the sender's deceased husband resulted in the body lying at a railway station several hours exposed to the sun, and in being interred at night without the usual burial rites, the sender may recover for mental anguish suffered after these facts came to her knowledge. (p. 830.)

TELEGRAPH COMPANY—Notice of Contents of Message.—A telegram reading "Charlie died to-day. Meet at Bookman to-morrow," is itself notice that delay in delivery will probably result in some want of care of the body and some delay in the burial. (p. 831.)

TELEGRAPH COMPANY—Delivery Limits.—An Instruction that where a telegraph company receives a message for transmission and afterward discovers that the person to whom it is sent lives beyond its free delivery limits, it is the duty of the company to notify the sender that additional charges are demanded for the delivery, and if its failure to do so is negligent, and the proximate cause of injury to the sender, the company is liable, is correct as a general proposition; and if the telegraph company desires a modification on the theory that the sender knew that the sendee lived beyond the free delivery limits, a request to that effect should be made. (p. 831.)

TELEGRAPH COMPANY—Delivery Limits.—One Expecting an early telegram may name to the company any person or any place within the free delivery limits as a place of delivery, and require it to be delivered or tendered to such person or at such place. (p. 831.)

TELEGRAPH COMPANY—Wantonness in Failure to Deliver Message.—Where an operator, on receiving a telegram, notifies the sending office that there is no way to get it to the sendee, who lives out in the country, and, receiving no answer, fails to mail the telegram to the sendee as directed by the rules of the company in such cases, and the sending office fails to notify the sender of the non-delivery of the telegram until twenty-four hours afterward, and the message is not delivered until some twenty-eight hours after it reaches the receiving operator, it is not error to submit to the jury the issue of wantonness or recklessness, as well as negligence. (p. 832.)

TRIAL—Instructions—Minor Errors.—Where a general charge covers substantially the law applicable to an issue, an appellate court should not grant a new trial on the supposition that the jury were influenced by minor errors or inconsistencies in granting or refusing requests discernible only on careful analysis. (p. 833.)

TELEGRAPH COMPANY—Delivery Limits.—An Instruction to the effect that a telegraph company cannot avail itself of its rules as to free delivery limits, unless it imparts to the sender a knowledge of such limits, is erroneous, but it may be cured by another instruction covering the general principles applicable to the case and making it clear that the company is entitled to the benefit of such rules, and has a right to extra compensation for delivery beyond the limits fixed. (p. 833.)

Geo. H. Fearons and Nelson & Nelson, for the appellant.

Marion B. Jennings, contra.

* WOODS, J. On July 1, 1903, the plaintiff sent from Columbia over defendant's lines this telegram, addressed to

J. B. Burley, Rockton, South Carolina: "Charlie died to-day. Meet at Bookman to-morrow." The plaintiff's purpose in sending the message was to notify Burley, her brother, of the death of her husband, and have him to meet the remains at Bookman and provide for interment at a place of burial some distance from the station. This notice was printed on the back of the message as sent from Columbia: "Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery." The defendant's agent at Rockton, on receipt of the message, sent to Columbia this service message, dated July 1st, as a statement of the reason for nondelivery: "Yours date to Burley, signed Lyles, undelivered. Party lives about ten miles in the country." No attempt was made to deliver the service message to the plaintiff, notifying her that her telegram had not been delivered, until the morning of July 2d, and it was not actually delivered until about 6:30 P. M. on that day.

In the meantime the plaintiff, relying on the delivery of her telegram, had sent her husband's body to Bookman, in charge of friends, on a train which left Columbia at 12 o'clock on July 2d. As Burley did not receive the death ⁴ message he did not meet the body at Bookman, and no arrangements were made for its conveyance to the place of burial or for proper interment. The consequence was that the body of plaintiff's husband remained at Bookman, a small railway station, exposed to the sun for several hours, and was interred late in the night, without the usual burial rites. The plaintiff recovered judgment for mental anguish, alleged to have been suffered by her, due to the defendant's alleged negligent, wanton and willful breach of duty in failing to deliver the message sent by her, and in delaying the notice of its nondelivery until after her husband's body had been sent to Bookman. The questions raised by the appeal will be considered without referring in detail to the numerous and elaborate exceptions.

There was no error in admitting testimony as to the body lying in the sun at Bookman and the delay in the burial. It is true the plaintiff was not suffering mental anguish from these things at the time they occurred, for she had no knowledge of them. But if they were the proximate results of the defendant's breach of duty, there is no reason why she could not recover for the mental anguish suffered when they did come to her knowledge. The remarks of the circuit judge, in passing upon the admissibility of this evidence, was not such a statement of facts to the jury as is forbidden by the constitution. It was not made in the charge, and could not

have been prejudicial, because there could be no difference of opinion that a wife, with normal feelings, would suffer mental anguish from the lack of attention to her husband's remains and from such delay in interment as here occurred.

On the former appeal the court, in disposing of a demurrer to the complaint, held that the message itself was notice to the defendant that delay in the delivery of the message "would probably result in some want of care of the body and some delay in the burial." There is, therefore, no foundation for the exceptions ⁵ alleging error in admitting evidence that such lack of proper care and delay actually did result: 77 S. C. 174, 57 S. E. 725, 12 L. R. A., N. S., 534.

Burley, the addressee of the original message, lived about ten miles from Rockton, and the circuit judge charged the jury, "That where a telegraph company has received for transportation and delivery a telegram, and afterward discovers that the party to whom same is sent lives beyond its free delivery limits, then it is the duty of the company to notify the sender that additional charges are demanded for the delivery; and if it fails to do so, and its failure is negligent, and that negligence as the proximate cause results in injury to the person sending the message, or for whose benefit it is sent—then the company is liable." The defendant excepts to this instruction, taking the position that, as the fact of Burley's residence being ten miles away was known to the plaintiff, and she paid only the charge to Rockton, and failed to notify the defendant and tender the additional charge for delivery beyond the free delivery limits, she could not recover damages for the failure to deliver the message. The instruction was certainly correct, as a general proposition: *Campbell v. Western Union Tel. Co.*, 74 S. C. 300, 54 S. E. 571; *Lyles v. Western Union Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A., N. S., 534; *Martin v. Western Union Tel. Co.*, 81 S. C. 432, 62 S. E. 833. If the defendant's counsel wished it modified, so as to cover the principles for which they contend, there should have been a request to that effect.

It may be true that good faith requires that the sender of a message, who knows it cannot be delivered within the free delivery limits to anyone authorized to receive it, should notify the telegraph company of that fact when he sends the message, and tender any reasonable amount demanded to cover the expense of delivery beyond the free delivery limits. But there can be no doubt that anyone expecting an early dispatch may name to the company any person, or any place, within the free ⁶ delivery limits, as the place of delivery, and require it to be delivered or tendered to such person or at such place.

In this instance the mail carrier, Elkins, testified that at the instance of Burley he notified the agent at Rockton to deliver the message to Burley by telephone or send it in the mail by the carrier himself, who passed Burley's house every day; that the agent assented to the arrangement, and that he was at the telegraph office on both the first and second days of July. But the instruction was expressly given to the jury to disregard all this testimony, as incompetent, so far as it related to the arrangement with the operator at Rockton, and to consider only such portion as tended to put the operator on notice that an important death message was expected. There is, therefore, no foundation for the exception alleging error in admitting the conversation between Elkins and the operator as evidence of a promise to deliver the telegram by telephone or mail.

Assuming the exclusion of the testimony as to the alleged arrangement to have been proper, it was not error to refuse to direct a verdict or to instruct the jury to find for the defendant, either on the whole case or on the issue as to punitive damages, for there was, nevertheless, evidence from which a wanton disregard of defendant's duty to the plaintiff, resulting in mental anguish, could be inferred. The operator at Rockton, according to his own testimony, received the message at about 3:45 P. M., on the first day of July, notified the Columbia office that Burley lived in the country, and there was no way to get the message to him, and received no answer. The defendant's own rule requires in such case, where a prompt reply to the service message is not received from the sending office, that the receiving operator shall mail the telegram to the addressee. The failure to mail, laying aside any special understanding or promise, was a direct violation of the rule of the company with respect to the message, the importance of which was evident on its face, and in addition had been called to the special attention of the operator.

7 There was evidence of reckless disregard of duty in the defendant's Columbia office, also, in failing to notify the plaintiff of the nondelivery of the telegram. The distance from Rockton to Columbia is only twenty or thirty miles, and there is no reason to doubt that if the prompt notice from Rockton of inability to deliver required by the rules of the company was sent, it must have reached the Columbia office early in the afternoon of July 1st; whereas, according to the testimony of defendant's own witnesses, no effort was made to extend the notice to Mrs. Lyles until about 11 o'clock on July 2d. Indeed, there was evidence from which the inference might be drawn that no effort was made to extend the notice to her until about 6:45 in the afternoon of July 2d. From this statement of the testimony it seems evident that

it was not error to submit to the jury the issue of wantonness or recklessness, as well as that of negligence.

Before beginning his general charge the circuit judge read to the jury all the requests on both sides, and refused to charge requests of the defendant to instruct the jury to find for defendant. With respect to all the other requests, from both sides, he then said to the jury: "You take all I don't modify to be good law; where I modify, you take that as the law of the case." The managing of numerous requests to charge abstract propositions of law, so as to enlighten rather than confuse the minds of jurors, is a task of extreme difficulty imposed on a trial judge. When the general charge covers substantially the law applicable to the issue, an appellate court should not grant a new trial on the supposition that the jury were influenced by minor errors or inconsistencies in granting or refusing requests discernible only on careful analysis. We do not think the method adopted here of disposing of requests will be found the safest, but in this instance it did not result in prejudicial error. Giving to the jury plaintiff's sixth request, to the effect that a telegraph company cannot avail itself of its rules as to free delivery limits, unless it imparts to the sender a knowledge of ^s such free delivery limits, was, we think, clearly erroneous; and there was no foundation in the evidence for the request on the subject of waiver by the telegraph company of its rules. But all this was cured by the following instruction, covering the general principles applicable to the case, in which the court made it clear that the defendant was entitled to the benefit of its rule as to its free delivery limits, and had a right to demand extra compensation for delivery beyond them: "Now, I charge you, as matter of law, that when the defendant company received this telegram in Columbia, to be sent to Rockton, South Carolina, if the understanding then between the operator at Columbia, the agent of the defendant company, was that that message was to be delivered to Mr. Burley at Rockton, if that was the understanding, that he was to call for it at Rockton, or it was to be delivered to him at Rockton, and that was the understanding between the sender of the message and the operator who received it at Columbia, then it wouldn't be the duty of the defendant company to deliver it to Mr. Burley beyond the free delivery limits. But if nothing was said, and they received the message, and it was prepaid, then, I charge you, as a matter of law, that our courts have decided the following, and that is the law of the case: When a person to whom a message is addressed resides within a reasonable distance from the company's office, though not within the free delivery limits, it cannot refuse to deliver the telegram unless it demands additional compensation from the

sender and he declines to pay it. In other words, that it is the duty of the defendant to notify the sender it wouldn't deliver the message unless he made additional compensation for the service beyond the free delivery limits. I charge you, further, as matter of law, that a telegraph company, failing to make any attempt to deliver the message because the person to whom it was addressed resided beyond the free delivery limits, and also failing to notify the sender, or of its refusal to deliver, is liable in damages resulting from its negligence in not making the delivery. I charge you, ⁹ further, that a telegraph company is not exempt from liability merely because the person addressed may chance to live outside of his free delivery limits, because it undertakes expressly and by the very terms of its contract to make a delivery within those limits free of any charge, and impliedly, at least, to deliver beyond the fixed limits, for which latter service an extra charge is made, not exceeding the amount of the actual costs of such special delivery. I charge you, further, that when a message is received at a terminal office, to which it has been transmitted for delivery to the person addressed, it is the duty of the company to make diligent search to find him, and, if he can't be found, to wire back to the office from which the message came for a better address, and, likewise, it is the duty of the company, when it has discovered that the person for whom the message is intended lives beyond its free delivery limits, either to deliver it by a special messenger or to wire back and demand payment, or a guaranty of payment, as it may choose to do, of the charge for the special delivery; and if it fails to deliver without demanding and being refused payment of the charge, it will be liable for its default."

The judgment of this court is that the judgment of the circuit court be affirmed.

Where a Telegraph Company has Established Free Delivery Limits, notice of which is given on its blanks, it has been thought that the duty is on the sender of a message to ascertain whether the sendee resides within the free limits, and to notify the sending operator of the fact; and that a failure to observe this duty will excuse prompt delivery by the company: *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148. Accordingly it has been held that if a telegraphic message is handed in for transmission, the presumption is that the sendee lives within free delivery limits and that the sender takes the risk of delivery unless he makes arrangements for delivery at a greater distance; and that handing in such a message without explanation casts no duty on the transmitting operator, other than to forward the message accurately and with proper diligence, and casts no duty on the terminal operator other than to copy the message correctly and to deliver it with all convenient speed, if the sendee resides within the free delivery limits: *Western Union Tel. Co. v. Merrill*, 144 Ala. 618, 113 Am. St. Rep. 66.

WHITAKER v. MANSON.

[84 S. C. 29, 65 S. E. 953.]

PARTIES.—One Tenant in Common may Sue for the Benefit of all the tenants, in an action against a stranger to recover land, when the cotenants are very numerous and it is impracticable to bring them all before the court, where the statutes provide that “when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole”; and that “any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein and any person claiming title or right of possession to real estate may be made parties, plaintiff or defendant, as the case may require, to any such actions.” (p. 838.)

Laurens T. Mills, for the appellants.

Clark & Von Tresckow, contra.

²⁹ WOODS, J. The plaintiffs above named brought this action to recover possession of the tract of land described in the complaint, containing thirteen hundred and thirty-five acres. In the original complaint the allegation was made that the plaintiffs owned the land in fee simple. ³⁰ The defendants answered by a general denial, and by setting up as affirmative defenses the statute of limitations and purchase of the land for value, without notice of plaintiffs’ alleged title. Thereafter the circuit court granted the motion of the plaintiffs to amend the complaint by adding in the title of the cause, after the names of the plaintiffs, “in behalf of themselves and for the benefit of those deriving their title in common with plaintiffs from John Chestnut, deceased,” and by inserting the words we have italicized in these portions of the complaint: “The plaintiffs, *complaining on behalf of themselves, as tenants in common of the lands hereinafter described, and all others who are tenants in common of said lands with plaintiffs, and deriving their title from John Chestnut, deceased, allege: 5. That those deriving their title in common with the plaintiff from John Chestnut, deceased, are very numerous, and that it is impracticable, therefore, for plaintiffs to bring them all before the court in this action; therefore, they sue for the benefit of all.*”

The motion to amend was made under section 140 of the Code of Procedure.

“Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is of a common or general interest of many persons, *or when*

the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

The appeal of the defendants depends on whether one tenant in common may bring in all his cotenants as plaintiffs, under the above italicized clause. The section was under discussion in *Bannister v. Bull*, 16 S. C. 220, and the court thus stated the law: "The case before us does not fall within the operation of this section. This is not a suit to partition land among tenants in common, in which it might be necessary³¹ to have all the cotenants before the court as plaintiffs or defendants in order to have a complete determination of the questions involved, but this is purely a legal action for the recovery of land—an action of trespass to try title against a stranger. The last paragraph of the section cited, allowing 'one or more to sue for the benefit of others,' does not apply to such a case, but was manifestly intended for creditors of an insolvent estate, and cases of that character, where the interest is in common. So, also, as to the first paragraph, in regard to making all parties who are united in interest. That does not control this case, for the reason that the interests of cotenants are not united. They may be said, in one sense, to have a common interest, but, according to our decided cases, they are not, as against a stranger, united in interest in the sense of this section of the code. They have interests in the same property while it remains undivided, but such interests are distinct. Each has a right to the extent of his share. Indulgence is extended in allowing tenants in common to join in an action against a stranger, but they are not required to do so. 'Tenants in common may sever, and any one of them may bring ejectment for his share, and, upon proof, recover it, or may bring ejectment for the whole, and, upon proof, recover his share': *Dorn v. Beasley*, 6 Rich. Eq. 408, in the late court of errors, where the authorities are cited.

"The heirs of Margaret refused to join in the action, and we know of no rule of law which authorizes the court to make parties sue for what may be supposed to be their rights, or to withhold their rights from those who do sue, only for the reason that others having similar interests in the same property do not join. They had the right to refuse to sue. They may wish to have a separate suit for their interests, or they may not intend to set up their rights at all. It was not necessary that they should be joined, either as plaintiffs or defendants, to enable Martha Jane Bannister and Edward F. Reese, who did sue, to recover to the extent of their shares."

³² On first view, this language may seem to be conclusive of the question here involved; but it is not really so. In

Bannister v. Bull, 16 S. C. 220, the plaintiff alleged that his cotenants, who owned a one-third interest in the land, had refused to join in the action as plaintiffs, and they had been made defendants. There was a demurrer to the complaint, on the ground that there was a fatal defect of parties, in that all the cotenants did not join as plaintiffs. The question before the court was whether section 140 forbade one tenant in common to sue to recover possession of his interest in the land, unless he joined all his cotenants as plaintiffs. The only point decided, therefore, was that cotenants have no such common or general interest, as makes all of them necessary parties to a suit instituted by any one or more for the recovery of the land. That all cotenants are proper parties to such an action, either as plaintiffs or defendants, there seems to be no doubt, and this court so held.

Bannister v. Bull is cited as authority in *Wilson v. Kelly*, 30 S. C. 483, 9 S. E. 523; but that case also fails to solve the point here involved. The question there was, whether the fees of the counsel for one of the distributees of an estate, who had brought an action which had resulted in the settlement of the estate, should be paid out of the fund before distribution. The court answered the question in the negative, holding that such distributee was not a representative of the others. But the last clause of section 140 was not construed, for the opinion sets out that "the parties were not numerous, and were all brought by summons before the court." These cases do decide cotenants have not such a common or general interest as that, merely by reason of common or general interest, one may sue for the benefit of others. But neither case decides that tenants in common do not fall under the last clause or condition of the section providing for cases where those who are either necessary or proper parties "are very numerous and it may be impracticable to bring them all before the court," and ³³ the intimations of the court on that subject have only the force of obiter dicta.

Analysis of section 140 shows that it provides that one or more persons may sue for the benefit of the whole in either of two separate conditions—first, when the question in the cause is one of common or general interest of many persons; or, second, where the parties are united in interest, but are very numerous, and it may be impracticable to bring them all before the court. As already indicated, the cases of *Bannister v. Bull*, 16 S. C. 220, and *Wilson v. Kelly*, 30 S. C. 483, 9 S. E. 523, decide that cotenants do not have such a common or general interest as to bring them under the first condition. Whether tenants in common fall under the second condition depends on whether one tenant in common is so united in interest with the others as against a stranger that he has the right to make all of them parties, either as plaintiffs or de-

fendants, to an action brought against such stranger to recover possession of the land. This is the test laid down in Pomeroy's Remedies, section 392, cited with approval in *Faber v. Faber*, 76 S. C. 156, 56 S. E. 677: "The parties thus represented by the plaintiff or defendant may not be in privity with each other, but there must be some bond of connection which unites them all with the question at issue in the action. The test would be to suppose that an action in which all the numerous persons were actually made plaintiffs or defendants, and if it could be maintained in that form, then one might sue or be sued on behalf of the others; but if such an actual joinder would be improper, then the suit, by or against one as a representative, would be improper, notwithstanding the permission contained in this section of the statute."

It seems clear that one cotenant does have the right to make all his cotenants parties to such an action under the last clause of section 139 of the Code of Procedure, which provides: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an ³⁴ action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or right of possession to real estate may be made parties, plaintiff or defendant, as the case may require, to any such actions." If a plaintiff has a right to make his cotenants parties to such an action when the number is small, then there can be no doubt that he may bring them in as beneficiaries of the suit, when it is impracticable to bring them all before the court on account of the number; for the design of the last portion of section 140 was to provide a mode of obtaining a complete determination of the rights of the parties in just such cases, when the number is so great as to make it impracticable to bring them all in by actual services. There are few adjudications of the point, but the exact question was decided in accordance with our conclusion in *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692; and the case of *McKenzie v. L'Amoureux*, 11 Barb. 516, is decided on the same principle.

The judgment of this court is that the judgment of the circuit court be affirmed.

Mr. Justice Hydrick Dissenting. The decision of the majority of the court in this case seems to me to be at variance with the decision of this court in the case of *Bannister v. Bull*, 16 S. C. 220, upon the point in question, which was reaffirmed in the case of *Wilson v. Kelly*, 30 S. C. 483, 9 S. E. 523.

This is an action at law for the recovery of land, as was the case of *Bannister v. Bull*. The plaintiffs sue as tenants in common, and it was distinctly held in *Bannister's* case that it was not necessary to make all the cotenants of the land sought to be recovered parties

plaintiff, but that any one cotenant might sue and recover his share. Under the authority of that case, there is no reason why these plaintiffs may not maintain their suit for their shares without undertaking to bring in all their cotenants merely by representation. Moreover, the defendant may be prejudiced by such a course of procedure, for certain defenses, for instance, title by prescription, may avail them against the adult plaintiffs, when it would not against infant plaintiffs. When parties are brought before the court in this way, it cannot be known who they are, or whether they are adults or infants.

For these reasons, and because I do not think the section of the code under which the amendment was allowed was intended to apply to a case like this, I dissent.

Actions by a Cotenant to Recover Possession of the property of the cotenancy are discussed in the note to *Marshall v. Palmer*, 50 Am. St. Rep. 839. According to the better rule a cotenant may recover in ejectment against a stranger the whole of the common property: *Dorlan v. Westervitch*, 140 Ala. 283, 103 Am. St. Rep. 35; *Griswold v. Minneapolis etc. Ry. Co.*, 12 N. D. 435, 102 Am. St. Rep. 572. Some authorities, however, would limit his recovery to the extent of his title: *Baber v. Henderson*, 156 Mo. 566, 79 Am. St. Rep. 540; *Johnson v. Hardy*, 43 Neb. 368, 47 Am. St. Rep. 765.

ROOKARD v. ATLANTIC AND CHARLOTTE AIR LINE RAILWAY COMPANY.

[84 S. C. 190, 65 S. E. 1047.]

RAILROAD—Liability for Torts of Lessee.—The lessor and lessee of a railroad are both liable for the torts of the lessee committed in the operation of the road. The liability of the lessor is predicated upon the fact that the lessee is its agent for the purpose of operating the road. But while both are liable, and while they may be sued jointly or severally, still there is no such privity between them as makes their interests, in actions arising out of the torts of the agent, identical. (p. 840.)

JUDGMENT—Res Judicata—Principal and Agent.—A judgment on the merits in favor of an agent is a bar to an action against the principal for the same cause, but a judgment against the agent is not conclusive in an action against the principal, nor will a judgment against the principal conclude the agent unless the latter has been vouched or given notice and opportunity to defend. (p. 840.)

EVIDENCE—Action Against Principal for Tort of Agent.—In an action against a principal for the tort of his agent, transactions between the agent and a third person are *res inter alios acta* and inadmissible. (p. 840.)

EVIDENCE—Admission by Lessee of Railroad.—Where a driver and carriage were struck by a train operated by the lessee of the railroad, evidence that the lessee has paid the owner of the carriage for damages done to it is not admissible in an action against the lessor railroad company for the death of the driver. (p. 841.)

Sanders & De Pass, for the appellant.

S. G. Finley, Butler, Osborne and Browne, contra.

¹⁹¹ HYDRICK, J. While attempting to drive a carriage across defendant's railroad, which was being operated by the Southern Railway Company, the plaintiff's intestate came into collision with an engine. He was killed, and the carriage was demolished. This action was to recover damages for his death.

Against the objection of defendant, the court admitted evidence that the Southern Railway Company had paid the owner of the carriage for the damage done to it.

The sole point is whether this ruling was correct.

It is well settled that the lessor, the owner of a railroad, and the lessee, operating it, are both liable for the torts of the lessee, committed in the operation of the road. The liability of the lessor is predicated upon the fact that its lessee is its agent for the purpose of operating the road: *Smalley v. Atlanta & C. A. L. Ry. Co.*, 73 S. C. 572, 53 S. E. 1000, 6 Ann. Cas. 868. While both are liable, and while they may be sued jointly or severally, still there is no such privity between them as makes their interests, in actions arising out of the torts of the agent, identical. In the first place, the agent is primarily liable for its own torts, and it is liable over to the principal. "The fact that two parties as litigants in two different suits ¹⁹² happen to be interested in proving or disproving the same facts creates no privity between them": 24 Am. & Eng. Ency. of Law, 747.

A judgment on the merits in favor of the agent is a bar to an action against the principal for the same cause, because the principal's liability is predicated upon that of the agent. But a judgment against the agent is not conclusive in an action against the principal. A judgment against the principal would not conclude the agent, unless the agent had been vouched, or given notice and an opportunity to defend: *Smith v. Moore*, 7 S. C. 209, 24 Am. Rep. 479; *Robinson v. Baskins*, 53 Ark. 330, 22 Am. St. Rep. 202, 14 S. W. 93, and notes; *Freeman on Judgments*, sec. 164; 24 Am. & Eng. Ency. of Law, 2d ed., 741; *Catterlin v. Frankfort*, 79 Ind. 547, 41 Am. Rep. 627; *Emma Silver Min. Co. v. Emma Silver Min. Co. etc.*, 7 Fed. 401; *Gillingham v. Charleston Tow Boat etc.*, 40 Fed. 649; *Bailey v. Sunberg*, 49 Fed. 583, 1 C. C. A. 387; *Logan v. Atlantic etc. Ry. Co.*, 82 S. C. 514, 64 S. E. 515. These principles show that, in an action between a third party and the principal for the tort of the agent, the rights and interests of the principal and agent are not identical. Therefore, transactions between the agent and still another party are *res inter alios acta*, and inadmissible in a suit against the principal for the tort of the agent.

The general rule is that declarations or admissions of the agent, within the scope of the agency, are admissible in evidence in a suit against the principal. But, in this case, the alleged admissions of the agent were not within the scope of the agency, which was to operate the railroad.

If an agent commits a tort, while acting within the scope of the agency, the principal is liable, but if he makes declarations or admissions concerning it, so long afterward that they cannot be admitted as part of the *res gestae*, the principal is not bound by them.

There is still another reason why the evidence should have been excluded. As said by Mr. Justice Woods, in his concurring opinion in *Nickells v. Seaboard A. L. Ry.*, 74 S. C. 102, 54 S. E. 193 255: "The highest public policy suggests that those charged with liability in such matters should be encouraged to settle claims, rather than have placed before them, in the consideration of just claims, the menace of settling them at the peril of having to justify such settlement, in a suit brought by another, whose claim is considered unjust, and show wherein the claims were distinguishable."

The case of *Nickells v. Seaboard A. L. Ry.*, 74 S. C. 102, 54 S. E. 255, cannot be distinguished from this case, in principle, upon the point involved, upon which two of the justices practically dissented, and upon that point it is no longer authority.

Judgment is reversed and new trial granted.

Mr. Justice Gary concurs in the result.

The Liability of a Lessor Railway Corporation to persons other than the lessee is considered in the notes to *Lee v. Southern Pac. R. R. Co.*, 58 Am. St. Rep. 147; *Ohio etc. R. R. Co. v. Dunbar*, 71 Am. Dec. 295. For recent decisions on this question, see *Maumee Valley etc. Co. v. Montgomery*, 81 Ohio St. 426, 135 Am. St. Rep. 802, and cases cited in the cross-reference note thereto.

The Admissibility in Evidence of Acts and Declarations of Agents is the subject of a note to *Johnson v. McLain Investment Co.*, 131 Am. St. Rep. 306.

KELLY v. SOUTHERN RAILWAY.

[84 S. C. 249, 66 S. E. 198.]

CARRIER—Damage to Goods—Presumption.—Where a carrier received a consignment of goods in good order, but delivered it in bad order, a presumption arises that it was damaged in the hands of the carrier. (p. 842.)

CARRIER—Filing Claim—Burden of Proof.—The burden of proof is on the carrier to show that a claim for damages to a consignment of goods was not filed within the time limited by the bill of lading. (p. 843.)

CARRIER—Waiver of Notice of Damages.—A stipulation in a bill of lading limiting the time for filing a claim for damages does not apply where the injury to the goods is examined by the carrier's agent for the purpose of ascertaining its extent. (p. 844.)

CARRIER—Waiver of Notice of Damages.—A stipulation in a bill of lading limiting the time for filing a claim for damages is waived where the carrier's agent, after examination and ascertainment of the injury, directs the disposition of the goods or promises to adjust the claim. (p. 844.)

CARRIER—Limitation of Liability—Value of Goods.—A stipulation in a bill of lading that the amount of loss or damage for which the carrier shall be liable shall be computed at the value of the property at the time and place of shipment, must be construed to mean the value when received by the carrier, including freight paid. (p. 844.)

Cothran, Dean & Cothran, for the appellant.

Haynsworth, Patterson & Blythe, contra.

250 HYDRICK, J. This is an appeal from a judgment in favor of plaintiff for damage to part of a carload of flour by contamination with kerosene oil while in the hands of the carrier.

The exceptions impute error to the court below:

1. In refusing motions for nonsuit and new trial on the ground that there was no evidence that the flour was damaged while in defendant's possession.

2. In refusing a new trial, because there was no evidence of waiver of the stipulation in the bill of lading that claim for damage must be filed within thirty days after delivery to consignee.

3. In charging that the measure of damages was the value of the flour at destination, when the bill of lading provided that it should be the value at the time and place of shipment.

When it appears that a carrier received a consignment in good order, and delivered it in bad order, a presumption arises that it was damaged in the hands of the carrier: *Cooper v. Seaboard A. L. Ry.*, 78 S. C. 81, 59 S. E. 930. The bill of lading acknowledged receipt of the flour by defendant "in apparent good order." While "apparent good order" would ordinarily refer to the outward appearance of the goods, or

to their receptacles, and not to hidden or concealed conditions, in this case there was testimony that when the flour was delivered to the plaintiff the sacks were stained with oil spots, plainly visible, and the whole shipment smelled strongly of oil. If it was in that condition when received, the carrier would scarcely have receipted for it in "apparent good order." Besides, there was testimony that the plaintiff's two other consignments of flour, of the same brand, and from the same lot, were delivered to defendant at the same time, out of the same warehouse, and shipped in the same car; that a little ²⁵¹ oil in a car of flour will contaminate the whole car; that the two other consignments, one for Liberty and one for Pickens, were delivered ten or twelve days before the plaintiff's consignment, and that neither of the others was contaminated. The evidence certainly tended to show that the flour was damaged while in defendant's possession.

The plaintiff testified that as soon as he discovered the condition of the flour, he notified defendant's agent, and defendant's claim agent came and examined it, and told him to dispose of it to the best advantage, and defendant would make it all right with him, and promised to let plaintiff hear from him right away, but never did so, and that he was nearly a year getting rid of the flour; that at first he thought he could dispose of it at cost, and filed a claim, made out by defendant's agent, for one hundred and twenty-seven dollars, but afterward discovered that it was worse contaminated than he at first thought, whereupon he told the agent that he would not accept the one hundred and twenty-seven dollars in settlement, and filed another claim for the cost of the flour, as shown by his invoice. The date of the filing of the second claim does not appear in the record. That it was not filed within the time limited was an affirmative defense, and the burden was on the defendant to prove it. The flour was delivered to plaintiff in March, 1905. Several letters passed between plaintiff and defendant's general claim agent between June 21 and September 27, 1905, relative to the claim, in which the agent stated that it was having his attention, and would be disposed of as soon as the necessary investigations could be made. In these letters of the agent, the claim is referred to as "above numbered claim," and, after giving claim number, as "this claim." In the letter of August 11, 1905, replying to an inquiry of plaintiff about the claim, the agent says: "If you do not hear from me in, say, ten days or two weeks, kindly drop me another note." The circuit judge properly left it to the jury to say whether these letters referred to the first or second claim, which the plaintiff had filed. The jury ²⁵² were also instructed that, if they referred only to the claim first filed, they

would not be evidence of waiver of the stipulation, as to the filing of the second claim. The verdict establishes the fact that they referred to the second, which was not without support in the testimony: *Hays v. Western Union Tel. Co.*, 70 S. C. 16, 106 Am. St. Rep. 731, 48 S. E. 608, 67 L. R. A. 481, 3 Ann. Cas. 424.

Moreover, where the injury to the goods is examined by the carrier's agent for the purpose of ascertaining its extent, as was done in this case, the stipulation limiting the time for filing a claim does not apply: 5 Enc. 324.

And where the agent, after examination and ascertainment of the injury, directs the disposition of the goods, or promises to adjust the claim, the stipulation is waived. The plaintiff could not tell for what amount to make his claim, until he had disposed of the goods, according to the agent's directions.

The stipulation in the bill of lading that the amount of loss or damage for which the carrier shall be liable shall be computed at the value of the property at the time and place of shipment, must be construed to mean the value when received by the carrier, under a contract for transportation, which would reasonably include freight paid, either by the consignor or by the consignee, since the property, under such circumstances, would be worth the invoice price with freight added at the point of shipment: 6 Cyc. 401; *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350.

The only element of value added at destination was the freight charges, which appear to have been paid by the consignee. The error complained of was, therefore, harmless.

Judgment affirmed.

The Effect of a Stipulation in a Bill of Lading for Filing Notice against the carrier within a stipulated time of any claim for loss or damage to goods is discussed in the note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 113. According to *Gwyn Harper Co. v. Carolina Cent. R. R.*, 128 N. C. 280, 83 Am. St. Rep. 673, a stipulation in a contract of carriage that claims for loss of goods must be made within thirty days after delivery, or after due time for delivery, is unreasonable, and will not be enforced.

OWEN v. BANKERS' LIFE INSURANCE COMPANY.

[84 S. C. 253, 66 S. E. 290.]

LIFE INSURANCE—Waiver of False Representations.—An insurance company which receives premiums on a life policy for more than two years, without questioning its validity, cannot, in an action on the policy, deny the truth of the statements of the insured in the application, whether they are representations or warranties, where the statutes provide that a life insurance company receiving premiums on a policy for two years shall be deemed to have waived the right to dispute the truth of the application, and that it may, within two years, sue to vacate policies for falsity of representations. (p. 846.)

LIFE INSURANCE—Conflict of Laws.—Where the Statutes provide that receiving premiums by a foreign corporation from a citizen of the state shall constitute the doing of business in the state, and that the place of the making and performance of the contract shall be deemed within the state, and that foreign corporations shall be subject to the laws of the state in like manner as domestic corporations, a policy of life insurance issued by a foreign company to a citizen of the state is a contract of this state, solvable according to its laws, although the contract provides that it is subject to the laws of another state. (p. 847.)

LIFE INSURANCE.—When a Foreign Insurance Company comes into a state to do business, it is bound to take notice of the laws of that state, and all business therein must be conclusively presumed to have been done subject to its laws. (p. 847.)

CONTRACTS.—Every Contract Embodies the Law Governing such contracts as much as if so stipulated in the contract in express terms. (p. 847.)

Barron, Moore & Barron and Sirrine & Charles, for the appellant.

Cothran, Dean & Cothran, contra.

254 HYDRICK, J. This was an action on a life insurance policy, dated August 24, 1898, and delivered to the insured, E. B. Owen, at Greenville, South Carolina. The sole defense was that the insured falsely and fraudulently represented, in his application for the policy, that he was of temperate habits, and never drank wines, spirits or malt liquors; and that said representations were, by the terms of the application and policy, made warranties, the breach of which avoided the policy. Owen died in July, 1907.

When the defendant offered evidence to prove that the representations were false, when made, it was, on objection of plaintiff, excluded. Section 1825, volume 1, Code of 1902, reads as follows: "All life insurance companies that shall receive the premiums on any policy for the space of two years shall be deemed and taken to have waived any right they may have had to dispute the truth of the application for insurance, or that the assured person had made false representations, and the said application and representations shall

be deemed and taken to be true." Section 1826 is as follows: "Life insurance companies are hereby authorized to institute proceedings to vacate policies on the ground of the falsity of the representations contained in the application for said policy: Provided, The same be commenced within two years from the date of said policy." These sections were enacted in 1878: 16 Stat. 530.

In view of these provisions of the statute, the evidence was properly excluded. But defendant contends that the statute applies only to representations, and that, by the terms of the application and policy, the representations of insured, as to his habits, became warranties. Without deciding that point, it is sufficient to say that they were, nevertheless, representations, and came within the terms of the statute. But the statute further says the company shall not, after having received the premiums on a policy for two years, "dispute the truth of the application," and "the application and representations shall be deemed and taken to be true."

²⁵⁵ It makes no difference, therefore, whether the statements were representations or warranties. Having received the premiums for more than two years, without availing itself of the privilege accorded it by section 1826, the defendant cannot deny the truth of the application.

The defendant contends, further, that by the terms of the application and policy, the contract must be governed by the laws of the state of New York; and it was not made to appear that there was any law of the state of New York under which the evidence should have been excluded. The contract does provide that it is subject to the laws of the state of New York.

Chapter 44, volume 1, Code of 1902, prescribes the conditions upon which foreign corporations may do business in this state.

Section 1787 of that chapter provides: "It shall be a further condition precedent to the right of any such corporation to do business in this state, that it shall be taken and deemed to be the fact, irrebuttable, and part and parcel of all contracts entered into between such corporation and a citizen or corporation of this state, that the taking or receiving, from any citizen or corporation of this state, of any charge, fee, payment, toll, impost, premium or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this state, and that the place of the making and of performance of such contract shall be deemed and held to be within this state, anything contained in such contract or any rules or by-laws of such corporation to the contrary notwithstanding."

Section 1790 is as follows: "All and every such foreign corporation carrying on business or owning property in this state shall be subject to the laws of the same in like manner as corporations chartered under the laws of this state, but nothing herein contained shall be construed to permit any such foreign corporation to exercise any franchise or enjoy²⁵⁶ any privilege or immunity other than the right to own property and carry on business in like manner as individuals, natural born citizens of such state of the United States or of foreign countries, might do, and subject to the terms and conditions of this chapter."

In the face of these statutes we must hold that this is a South Carolina contract, solvable according to our laws. The defendant, a foreign insurance company, had no legal right to do business in this state, except upon such terms and conditions as the state has seen fit to impose; and when it came here to do business, it was bound to take notice of our laws; and all business done within the state must be conclusively presumed to have been done subject to the laws of the state.

There is no force in appellant's contention that such a construction of the statutes impairs the obligation of the contract, and renders the statutes obnoxious to the constitution, for the contract was made with reference to the statutes. In *Adler v. Cloud*, 42 S. C. 272, 20 S. E. 393, the court said: "It has been repeatedly held by this court and the United States supreme court, that every contract made embodies the law governing such contracts as much as if so stipulated in the contract in express terms."

Judgment affirmed.

The Question as to What Law Governs an Insurance Policy where the insured resides in one state and the insurance company is domiciled in another is discussed in the recent cases of *Stone v. Penn Yan etc. Ry.*, 197 N. Y. 279, 134 Am. St. Rep. 879; *Peckham for an Opinion*, 29 R. I. 250, 132 Am. St. Rep. 813; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 110 Am. St. Rep. 919; note to *Grevenig v. Washington Life Ins. Co.*, 104 Am. St. Rep. 488. The Mississippi statute that "all contracts of insurance on property, lives or interests in this state shall be deemed to be made therein" is the law of that state, and no contract of the parties can change it. Hence a contract of life insurance entered into between a resident of Mississippi and a corporation of another state is to be construed under the laws of the former commonwealth: *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 18, 136 Am. St. Rep. 534.

BAKER v. WESTERN UNION TELEGRAPH COMPANY.

[84 S. C. 477, 66 S. E. 182.]

TELEGRAPH COMPANY—Delay in Delivery—Condition of Wires.—It is competent to explain a delay in the transmission of a telegram, by showing that any trouble with the wires between the sending and delivery offices was not due to the negligence of the telegraph company, but evidence of the condition of a wire is not admissible, if there is no showing of a necessity of the message going over it. (p. 850.)

TELEGRAPH COMPANY—Delay in Delivery—Injury to Credit.—Where delay in the transmission of a telegram results in the dishonor and protest of a note given by the sender, and he sues for injury to his credit, he may testify to circumstances indicating that his credit was not injured by protest of other notes. (p. 850.)

TELEGRAPH COMPANY—Notice of Importance of Message. Where a telegram reads: "Pay note bank of Charleston to-day," and the sender informs the operator that he has a note due in Charleston and that the message is important, this puts the telegraph company on notice that the probable consequences of failure to deliver will be the dishonor of the note and injury to the sender's credit. (p. 850.)

TELEGRAPH COMPANY—Delay in Delivery.—Where a Complaint alleges that a telegram was not delivered until "after banking hours and too late for" the sender's agent to pay a note referred to in the message, evidence is not fatally variant that by reason of failure to get the telegram promptly the agent used funds in the bank to pay another debt just before the bank closed, and so was unable to prevent the protest of the note. (p. 850.)

TELEGRAPH COMPANY—Delay in Delivery—Injury to Credit.—A telegraph company is liable to a merchant for injuries resulting to him from his note being protested when he had funds with which to pay it and which would have been so used but for negligence in not delivering the message promptly. (p. 851.)

TELEGRAPH COMPANY.—Delay in the Transmission and delivery of a telegram is evidence of negligence on the part of the telegraph company. (p. 851.)

TELEGRAPH COMPANY.—Evidence of Long Delay in Delivering a telegram, without an affirmative showing by the company of an effort to deliver, is sufficient to carry the issue of willfulness to the jury. (p. 852.)

TELEGRAPH COMPANY.—A Delay of Four or Five Hours in Delivering a telegram, without proof of a direct line between the initial and terminal offices, or other supporting circumstances, is not evidence of willful disregard of duty. (p. 852.)

APPEAL.—An Exception Urging That There were Contradictions in the evidence on the part of the plaintiff, and such an entire failure of proof of damage to him that the trial court should have granted a new trial, cannot be considered on appeal if there was no motion for nonsuit and no request to direct a verdict. (p. 852.)

Mitchell & Smith, for the appellant.

Nathans & Sinkler, contra.

479 WOODS, J. In this action the plaintiff recovered a judgment for three hundred dollars against the Western Union

Telegraph Company under the allegation that he had been "injured in his good reputation and standing and credit as a merchant," by the delay in the delivery of a telegram. According to the evidence on behalf of the plaintiff, this was the case before the court: The plaintiff Baker, a small merchant, had stores at Elloree and Georgetown. Having a note of one hundred dollars due in the Bank of Charleston on September 11, 1906, he delivered to defendant's agent at Elloree between 9 and 10 o'clock on September 10, 1906, this dispatch, addressed to Jacob Baker, his son and agent in Georgetown, "Pay note Bank of Charleston to-day." He specially requested prompt delivery, informing the agent that he had a note due in Charleston and that the message was important, and was told by the agent that it would be delivered in about fifty minutes. The message was not delivered until about 4 o'clock in the afternoon of the same day, after the banks in Georgetown had closed for the day. Jacob Baker had funds in the bank to the credit of the plaintiff, sufficient to pay the note referred to in the telegram, and would have so applied them if the telegram had been promptly delivered. According to one version given by Jacob Baker, he had applied the funds to the payment of another note at about 2:30 o'clock just before the close of banking hours, and, therefore, could not pay the note in Charleston after the receipt of the telegram. Jacob Baker also testified he had the funds to the credit of his father to pay the note to the Bank of Charleston when the telegram was received, but because it was after banking hours he could not make the remittance in time to prevent protest. The note in the Bank of Charleston was protested, and, according to the plaintiff's evidence, his credit, especially in that bank, was greatly injured.

⁴⁸⁰ The defendant offered evidence tending to show that the plaintiff was in bad credit with merchants and banks, and that it was not his habit to pay notes at maturity; and that Jacob Baker could have prevented the protest by having the Georgetown bank to telegraph payment to the Bank of Charleston on the 11th of September. Defendant's agent at Georgetown testified that he received the message at 1:56 o'clock in the afternoon of the 10th of September, and sent it out at 2:50 o'clock, the delay being due to the absence of the messenger boys from the office on other business. No other explanation of delay appears in the evidence.

The first exception relates to the subject of explanation of the delay, alleging error in the refusal of the circuit judge "to allow defendant's witness, P. E. Ryan, to testify as to the conditions of the telegraph wires of the defendant company between Charleston and Georgetown over which the

message had to be sent, and to explain the alleged delay." The portion of the record relied on to sustain the exception is as follows: "Q. Where do you live? A. Charleston. Q. What was your occupation on September 10, 1906? A. I was acting chief operator that day. Q. For who? A. For the Western Union Telegraph Company. Q. Mr. Ryan, on that day, September 10, 1906, will you state what was the trouble, if there was any trouble, with the wires from Charleston to Georgetown? Objected to. Objection sustained. Exception noted."

It was certainly competent for the defendant to explain the delay, by showing that any trouble with its wires between Elloree and Georgetown was not due to its negligence. But there is nothing whatever in the record to show that it was necessary for the message to go by way of Charleston, and until the defendant had offered some evidence that the message would pass over the wire connecting Georgetown and Charleston, there could be no complaint of the exclusion of this testimony as irrelevant. As there was no evidence of any derangement of the wires between Elloree and ⁴⁸¹ Georgetown, there was no basis for the request to charge on that subject.

The objection to testimony of Baker in explanation of the protests of the other notes cannot be sustained; for it was certainly competent for him to testify to circumstances, indicating that his credit was not injured by the other protests. No objection to the statement of the plaintiff that he had a wife and children appears in the record. The ground of objection to his testimony that since the bank had refused him credit he had lost a lot of business and could not buy bargains, because he could get no credit, was not indicated to the court when the objection was made. But aside from that, it was nothing more than a statement that he could not do that which every merchant strives to do.

The words of the telegram, and the evidence of the plaintiff that he gave special notice of the importance of prompt delivery were sufficient to put the defendant on notice that the probable consequences of failure to deliver would be dishonor of the plaintiff's note and injury to his credit.

The evidence that by reason of the failure to get the telegram promptly, plaintiff's agent, Jacob Baker, used the fund in bank to pay another debt, just before the bank closed, and so was unable to prevent the protest of the note in the Bank of Charleston, was not fatally variant from the allegation of the complaint that the telegram was not delivered until "after banking hours and too late for the plaintiff's son and agent to have paid said notes."

The cause of action stated in the complaint was the defendant's breach of duty in failing to deliver the telegram promptly, and injury to the plaintiff, which arose from the delay in that his note was protested and his credit impaired. The circumstances which made it impossible to meet the note after the telegram was received were mere details. It was not error, therefore, for ⁴⁸² the court to charge the jury that: "If he had plenty of time and the means, and was not without means because of the failure of duty on the part of the defendant company, but had used those means for other purposes which he would not have used but for the negligence of the defendant company, and then injury resulted to him by reason of the protesting of the note, which would not have been protested had the telegram been delivered within a reasonable time, then the defendant would be responsible." It is true that the statements of Jacob Baker on this subject are utterly irreconcilable, but that was a matter for the jury.

There was no evidence of wantonness and willfulness, and the circuit judge should have instructed the jury as requested by defendant that they could not find punitive damages. The only evidence relied on to show willfulness or wantonness was the delay in the transmission of the telegrams. The telegram was sent, according to the complaint, at 10:30 A. M., and according to the evidence at about 9:30 A. M., and received at about four on the same day. There is no evidence that the line is direct between Elloree and Georgetown; on the contrary, the statement of the defendant's agent to the plaintiff that it would take fifty minutes to get it through indicates plainly that it was not direct. The delay from 1:56 P. M., when it reached the Georgetown office, to the time of delivery was explained by the Georgetown agent to be due to the absence on office duty of all the messenger boys. The question is, whether an unexplained delay of four or five hours between Elloree and Georgetown is evidence of wantonness or willfulness. The rule in this state is that delay in the transmission and delivery of a telegram is evidence of negligence on the part of the telegraph company: *Poulnot v. Western Union Tel. Co.*, 69 S. C. 545, 48 S. E. 622; *Helams v. Western Union Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *Arial v. Western Union Tel. Co.*, 70 S. C. 418, 50 S. E. 6; *Eaker v. Western Union Tel. Co.*, 75 S. C. 97, 55 S. E. 129; *Kirby v. Western Union Tel. Co.*, 77 S. C. 404, 122 Am. St. Rep. 580, 58 S. E. 10; and that long and unexplained delay ⁴⁸³ is evidence of willfulness or wantonness. This latter doctrine has its origin in *Young v. Western Union Tel. Co.*, 65 S. C. 93, 43 S. E. 448. In that case Justice Gary, speaking for the court, laid down the rule that evidence of the telegram remaining in the possession of the telegraph company undeliv-

ered for fourteen hours, together with affirmative evidence that no effort had been made to deliver it, was sufficient to go to the jury on the issue of willfulness. This case went no further than to hold that where the plaintiff offered evidence not only of the long delay, but also of lack of effort to deliver, he had made an issue of willfulness for the jury. The cases which followed have extended the rule in favor of the plaintiff in such cases by holding evidence of long delay in delivering the message without an affirmative showing by the defendant of effort to deliver, to be sufficient to carry the issue of willfulness to the jury: *Machen v. Western Union Tel. Co.*, 72 S. C. 256, 51 S. E. 697; *Willis v. Western Union Tel. Co.*, 73 S. C. 379, 53 S. E. 639; *Bolton v. Western Union Tel. Co.*, 76 S. C. 529, 57 S. E. 543; *Dempsey v. Western Union Tel. Co.*, 77 S. C. 399, 58 S. E. 9; *Balderston v. Western Union Tel. Co.*, 79 S. C. 160, 60 S. E. 435; *Fail v. Western Union Tel. Co.*, 80 S. C. 207, 60 S. E. 697, 61 S. E. 258. In these cases the range was from a delay of seventeen hours to an entire failure to deliver, and in some of them the delay was accompanied by other circumstances tending to show willfulness. It is not possible to lay down any hard-and-fast rule as to the duration of the time of delay necessary to carry the issue of willfulness to the jury, because of the varying circumstances of each case. But we reject the proposition that delay of four or five hours, without proof of a direct line between the initial and terminal offices or other supporting circumstances, is evidence of willful disregard of duty. The law does not assume willful violation of duty. On the contrary, the burden is on him who alleges it to prove it. When it is remembered that inexplicable miscarriages in business will sometimes occur, notwithstanding the utmost human care, vigilance and ingenuity, the courts ought to be very cautious ⁴⁸⁴ in allowing the inference not only of lack of care but also of willful violation of duty to be drawn from a particular instance of lack of promptness in transmitting and delivering a telegram or in the performance of any other duty.

Counsel for appellant earnestly contends that there were contradictions in evidence on the part of the plaintiff, and such an entire failure of proof of damage to plaintiff that the circuit judge should have granted the motion for a new trial. The exception on this point cannot be considered, because there was no motion for nonsuit and no request to direct a verdict as to the alleged cause of action for actual damages.

The judgment of this court is, that the judgment of the circuit court be reversed and the cause remanded to that court for a new trial on the cause of action for the alleged negligence of the defendant.

HYDRICK, J., Concurring and Dissenting. I concur in the opinion of Mr. Justice Woods, except in his conclusion that the circuit judge erred in submitting the question of punitive damages to the jury, as to which I dissent. The plaintiff testified that he filed the telegram for transmission about 9 o'clock A. M., and notified the agent of its importance, and the agent told him it would be delivered in about fifty minutes. His son testified that it was not delivered until 4 o'clock P. M. The defendant's agent at Georgetown testified that it was received at 1:56 P. M., and sent out at 2:50 P. M. Besides the information given the agent at Elloree, the telegram showed on its face the importance of delivery during banking hours that day. In considering the question, the testimony must be taken most strongly against the defendant. So, we have a delay in transmission from about 9 o'clock in the morning until 1:56—nearly five hours—and not a word of explanation. It was not shown that the information given the agent at Elloree, as to the importance of ⁴⁸⁵ prompt delivery, was transmitted to the agent at Georgetown, nor does it appear whether any service message was sent to ascertain if the message was delivered, although the agent at Elloree had promised plaintiff that it would be delivered to his son in fifty minutes. In Bolton's case (76 S. C. 529, 57 S. E. 543) the court said: "The agent of the defendant, who received the message at Lithonia, ought to have been informed by the transmitting office of the undertaking to put the message through that night, and if the Lithonia night operator, under the circumstances in which he was situated, could not with reasonable diligence have arranged for the delivery of the message, he should have informed the transmitting office so that plaintiff might have been informed in order that she could make the necessary arrangements to meet the difficulty arising from a failure to deliver the message that night as contemplated."

At the Georgetown office we have a delay of nearly two hours, according to plaintiff's testimony, from 1:56 until 4 o'clock, in delivering so important a message to one who was not a quarter of a mile from defendant's office; and the only explanation given is that the messenger boys were all out on other business. We are not told what the usual business of the office was, whether there was an unusual rush of business that day, how many messengers were usually employed, or how many were in the service that day, or why a special messenger could not have been employed to deliver this message.

The reason of the rule that unreasonable delay in the transmission or delivery of a telegram raises a presumption of negligence, and casts the burden of explanation on the com-

pany, is because it is a public business, requiring a high degree of technical skill and diligence, and the causes of delays, mistakes and errors are peculiarly within the knowledge of the company. Hence, the burden was upon the company, and not upon the plaintiff, to show whether the message ⁴⁸⁶ had to go from Ellore to Georgetown over a direct line, or through one or more relay stations.

This court has held, time and again, that long delay, in the absence of undisputed evidence of a real effort to transmit or deliver, will carry the case to the jury on the issue of punitive damages. We have never yet said what is the shortest time that will be held to be a long delay. That must depend upon the circumstances of each case. But we have said that the issue must be submitted to the jury, unless the testimony, both on the part of the plaintiff and the undisputed exculpatory evidence on the part of the defendant, will not justify a reasonable inference of recklessness, which is indifference to the rights of others, or of wantonness, which is a conscious failure to observe due care.

I am constrained to think that the testimony in this case warranted a reasonable inference of indifference to the rights of the plaintiff, and of a conscious failure to observe due care.

PER CURIAM. After careful consideration of the petition herein, the court fails to discover wherein any material question of law or of fact has either been overlooked or disregarded.

It is, therefore, ordered that the petition be dismissed, and that the order heretofore granted, staying the remittitur, be revoked.

Damages Recoverable from Telegraph Companies for negligence in the transmission and delivery of messages are discussed in the note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 286. Injury to credit as an element of damages in such cases is considered on page 295 of that note. Where the terms of a telegraphic message and the circumstances known to the telegraph company when the message was presented for transmission were reasonably sufficient for the company to contemplate therefrom that the losses sustained by the plaintiff would probably result from a negligent transmission, it will be liable in damages to the amount of loss directly sustained by him from its negligence. And it is not essential that the particular loss sustained was contemplated, it being sufficient if the loss sustained should have been contemplated as a probable and proximate result of the negligence: *Western Union Tel. Co. v. Milton*, 53 Fla. 484, 125 Am. St. Rep. 1077; *Western Union Tel. Co. v. Merritt*, 55 Fla. 462, 127 Am. St. Rep. 169; *Marriott v. Western Union Tel. Co.*, 84 Neb. 443, 133 Am. St. Rep. 633.

STATE v. DRIGGERS.

[84 S. C. 526, 66 S. E. 1042.]

HOMICIDE—Self-defense—Absence of Peril.—Where a woman, who during the day has been guilty of misconduct and violence toward her brother, gets into a wagon to go away, and he, while in no peril, shoots her as she sits in the vehicle with a gun in her lap, which she makes no attempt to use, the law of self-defense has no application. (p. 856.)

HOMICIDE—Evidence of Insanity.—On the Issue of Insanity of one accused of murder, his entire conduct, including words spoken by him and the manner of his speech, is competent. But there should be some preliminary evidence of mental aberration indicating to the court that such testimony is tendered in support of a substantial plea of insanity, and not for the purpose of getting in evidence the declarations of the defendant in his own favor. (p. 857.)

HOMICIDE—Remarks of Court Discrediting Plea of Insanity. Statements by the court in a murder trial, in responding to objections to testimony, "I suppose he is leading up to brain-storm or something like that. Do you contend that a drunken debauch would excuse a homicide? Do you want a man to prove his own lunacy?" were better omitted, but they do not amount to such expressions of opinion on the merits of the defense of insanity as to indicate that the judge is a participant in the consideration of that question of fact. (p. 858.)

WITNESS—Questioning by Judge.—It is Within the Province of the trial judge to elicit from witnesses any evidence tending to show the truth of the matter in issue. (p. 858.)

TRIAL—Instructions Singling Out Evidence.—The court is not required to single out and emphasize any of the evidence bearing on the issues. A request for an instruction that it would be proper for the jury on the issue of insanity "to consider the general conduct, condition, appearance and language of the defendant," is properly refused. (p. 859.)

HOMICIDE—Provocation.—An Instruction in a homicide case to the effect that mere drunkenness or anger would not reduce the crime to manslaughter, and that the fact that the deceased cursed the defendant and they had a fight would not constitute such legal provocation as to reduce the killing to manslaughter, is not error, where the homicide is admitted and the only possible questions are whether the defendant committed it while insane or in sudden heat and passion under such legal provocation as would reduce the crime to manslaughter. (p. 860.)

TRIAL—Instruction Stating Facts.—The Constitutional requirement that the judge shall not state the facts in charging the jury does not prohibit such reference to the undisputed evidence as is necessary to enable the jury to apprehend the law applicable to the concrete issues of fact which they are to decide. (p. 860.)

Davis & Weinberg, for the appellant.

P. H. Stoll and S. Oliver O'Bryan, contra.

527 WOODS, J. The defendant, J. Frank Driggers, was convicted of the murder of his sister, Mrs. Boseman. As the verdict embraced a recommendation to mercy, the court imposed a sentence of life imprisonment. There is no need to

set out the evidence in its revolting details, for the questions made by the appeal will be sufficiently clear from a very brief statement of the undisputed facts. The defendant and his sister, Mrs. Boseman, previous to the homicide, had quarreled about the balance claimed by Mrs. Boseman to be due her on a trade of a horse and some cattle. On December 26, 1908, Henry Boseman, his wife, Mary Boseman, and Frank Driggers, Jr., a young son of the defendant, went in a wagon to the home of defendant. They carried wine and gin, and the defendant already had liquor ⁵²⁸ at the house. Boseman and young Driggers went hunting, leaving Mrs. Boseman with the defendant and his family. The evidence is conflicting as to the conduct of the defendant and his sister during the day. They both drank, and after Boseman returned from the hunt, went out on the piazza engaged in a violent quarrel, either striking or menacing each other. They were then separated, and Boseman induced his wife to get into the wagon with him. As they were leaving, there was a challenge to have satisfaction in the public road. The evidence is conflicting as to whether Boseman or the defendant offered the challenge.

But, according to the evidence on both sides, after Boseman and his wife had started away in the wagon, the defendant sent his little daughter for his gun. On her return with the gun, he sent her back for another loaded shell, walked out of his house some distance to the road, and deliberately shot his sister to death. She had a gun in her lap, but made no effort to use it.

Assuming that the deceased during the day used all the profanity, and was guilty of all the misconduct and violence to the defendant, attributed to her by the members of his family, all that was at an end; and after it was ended, the defendant pursued, and when in no peril whatever, committed the homicide. It is too evident for discussion that the law of self-defense has no application to a homicide committed under such circumstances. There is no reason, therefore, to discuss the alleged errors in the charge on the subject of self-defense, for the defendant had no right to any instructions on that subject. The circuit judge, nevertheless, charged the law of self-defense, as the plea was set up, and we are unable to discover any error in the charge.

For the same reason that it was affirmatively shown beyond all controversy by the evidence offered by the defendant that he was in no peril whatever when he shot, there would have been no error in excluding testimony of ⁵²⁹ Frank Driggers, Jr., as to the language used by the deceased in insisting that she would go to the house of defendant. But the exception on this point was taken under a misapprehension, for the evidence was not excluded, the witness having testified: "She said,

'I am going to jump out and carry my gun with me, if you don't,' and I said, 'I will go if you go.' Q. Did he drive in? A. Yes, sir."

The real defense was that the defendant at the time of the homicide was in such a state of delirium from excessive drink that he was irresponsible. In support of this defense, J. D. Driggers, the brother of the defendant, gave this account of a visit to his house on the night of December 24th, before the homicide on the morning of December 26th.

"And when I went into the house, I found him locked up in the house, the key in the door on the outside. I carried Dan Driggers in with me, and I wouldn't advance right on him. I saw him sitting in the corner of the house with his gun across his lap. I pushed the door half open, and I said, 'Frank, what in the world is the matter?' And he looked straight at me and said, 'Is that Major?' And I said, 'Yes, this is Major.' And he said, 'What is the matter with you, Melvin Croton?' That is a colored man that lives near him." At this point the court stopped the witness, holding this declaration of the defendant to be in his own favor and incompetent.

There is no doubt of the correctness of the general rule stated by the court, but we think on the issue of insanity the entire conduct of the defendant, including words spoken by him and the manner of his speech, is competent. Wild, foolish or irrelevant speech is as much evidence of most forms of insanity as violent or unreasonable actions and unnatural appearance. One may be feigned as well as the others, and there is no reason for the rejection of one that would not apply with equal force to the others. Such speech of a party is not subject to the objection that it is ⁵³⁰ a declaration of the defendant in his own favor, for evidence of it is not received as tending to prove any act or intention of the party, but merely as an indication of his mental condition. No doubt there should be some preliminary evidence of mental aberration, indicating to the court that the speech or conversation of the person accused is tendered in support of a substantial plea of insanity, and not for the purpose of getting in evidence the declarations of the defendant in his own favor. The authorities on the point are not unanimous, but such evidence was held admissible in *People v. Nino*, 149 N. Y. 317, 43 N. E. 853; *McLean v. State*, 16 Ala. 672; *Norwood v. Marrow*, 20 N. C. 578. It is true that the North Carolina court in the later case of *State v. Vann*, 82 N. C. 631, held such speech and conversation incompetent, but in the still more recent case of *McLeary v. Normont*, 84 N. C. 235, the principle of *Norwood v. Marrow* was reaffirmed.

The defendant, however, was not injured by the ruling of the circuit judge on this point, for the evidence of his re-

marks to Driggers, and also to the witness, Lesesne, had been adduced before the objection was made, and was not withdrawn from the consideration of the jury. Besides, there was evidence from other witnesses of foolish remarks from the defendant.

The second exception is as follows: "That his honor erred, it is respectfully submitted, in frequently and repeatedly throughout the trial responding to objections to the introduction of testimony by the use of such expressions as, 'I suppose he is leading up to brain-storm or something like that.' 'Do you contend that a drunken debauch would excuse a homicide?' 'Do you want a man to prove his own lunacy?' Thereby clearly and plainly indicating to the jury his opinion of the defense of insanity, interposed by the defendant." We have examined with care the connection in which these expressions were used by the circuit judge, and have reached the conclusion that while it ⁵³¹ would have been better to omit them, yet they did not amount to such expressions of opinion on the merits of the defense of insanity as to indicate that the circuit judge was a participant in the consideration of that question of fact; and, therefore, they do not fall within the rule stated in *Willis v. Western Union Tel. Co.*, 73 S. C. 379, 53 S. E. 639, and *Latimer v. General Electric Co.*, 81 S. C. 374, 62 S. E. 438. Expressions like those quoted in the exceptions, as, indeed, almost any expressions, though harmless in themselves, it is true might be made with such emphasis and manner that they would be highly improper and prejudicial to the rights of one or the other of the parties litigant; and the defendant contends that the emphasis and manner of the circuit judge produced that result in this instance. If so, this court can give no relief. The law clothes the judges with the presumption of poise and dignity, and fairness in both mind and manner. The circuit judges of this state have by their conduct added force to this presumption; and an emphasis or manner indicative of partiality or unfairness cannot be assumed in this instance.

The exceptions charging error in that the circuit judge asked questions of the witness is without foundation. The questions were not improper in themselves, and it is well within the province of the trial judge to elicit from witnesses any evidence tending to show the truth of the matter.

The defendant further complains that the circuit judge refused to charge: "That habitual intoxication often results in what is called delirium tremens, which the law considers a form of insanity, and this will often excuse the party from criminal responsibility; if a person suffering with delirium tremens is so far insane as not to know the nature of his act, he is no more punishable than he would be if he had contracted a habitual and fixed insanity from the use of intoxi-

cating liquors or any other cause." The charge actually made was more comprehensive ⁵³² than these requests, in that it covered not only insanity as an incident of delirium tremens, but also insanity of any other form resulting from the excessive use of liquor. This might be shown by several extracts from the charge, but the following will suffice: "Is the defendant, or was the defendant at the time, in such a diseased state of mind that he did not have the faculty of determining right from wrong? Not was he intoxicated at the time, but was the effect on his mind, after having indulged, and indulged to such an extent as to weaken and impair his mind to such an extent that he did not have enough brain matter left to distinguish the difference between right and wrong? If he did it under those circumstances, he is not guilty, and in determining that, you judge of his acts before and after."

As to the request for the instruction that it would be proper for the jury on the issue of insanity "to consider the general conduct, condition, appearance and language of the defendant," it need only be said that the circuit judge is not required to single out and emphasize any of the evidence bearing on the issues: *State v. Thrailkill*, 71 S. C. 136, 50 S. E. 551.

The exception alleging the failure of the circuit judge to charge properly on the subject of reasonable doubt was taken under a misapprehension, for the following instruction was given at defendant's request: "I charge you that while it is true that the defendant is required to prove that he was of unsound mind at the time of the homicide by the preponderance of the evidence, but it is also true that upon the consideration of the testimony of the whole case, the state's position, as well as the defendant's, if any reasonable doubt remained in the minds of the jury, the defendant is entitled to a verdict of not guilty."

The remaining exception to be considered is that imputing error to the circuit judge in charging: "If he killed her, because he was drunk or mad, that is not manslaughter. ⁵³³ If he killed her because she came to his house and she cursed him and they had a fight; if that is the motive that provoked it, that is not sufficient legal provocation. It must have been done in sudden heat and passion, and upon a sufficient legal provocation." The homicide was admitted by defendant, and the only possible questions were: (1) Did the defendant kill while insane; or, (2) in sudden heat and passion under such legal provocation as would reduce the crime to manslaughter? The instruction complained of was nothing more than saying to the jury that mere drunkenness or anger would have no effect to reduce the crime to manslaughter; and, further, that the mere fact that the de-

ceased had cursed defendant, and that they had had a fight would not have constituted such legal provocation as would reduce a killing afterward done to manslaughter. That this was the proposition of law the court meant to state is obvious from the illustration which immediately followed: "To illustrate a case of sudden heat and passion, if two parties, without any previous quarrel or animosity meet and get into a discussion, and that waxes warmer and warmer, and they get into a fight, mutual combat, and as a result of the combat, one strikes the other and he dies from the effect of it, and that was the result of that quarrel suddenly precipitated, and he dies, under those circumstances the law says, 'Well, you had no right to kill him, but inasmuch as you did it in a fight, in sudden heat and passion, while the blood was coursing through your veins, inasmuch as you did it under those circumstances, it will not hold you to as strict accountability for that act, as if you had gone there premeditatedly and sought it, and, therefore, it takes a charitable view of the act, and reduces the killing from murder to manslaughter.' "

Nor was the portion of the charge to which the exception refers a charge on the facts within the prohibition of the constitution. The constitutional requirement that the judge shall not state the facts in charging the jury does ⁵³⁴ not prohibit such reference to the undisputed evidence as is necessary to enable the jury to apprehend the law applicable to the concrete issues of fact which they are to decide: *Anderson v. South Carolina & G. R. R. Co.*, 81 S. C. 1, 61 S. E. 1096; *Tucker v. Buffalo C. Mills*, 76 S. C. 539, 121 Am. St. Rep. 957, 57 S. E. 656; *State v. Way*, 76 S. C. 91, 56 S. E. 653.

The judgment of this court is that the judgment of the circuit court be affirmed.

The Law of Self-defense is discussed in the notes to *State v. Sumner*, 74 Am. St. Rep. 717; *State v. Gordon*, 109 Am. St. Rep. 804.

Homicide.—The Condition of Mind of the slayer which reduces murder to manslaughter is the subject of a note to *People v. Poole*, 134 Am. St. Rep. 726.

GILLILAND & GAFFNEY v. SOUTHERN RAILWAY.

[85 S. C. 26, 67 S. E. 20.]

CARRIER OF LIVESTOCK—Interstate Shipment—What Law Governs.—Where a contract to ship livestock from Georgia to South Carolina is made in Georgia, the validity and interpretation of that portion thereof which relates to safe transportation and is to be performed partly in each state is determined by the laws of Georgia, unless the intention of the parties is otherwise. (p. 863.)

CARRIER OF LIVESTOCK—Liability While Animals Unloaded.—To avail itself of a stipulation in a bill of lading that the shipper of livestock shall load and unload the animals at his own risk, and feed, water and attend them at his own expense and risk, the carrier must show that injury to the animals while unloaded is not caused by its negligence. (p. 864.)

CARRIER OF LIVESTOCK—Liability While Animals Unloaded.—Where a bill of lading provides that the shipper of livestock shall load and unload the animals at his own risk, and feed, water and attend them at his own expense and risk, but he does not attend the animals, and the carrier unloads them for feed and water at a place where they are exposed to cold and storm to their injury, it is liable for the injuries which such negligence causes. (p. 864.)

CARRIER OF LIVESTOCK—Unloading Animals.—Under the Federal statutes, if an interstate carrier of livestock unloads the animals for food and water in the cold and storm without shelter or protection, it is liable for resulting injuries to them, although the bill of lading stipulates that the shipper shall load and unload the animals at his own risk, and feed, water and attend them at his own expense and risk, and he fails to attend them. (p. 866.)

CARRIER OF LIVESTOCK—Waiver of Notice of Damage.—Where a shipper of livestock telephones to the carrier's agent that the animals have been injured, and is told in reply to get a veterinary surgeon, have them examined, and the carrier will settle the bill, this is evidence to go to the jury of a waiver of stipulations in the bill of lading that notice of injury shall be given in writing before the stock is unloaded and mingled with other animals. (p. 867.)

EVIDENCE.—One Who Answers a Telephone Call from the place of business of the person called for, and undertakes to respond as the agent, is presumed to speak for him in respect to matters of the general business carried on by such person at that place. (p. 867.)

Sanders & De Pass, for the appellant.

Wilson & Osborne, contra.

28 WOODS, J. On February 27, 1907, the plaintiffs, dealers in horses and mules, shipped a carload of stock consisting of eleven horses and five mules from Atlanta, Georgia, to Spartanburg, South Carolina, over the defendant's railroad. A judgment was recovered for injuries to the stock in transit under this allegation: "That at Greenville, South Carolina, a station on its line, defendant unloaded such stock in an unfit, unsuitable and unprotected place, where for several hours they were subjected in the mud to very severe cold, rain, wind and sleet; in consequence of which they contracted

severe colds and other ailments, were stiffened, hair turned and rendered unsalable, and permanently injured, and plaintiffs thereby made to suffer much damage." It was further alleged in the complaint that the plaintiff had specially warned the defendant not to expose the stock to such weather.

The first defense was a general denial, but the defense involved in the appeal is that the plaintiffs, in consideration of a reduced freight rate, made a contract with the defendant, embodied in the bill of lading in this language: "That he will load and unload said animals at his own risk, and feed and water and attend the same at his own expense and risk while they are in the stockyards of the railway company awaiting shipment, and while on the cars, or at feeding or transfer points, or where they may be unloaded for any purpose, whether arising from accident or from delay of trains, or otherwise, and to that end he or his agent in charge of said livestock shall pay regular published passenger fare when proper under rules governing transportation of livestock, and shall ride upon the freight train in which said animals are transported, and in case the railroad company shall furnish laborers to assist in loading and unloading or caring for said livestock, they shall be subject to the orders and shall be the employes of the party of the second part while assisting, provided, however, that in the event that the party of the second part shall fail to properly ²⁹ care for, feed or water the said livestock during transportation the railroad company may, itself, care for, water and feed the same at the expense of the owner thereof, and shall and may have a lien upon the said livestock for the amount of its expenditures in that respect."

The answer further alleges: "That the plaintiffs failed to attend to the said horses and mules, or to unload, feed and water and care for the same as they had contracted to do, and that any injuries which came to the said animals were caused by the failure of the plaintiffs to comply with their said contract, as hereinbefore stated."

The answer set up also this provision of the contract: "That as a condition precedent to any right to recover any damages for loss or injury to said livestock, notice in writing of the claim thereof shall be given to the agent of the carrier actually delivering said livestock, wherever such delivery may be made, and such notice shall be given before said livestock is removed or is intermingled with other livestock"; and alleged that the plaintiff unloaded the stock and allowed it to be mingled with other stock before making any claim.

The evidence offered by the plaintiff, none of which was disputed, tended to establish these facts: The horses and mules were delivered in good condition to the defendant company in Atlanta, and a bill of lading was issued containing the

stipulations above set out. Neither of the plaintiffs accompanied the stock or made any provision for their care. The defendants unloaded the animals in their yard at Greenville, an intermediate station, and fed and watered them. This was done at night in a very cold rain, and the yard was uncovered and muddy. The plaintiffs attempted to prevent the unloading on account of the severity of the weather, but when the message reached Greenville the horses and mules were already in the yard.

The first position taken by the defendant's counsel is that the circuit judge should have directed a verdict as requested³⁰ by them on two grounds: First, "that under the law of Georgia it was the duty of the plaintiffs, under their contract with the defendant, to go along with the animals at their own risk, feed, water and attend to the same, and as the evidence shows conclusively that they failed to do so, they could not under the law of Georgia recover against the defendant for any damages done said animals while being fed and watered by the defendant in the absence of the plaintiff. Second, that the plaintiffs failed to give notice of the injuries to the stock, to the agent of the defendant delivering it, as required by the other clause of the bill of lading set out in the answer."

The contract of shipment was made in Georgia and required part performance in that state and part in South Carolina. The rule which prevails in most jurisdictions, including this state, is that under such conditions any question as to the nature, validity and interpretation of that portion of the contract to be performed partly in Georgia and partly in South Carolina, namely, the portion which related to safe transportation from the point of delivery to the point of destination, would be determinable under the laws of Georgia, unless there was evidence of the intention of the parties that a different law should be applied: *Frasier v. Charleston etc. Ry.*, 73 S. C. 140, 52 S. E. 964; *Wharton on Conflict of Laws*, 1062-1064. The record indicates that the circuit judge adopted the general rule and applied the laws of Georgia in the trial of the case.

The supreme court of Georgia has held, as shown by the reports of that state introduced by the defendant, that under such a bill of lading as this, the shipper cannot hold the carrier liable for injuries which resulted from failure to properly load and unload the stock, or for lack of feed, water and attention, because the shipper undertakes to load and unload, and to supply necessary feed, water and attention: *Susong v. Florida Cent. R. R. Co.*, 115 Ga. 361, 41 S. E. 566; *Seaboard A. L.*³¹ *R. R. v. Cauthen*, 115 Ga. 422, 41 S. E. 653; *Central of Ga. R. R. Co. v. James*, 117 Ga. 832, 45 S. E. 223. But that court has also held that for a common carrier to

avail itself of an exception to its usual liability, set out in the contract of shipment, it must show that the injury and loss fell within the exception, and were not caused by its negligence: *Atlanta etc. R. R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355; *Carter v. Southern R. R. Co.*, 3 Ga. App. 34, 59 S. E. 209.

Applying the law as thus laid down, it was the duty of the shipper to load and unload and supply food, water and attention, but it was the duty of the railroad company to supply a proper place to unload the stock and to have proper protection for them; and if the horses and mules were injured because the carrier neglected to have a proper place and proper protection for the unloading, it would be liable for the resulting injury. There was evidence tending to show that the injury was due to the negligence of the carrier in these particulars, and therefore the circuit judge was right in refusing to instruct the jury that the mere fact that the animals were injured "while being fed and watered" would, under the law of Georgia, prevent recovery, and in charging instead: "The stipulation between the plaintiff and the defendant in this part of the contract does not refer to the place where the stock is to be unloaded except to refer to the stock-yards and transfer and feeding points. The matter of transfer and feeding points is a matter that is within the control of the railroad company, and not of the plaintiff, and is not embraced in this stipulation of the contract. . . . If the stock were unloaded at some place provided by the railroad and that place was unsuitable and unfit for that purpose, then if injury resulted to the stock from the fact of their being unloaded there, that would be a matter for which the railroad would be responsible, and not the plaintiff. That would be as much in the control of the defendant as the running of its trains."

³² As both parties acquiesced in the application of the laws of Georgia, this conclusion as to the law of that state is decisive of the question now under consideration as made in this case, whether the laws of Georgia were really applicable or not. There is, however, a federal statute which was not called to the attention of the circuit court. It provides:

"That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine or other animals shall be conveyed from one state or territory or District of Columbia, or the owners or masters of steam, sailing or other vessels carrying or transporting cattle, sheep, swine or other animals from one state or territory or District of Columbia into or through another state, territory or District of Columbia, shall confine the same in cars, boats, or vessels of any

description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence or foresight; provided, that upon the written request of their owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest, or food, or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: Provided, that it shall not be required that sheep be unloaded in the night-time, but where the time expires in the ³² night-time in case of sheep, the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

“Sec. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee or lessee of any of them, owners or masters, shall in such cases have a lien upon such animals for food, care and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires”: Comp. Stats. Supp. 1907, p. 918.

To the extent that this statute fixes the duties and liabilities of the shipper and carrier in interstate transportation it is obviously controlling, and displaces any state law on the subject.

With respect to interstate commerce the supreme court of the United States adheres to the rule that a common carrier cannot contract for exemption from liability for the

injuries resulting from its own negligence; and that under a contract like that evidenced by the bill of lading in this case, the burden is on the carrier to exempt itself from liability by showing that the injury resulted not from its negligence, but from the breach of contract or negligence of the owner or shipper; and further that any stipulations for ³⁴ exemption from liability are to be construed strictly against the carrier: *Chicago etc. Ry. v. Solan*, 169 U. S. 133, 18 Sup. Ct. Rep. 289, 42 L. ed. 688; *Niagara v. Cordes*, 21 How. 7, 16 L. ed. 41; *New Jersey etc. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465; *Texas & P. R. R. Co. v. Reiss*, 183 U. S. 621, 22 Sup. Ct. Rep. 253, 46 L. ed. 358.

We have found no case from any of the federal courts deciding that in a case like this the carrier would be liable, or indicating that the carrier would be liable in any case to the owner under a contract like that now under consideration, for injuries resulting from failure to provide food, water and proper attention when the owner fails to do so. The federal statute regulating interstate shipments of stock is, however, substantially the same as the statute of this state regulating shipments of stock within the state, the only point of difference material here being that the state statute imposes upon the owner the duty to feed, water and shelter during the period of rest, while the duty to shelter is not imposed on the owner in the federal statute. In construing the state statute, this court held that as the statute requires the carrier to feed, water and shelter the stock in case the owner failed to do so, and gives the carrier a lien for expenses incurred, the carrier is liable to the owner for injuries resulting from failing to supply proper food, water and shelter: *Comer v. Columbia etc. R. R. Co.*, 52 S. C. 36, 29 S. E. 637; *Crawford v. Southern Ry. Co.*, 56 S. C. 136, 34 S. E. 80. In the absence of federal decisions on the question, we must give the same construction and effect to the federal statute, and hold that the carrier is liable to the owners for injuries resulting from its failure to supply proper shelter and protection at Greenville, where the horses and mules were unloaded to be fed and watered.

The conclusion is that in no view of the law can the exceptions on this point be sustained.

The second ground on which the defendant requested the court to direct a verdict is also untenable. The plaintiff, it ³⁵ is true, did not give notice in writing to the carrier's agent who delivered the stock of the claim for damages for injuries before the horses and mules were unloaded and intermingled with other stock, and the bill of lading expressly stipulated that such notice should be a condition precedent to any right to recover damages for loss or injury to the stock; but there was evidence of waiver of this condition

sufficient to carry the case to the jury. The plaintiff, Gaffney, testified that after the horses and mules had been unloaded and mingled with other stock he called for telephone connection with defendant's office; that some one answered and told him to get a veterinary surgeon and have an examination made of the injured animals, and the company would settle the bill; and that he complied with the request. If the request on which the plaintiffs acted, that the plaintiffs should take the pains to procure a veterinary surgeon and have him examine the injured stock, was made by the defendant's authorized agent, it was evidence of waiver to go to the jury; for "the party to be charged waives the forfeiture if, with knowledge of the facts, he requires the claimant to do some act, or incur some trouble or expense, inconsistent with the position that the contract had become inoperative in consequence of the breach of its conditions": *Hayes v. Western Union Tel. Co.*, 70 S. C. 16, 106 Am. St. Rep. 731, 48 S. E. 608, 67 L. R. A. 481, 3 Ann. Cas. 424; *Madden & Co. v. Phoenix Ins. Co.*, 70 S. C. 295, 49 S. E. 855; *Cobb etc. v. Aetna Ins. Co.*, 78 S. C. 388, 58 S. E. 1099; *Davis v. Blue Ridge R. R. Co.*, 81 S. C. 466, 62 S. E. 856. Even if the Georgia law be applied, the case of *Arnold v. Louisville etc. R. R. Co.*, 4 Ga. App. 519, 61 S. E. 1050, introduced in evidence by the plaintiff, and the cases cited in the opinion of the court, show that in Georgia such stipulation may be waived by the carrier. In the absence of proof to the contrary, we must presume that the same evidence would be sufficient to carry the case to the jury on the issue of waiver in that state as in this.

³⁶ But the defendant's counsel contends that there was no evidence that the request given over the telephone to the plaintiff, Gaffney, that he procure a veterinary surgeon, was made by the defendant. The soundness of this proposition depends on whether one who answers a telephone call from the place of business of the person called for, and undertakes to respond as the agent, is presumed to speak for him in respect to matters of the general business carried on by such person at that place. The authorities are not in accord, but we think the weight of reason and authority is in favor of such presumption. Those who install telephones in their places of business, in connection with a telephone exchange, and use them for business purposes, impliedly invite the business world to use that means of communicating with them with respect to the business there carried on; and the presumption is that they authorize communications made over the telephone in ordinary business transactions: *General Hosp. Co. v. New Haven etc. Co.*, 79 Conn. 581, 118 Am. St. Rep. 173, and note, 65 Atl. 1065, 9 Ann. Cas. 168; note to *Planters' C. O. Co. v. Western Union*

Tel. Co., 6 L. R. A., N. S., 1180; *Godair v. Hamilton Nat. Bank*, 225 Ill. 572, 116 Am. St. Rep. 172, and note, 80 N. E. 407, 8 Ann. Cas. 447; *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 11 S. W. 49, 3 L. R. A. 539; 3 Wigmore on Evidence, sec. 2155; *Reed v. Burlington etc. Ry.*, 72 Iowa, 166, 2 Am. St. Rep. 243, 33 N. W. 251; *Oskamp v. Gadsden*, 35 Neb. 7, 37 Am. St. Rep. 428, 52 N. W. 718, 17 L. R. A. 440. The reason is the same as that for the presumption that a business letter, properly directed and sent by mail, reaches the business office of the addressee, and is opened by him or his authorized agent.

The presumption that the person who answers is authorized to speak may be very slight or strong according to the circumstances, but the statements of such persons should be admitted in evidence as prima facie the statements of one having authority to speak. It is important to observe that the presumption extends only to communications relating to the usual business carried on at the place from which the telephone communication comes. To illustrate the rule³⁷ and limitation, there is a presumption that a communication purporting to come from a local railroad freight office, relating to loss or injury incurred by owners of freight shipped to the station where the office is located, is made by authorized agents; but there would be no presumption that a telephone communication purporting to come from such a local freight office, relating to the general management of the road, was authorized by the railroad company.

Some authorities hold such communications not competent unless the witness identified the voice as that of an employé in the place of business of the party to be charged: *Young v. Seattle Transfer Co.*, 33 Wash. 225, 99 Am. St. Rep. 942, 74 Pac. 375, 63 L. R. A. 988; *Planters' Cotton Oil Co. v. Western Union Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A., N. S., 1180. We do not think such identification necessary to the admissibility of the evidence, for the reason above stated. But even if that rule were adopted, the evidence here was admissible, because Gaffney testified that he recognized the voice as that of a clerk in defendant's office.

The judgment of this court is that the judgment of circuit court be affirmed.

The Duties and Liabilities of Carriers of Livestock are discussed in the recent note to *Stiles v. Louisville etc. R. R. Co.*, 130 Am. St. Rep. 432. An agreement by the shipper of livestock to load, unload, and water the animals, and to care for them while in the stockyards, is legal and binding upon him. But a carrier cannot by contract exempt itself from liability for negligence in transporting livestock: *Bartelt v. Oregon R. R. etc. Co.*, 57 Wash. 16, 135 Am. St. Rep. 959.

The Temporary Unloading and Placing of Livestock in a Yard for Feed, water and rest, as required by the federal statute, does not reduce, for the time being, the liability of the carrier as an insurer of their

safety: Louisville etc. R. R. Co. v. Stiles, 133 Ky. 786, 134 Am. St. Rep. 491.

The Limitation of a Carrier's Liability in Bills of Lading is the subject of a note to Chicago etc. Ry. Co. v. Calumet etc. Farm, 88 Am. St. Rep. 74.

STATE v. LEE.

[85 S. C. 101, 67 S. E. 141.]

WITNESS—Discrediting—Showing Relation to Defendant.—Permitting the solicitor to show that a witness for the state is the putative father of the defendant is not within the rule that a party cannot discredit his own witness. (p. 870.)

HOMICIDE—Self-defense.—The Fault in Bringing on a Difficulty which will deprive one of the right of self-defense is not confined to the precise time of the fatal encounter which results, but may include fault so closely connected with the difficulty in time and circumstances as to be fairly regarded as operating to bring it on. (p. 870.)

HOMICIDE—Self-defense—Fault in Bringing on Difficulty.—When a plea of self-defense is interposed in a homicide case, the jury may consider the acts and threats of the accused a short time before the fatal encounter, indicating that he was seeking the deceased with intent to injure him. (p. 872.)

HOMICIDE—Self-defense—Opprobrious Language.—The plea of self-defense is not available to one who used language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which actually did contribute to bring it on. (p. 872.)

E. S. Herndon, for the appellant.

Proctor A. Bonham, contra.

103 JONES, C. J. The defendant was charged with the murder of Miles Smith, in Oconee county, on March 10, 1907, and was convicted of manslaughter and sentenced.

The first ground of appeal assigns error in permitting the solicitor, on the examination of G. S. Massey, a witness for the state, to show that he was the putative father of the defendant. It is objected that it was not competent for the state to thus discredit its own witness.

The general rule is that a party is not allowed to impeach the credibility of his own witness, either by testimony as to his general character, or by showing that he made statements inconsistent with his testimony on the trial: *Perry v. Massey*, 1 Bail. 32; *Farr v. Thompson*, 1 Cheves, 37; *Bauskett v. Keitt*, 22 S. C. 187; *State v. Johnson*, 43 S. C. 123, 20 S. E. 988.

The testimony admitted in this case, however, does not fall within the terms or reason of the rule. It merely shows the relation between the witness and the defendant: *State*

v. Petsch, 43 S. C. 132, 20 S. E. 993; State v. Stukes, 73 S. C. 386, 53 S. E. 643.

The next exception is to the following charge: "If two persons are hunting for each other with a deliberate, willful and malicious purpose of inflicting serious bodily harm upon each other, or of taking the life of each other—if they start out with that purpose, each one hunting for the other, and they come in contact with each other and get in a difficulty, and that was their intention when they started out, and one is killed by the other, I charge you under those circumstances, that the party who did the killing will be guilty of murder. If two parties start out hunting for each other, with the expectation of getting into a difficulty, and they come together and get into a difficulty, not with deliberation, not with malice aforethought, but if they get into a difficulty suddenly, upon sudden heat ¹⁰⁴ and passion, one being as much at fault as the other, and one kills the other, I charge you that would be a case of manslaughter. The difference being, the law would say there was no malice in the latter illustration I have given to you, and that would reduce the killing from murder to manslaughter."

The objection to the charge is that there was no evidence tending to show that defendant was at any time seeking the deceased for the purpose of doing him any injury, and that the charge was inapplicable and prejudicial. The record shows there was some evidence to render the charge applicable as to manslaughter. The verdict being for manslaughter, which negatives malice, it is unnecessary to inquire whether there was any testimony tending to show that defendant was seeking the deceased to injure him.

The third exception assigns error in refusing to charge the defendant's seventh request as follows: "Fault in bringing on a difficulty so as to deprive one of the right of self-defense must be a fault at the time of the fatal encounter, and not a fault at some previous time." The court refused to charge in that language.

The instruction requested was inaccurate and misleading in restricting the "fault in bringing on the difficulty" to the precise time of the fatal encounter and in excluding from consideration fault which, although not occurring at the precise time of the difficulty, but previously, may have been so closely connected with the difficulty in time and circumstances as to be fairly regarded as operating to bring it on.

The evidence tended to show that there was bad blood between the parties, that the deceased believed that defendant had reported him to the revenue officers as running a still, and with having cut a pine bush as a pointer, and deceased had expressed his belief to others in hostile and threatening language, that the defendant was greatly an-

gered by the charge that he was a reporter, denounced it as false and threatened to kill the deceased.

¹⁰⁵ There was some testimony that about two hours before the homicide defendant went to the house of the deceased and raised a fuss with him, and was prevented from shooting him by a companion, and that as he went off, threatened to come back and kill deceased before sundown, and after going off a short distance shot off his pistol twice in the direction of the deceased.

There was evidence tending to show that in consequence of this attack and threat by defendant, the deceased anticipating a conflict, and wishing his wife, who was enceinte, out of the way, carried her to her father's, about two miles distant, and was returning by G. H. Massey's house, armed with a shotgun loaded with buckshot, and was making inquiries and looking about to ascertain whether defendant was there and using threatening language. Near sundown defendant rode by Massey's, met Massey in the road and talked with him, and information was given by Rholetter that deceased "was down there with a double barrel shotgun and powerful mad." Massey said to the defendant: "I will go down there and you can stay here." While Massey and deceased were talking defendant rode by them, spoke to deceased, to which deceased made no response. Then Massey and deceased went toward Massey's house, and as they went on in that direction defendant and deceased began to quarrel. At Massey's request to leave defendant went off some twenty or more yards, and as he went off words were passed between defendant and deceased. Then deceased said, "I am coming to show you that I am not afraid to come back," and walked up to the defendant, having his gun with one barrel cocked, but as he got close to the defendant he let the hammer down. Defendant was standing with his pistol down in his hand by his side. One witness testified that the deceased said to the defendant: "You cut that pine bush." Defendant replied, "I didn't." Deceased said, "You are a damn lie." Defendant said, "You are another one." Then deceased ¹⁰⁶ drew the gun like he was going to strike defendant, and the defendant caught hold of the muzzle of the gun with his left hand. The gun was taken from deceased by one of the witnesses. Deceased grabbed around defendant and soon the defendant cried out: "Boys, he is cutting me," and while Massey and Butt were trying to get them apart, and as they started to fall to the ground, defendant fired the fatal shot. Defendant was cut in two places on the wrist, and in the back. The witness Ivester testified, in part, that something was said about cutting a pine bush, and defendant said: "I suppose you accused me of reporting"; that the deceased said:

"I didn't accuse you of reporting a still, but the way everything has turned out it looks damn suspicious that you did it." Defendant said: "Anybody that says I reported a still is a damn lie, and a damn son of a bitch," and that time they hugged up together, and Hamp Butt wrung the gun out of deceased's hand, and in a little while defendant halloed: "Boys, he is cutting me," and that defendant threw his pistol around and shot deceased; that defendant had his pistol in his hand all the time.

The foregoing statement is sufficient to show the general nature of the case. It thus appears that if the court had given the instruction in the language of the request, the jury would have been deprived of the right to consider whether the acts and threats of the defendant, a short time previous to the fatal encounter, indicated that defendant was seeking the deceased with intent to injure him if they met, and whether such acts and threats were reasonably calculated and intended to bring about the combat: See authorities cited in note to 45 L. R. A. 698. In the case of *Airhart v. State*, 40 Tex. Cr. 470, 76 Am. St. Rep. 736, 51 S. W. 214, cited for appellant, the court recognized, as a matter of course, that we may look to defendant's preceding conduct to characterize or lend significance to his conduct at the time of the meeting.

¹⁰⁷ The fourth exception contends that the court erred in refusing to charge the following request: "16. A person is not deprived of defensive rights because he used insulting or opprobrious language. One who insults another by opprobrious words may be bound to anticipate that the person insulted will repel the insult to the extent the law allows, but he is not bound to anticipate that the latter will go to the extent of attempting to take his life; and, if such attempt is made, upon no greater provocation than this, and the person thus assaulted kills his assailant, under a reasonable belief that it is necessary to do so in order to save his own life, it is neither murder nor manslaughter."

The request was faulty, and the court was not bound to charge it. "The true rule is that the plea of self-defense is not available to one who uses language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on": *State v. Rowell*, 75 S. C. 494, 56 S. E. 23.

Viewing the charge as a whole, the law of self-defense was fully and fairly given to the jury, and there is no good reason for disturbing the verdict.

The judgment of the circuit court is affirmed.

The Law of Self-defense is discussed in the notes to *State v. Sumner*, 74 Am. St. Rep. 717; *State v. Gordon*, 109 Am. St. Rep. 804. As to

whether one may invoke the right of self-defense where he himself has provoked the difficulty, see *State v. Stockman*, 82 S. C. 388, 129 Am. St. Rep. 888; *Young v. State*, 53 Tex. Cr. 416, 126 Am. St. Rep. 792; *State v. Cook*, 78 S. C. 253, 125 Am. St. Rep. 788. Mere words of reproach or opprobrious epithets do not constitute such a provocation as will put the speaker in the wrong, if it becomes necessary for him in his own defense to kill the person to whom they are addressed when he makes an attack: *State v. Gordon*, 191 Mo. 114, 109 Am. St. Rep. 790.

The Admissibility of Threats in Evidence in Prosecutions for Homicide is discussed in the notes to *State v. Nelson*, 89 Am. St. Rep. 691; *Campbell v. People*, 61 Am. Dec. 53. If the other elements of self-defense exist, and the deceased has made threats against the defendant which have been communicated to him, he has the right to act upon any overt act or hostile demonstration which may have led to the honest belief that he was in imminent peril, although such act or demonstration may not have amounted to a felonious assault: *George v. State*, 145 Ala. 41, 117 Am. St. Rep. 17. See, also, *State v. Stockman*, 82 S. C. 388, 129 Am. St. Rep. 888.

The Condition of Mind of the Slayer Which Reduces Murder to Manslaughter is the subject of the note to *People v. Poole*, 134 Am. St. Rep. 726. Provocation forms the subject of subdivision VIII and blood-hot passion of subdivision VII of that note.

MESSERVY v. MESSERVY.

[85 S. C. 189, 67 S. E. 130.]

ALIMONY—Compelling Husband to Earn Money.—A court cannot, by punishment as for contempt, compel a man, who has no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and by the exercise thereof derive an income to pay a judgment for alimony. (p. 874.)

Legare, Holman & Baker, for the appellant.

Logan & Grace, contra.

¹⁹⁰ HYDRICK, J. This is an appeal from an order of the circuit court committing the appellant to jail for contempt for failing to pay to the plaintiff alimony and suit money according to a previous order, which was affirmed by this court: 80 S. C. 277, 61 S. E. 442.

The testimony shows that appellant is a young man of limited education, who has no trade, profession or employment, and no property or income. It does not appear that he has, or ever had, any steady employment, or that he has ever engaged in any business. On the contrary, it does appear that he has always been supported by his father, who is a man of means.

In his sworn return to the rule to show cause why he should not be attached for contempt, appellant asserts his

inability to comply with the order of the court, and says that he tried to get work but failed; and that, if he could obtain employment, on account of his lack of skill and training, he could not earn more than enough to support himself.

The circuit court found as facts "that he has no property from which he can derive an income, and that he is without any income, except such as his father sees fit to allow him," and further, "that his father will not voluntarily allow him anything for plaintiff, and that were he disposed to share with plaintiff any allowance he might receive from his father, he would have to do so without his ¹⁹¹ father's knowledge, or else such allowance would be discontinued."

The circuit court held, however, that he had not made an honest effort to get such work as he was capable of doing, and, therefore, adjudged him in contempt.

There is no doubt of the obligation, legal and moral, of the appellant to support his wife. This court has held that a judgment may be given against a husband for alimony when he has neither property nor income, but is able by the use of his faculties to provide maintenance for her. In such a case, the wife is entitled to the judgment, even though it may be impossible for the court to enforce its payment. The court cannot deny a party the right to a judgment to which he is entitled, on the ground that the judgment debtor is insolvent, or unable to pay the amount adjudged to be due, for the debtor may thereafter acquire property which could be subjected to the payment of the judgment.

There is, therefore, no inconsistency in the court decreeing alimony in a case like this, even though it may find itself unable to enforce payment thereof.

If a husband has property, or an income, or if, by the exercise of his faculties, he does derive an income, the court may, in its discretion, to be exercised according to the facts of the case and the circumstances of the parties, order a part of such property or income, in excess of what is necessary for the support of the husband, devoted to the support of the wife, and obedience to such order may be enforced by attachment for contempt. The remedy, however, is a harsh one, and it should be applied with caution. But where it appears that the husband is able to comply with the order of the court, and willfully refuses to do so, or has, in fraud of the rights of his wife and in violation of the order of the court, brought upon himself the inability to do so, he may be punished as for a contempt.

¹⁹² But we do not think the court can compel a husband, who has no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and, by the exercise thereof, derive an income for the support of his wife. If it could do so to enforce payment of a judgment

for alimony, why could it not do so to enforce payment of any other judgment? The moral obligation to pay a judgment for alimony may be greater than the obligation to pay any other, but there is no difference in the legal obligation. The court does not undertake to enforce purely moral obligations; nor can it undertake to make the thriftless thrifty.

The order of the circuit court is reversed, but without prejudice to plaintiff to apply for such further orders as may be proper to compel obedience to the orders of the court if and when appellant is able to comply therewith.

CONTEMPT PROCEEDINGS TO ENFORCE PAYMENT OF ALIMONY.

- I. Nature of the Procedure, 875.**
- II. Attachment for Contempt, 876.**
- III. Adoption of the Procedure, 878.**
- IV. Notice to the Defendant and Demand, 879.**
- V. What Constitutes Contempt.**
 - a. Previous and Contumacious Refusal, 881.**
 - b. Bona Fide Refusal from Inability, 883.**
 - c. Bona Fide Refusal on Other Grounds, 885.**
- VI. The Purging of the Contempt, 886.**

I. Nature of the Procedure.

In divorce cases the court is authorized to require the husband to pay the wife such sums of money as may enable her to prosecute or defend the suit, and, where it is just and equitable, may allow her alimony pending the litigation, and may enforce the payment in any manner consistent with the rules and practice of the courts: *Blake v. People*, 80 Ill. 11.

The procedure by contempt process in divorce causes is so well known that we do not feel justified in giving it more than a passing introduction in this note. The subject of alimony has been treated in the monographic note to *Harding v. Harding*, 102 Am. St. Rep. 700, on the power of the courts to create or enforce liens to secure the payment of alimony, and the effect of such lien on contempt proceedings is there dealt with, page 712. In this note it is our intention to consider the power of the court to enforce its decree for the payment of alimony by punishment for contempt, as distinguished from its powers, varying in different states, of enforcement in the usual method of and consistent with chancery practice, or by supplemental proceedings, or by action of debt, or assumpsit or on the judgment. Sometimes these methods are pursued by invoking the aid of the writs of *scire facias*, or *feri facias*, or other mode of execution. Another form of enforcement is sequestration of the husband's property: *Isaacs v. Isaacs*, 61 How. Pr. 369. In some cases a receiver is appointed: *Holmes v. Holmes*, 29 N. J. Eq. 9; in others a trustee: *Murray v. Murray*, 84 Ala. 363, 4 South. 239. Occasionally, the party in default is denied the privilege of proceeding with his case until the decree of the court is complied with, or at least prevented from asking indulgence in its prosecution: *McClung v. McClung*, 40 Mich. 493. In an action by a wife against her husband for permanent support and maintenance, the court has discretion to refuse to proceed with the trial at the request of the defendant until he has complied

with an order made pendente lite directing him to pay counsel fees to the plaintiff, or until the order has been reversed or annulled on appeal: *Winter v. Superior Court*, 70 Cal. 295, 11 Pac. 633. There has been a conflict as to whether the court may strike the defendant's answer from the files and proceed with the case ex parte. In support of the exercise of the power we find in *Walker v. Walker*, 82 N. Y. 260: "That case (*Rice v. Ehele*, 55 N. Y. 518) holds that the pleading may not be stricken out, save on notice to the party; and that the exercise of this power was legitimate was recognized by *Marcey, J.*, in *Birdsall v. Pixley*, 4 Wend. 196. The power seems to have been exerted or recognized by the supreme court in several instances, without question made by appeal: *Farnham v. Farnham*, 9 How. Pr. 231; *Barker v. Barker*, 15 How. Pr. 568; *Ford v. Ford*, 41 How. Pr. 169. We are brought to the conclusion that there has long been exerted by the court of chancery in England the power to refuse to hear the defendant when he was in contempt of the court by disobeying its orders, and that that power was in the courts of chancery of this country." In *McCrea v. McCrea*, 58 How. Pr. 220, it was laid down that the only power possessed by the court to strike out a pleading, on such a motion, was contained in sections 538, 545 and 546 of the code, and an application by the wife to that effect was not within those sections, notwithstanding the husband neglected and refused to comply with an order to pay a certain sum for her expenses of the suit. We are more inclined to think that the inherent power of the court to enforce its orders would both enable and justify it in placing such an embargo on a defaulting defendant. We have merely referred to these modes, en passant, as they lead up to the subject for our discussion, and the student is in a more appropriate condition to consider the mode we specially present, when he has his knowledge of other modes refreshed by even the cursory glance we are enabled to give at the parallel remedies.

II. Attachment for Contempt.

Notwithstanding the existence of so many other remedies, the most favored is that of attaching the person of the defaulter for contempt. Attachment is a criminal process in form only; in substance it is a civil execution issued against a party in a civil action for disobeying an order of the court for the benefit of another party to the cause: *Ex parte Hardy*, 68 Ala. 303; *Ex parte Thurmond*, 1 Bail. 605. In *Burbach v. Milwaukee Electric Ry. & Light Co.*, 119 Wis. 384, 96 N. W. 829, it is defined as "a writ issued by a court of record, commanding the sheriff to bring before it a person who has been guilty of contempt of court, either in neglect or abuse of its process or of subordinate powers: 3 Blackstone's Commentaries, 280; 4 Blackstone's Commentaries, 283." In *Morrison v. Lester*, 15 Hun, 538, the court was at considerable pains to distinguish between the writ of *capias ad satisfaciendum* and an attachment, and describes the attachment as a criminal process in form issuing in the name of the people against the supposed offender, and granted in theory on account of some supposed contempt. Its object is to bring the party against whom it is issued into court, and the duty of the officer is to have such person in court at the return day.

Having thus seen what an attachment is, we proceed to apply it to the contempt of disobedience to comply with an order for the payment of alimony.

The power of the court to deal with the enforcement of orders for the payment of alimony by attachment for contempt is founded both on its inherent authority as well as on statute: *Lyon v. Lyon*, 21 Conn. 185; *Tolman v. Leonard*, 6 App. D. C. 224; *Lane v. Lane*, 27 App. D. C. 171; *Van Dyke v. Van Dyke*, 125 Ga. 491, 54 S. E. 537; *Welty v. Welty*, 195 Ill. 335, 88 Am. St. Rep. 208, 63 N. E. 161; *Cavanaugh v. Cavanaugh*, 106 Ill. App. 209; *State v. King*, 49 La. Ann. 1503, 22 South. 887; *Carnahan v. Carnahan*, 143 Mich. 390, 114 Am. St. Rep. 660, 107 N. W. 73, 8 Ann. Cas. 53; *Coughlin v. Ehlert*, 39 Mo. 285; *Reese v. Reese*, 46 App. Div. 156, 61 N. Y. Supp. 760; *State v. Cook*, 66 Ohio St. 566, 64 N. E. 567, 58 L. R. A. 625; *Hutchinson v. Canon*, 6 Okl. 725, 55 Pac. 1077; *Ex parte Latham*, 47 Tex. Cr. 208, 82 S. W. 1046; *Curtis v. Gordon*, 62 Vt. 340, 20 Atl. 820; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817; *In re Cave*, 26 Wash. 213, 90 Am. St. Rep. 736, 66 Pac. 425.

In *Ex parte Latham*, 47 Tex. Cr. 208, 82 S. W. 1046, the question of jurisdiction was elaborately discussed by the court without a scintilla of doubt as to the power to punish for contempt. The facts were that the husband had been committed to jail by the court for contempt, which consisted of his refusal to comply with a decree in divorce, such decree involving the adjustment of rights in connection with the community property. He was brought up on habeas corpus, his contention being that though the judgment in the divorce suit was actually deposited with the clerk when the attachment process was issued, it was not entered for two days thereafter, while the court was still in session. The granting of the writ of habeas corpus was subsequent to the completion of the record proceedings in the divorce suit. The court first disposed of the suggestion that the adjustment of the community property rights was a debt and showed the authority to make disposition of such property between the spouses: *Boyd v. Boyd*, 22 Tex. Civ. App. 200, 54 S. W. 380; *Moor v. Moor*, 24 Tex. Civ. App. 150, 57 S. W. 992; *Long v. Long*, 29 Tex. Civ. App. 536, 69 S. W. 428. "If it was competent for the court to make the partition of the community property, and to appoint a trustee to take charge thereof, . . . then it was competent, and the court was authorized, to require appellant to turn over the community property conceded then to be in his hands to said trustee, for the purpose of distribution under the order of the court. And if the court had the power to do this, it must be conceded that it was authorized to enforce its decree by a contempt proceeding: *Ex parte Tinsley*, 37 Tex. Cr. 517, 66 Am. St. Rep. 818, and authorities there cited, 40 S. W. 306." As to the main contention that the nonentry of the judgment deposited with the clerk should prevent the attachment issuing, it was held that as the court was still in session, it had, unquestionably, the right to enter it later. "It is said, however, that the judgment is too indefinite, and does not find the facts constituting the contempt. We do not agree to this contention. We can look to the moving papers and the whole judgment in order to ascertain in what the adjudicated contempt consisted: *Ex parte Smith*, 40 Tex. Cr. 179, 49 S. W. 396. A reference to the judgment shows very succinctly and definitely the facts adjudicated by the court which constitute the contempt." The habeas corpus was denied.

In a comparatively recent case, *Sebastian v. Rose*, 135 Ky. 197, 122 S. W. 120, it was clearly affirmed that divorce proceedings in that state were within the exclusive cognizance of courts of chancery jurisdiction, and that such courts have, as incident thereto, the power

to enforce obedience to their decrees by summary mode, attachment and imprisonment.

In an older case, *Ballard v. Caperton*, 2 Met. 412, the court said: "This power belongs of necessity to the court, that its judgments and orders may be carried into execution and not remain powerless, and that its dignity and right to respect may be preserved by prompt punishment for contumacy."

When the statute provides exclusive methods for enforcing a decree, the court will not commit for contempt for not signing an alimony bond, when there is no power conferred by the section to that effect, as by sections 1772, 1773 of the New York Code of Civil Procedure: *Stewart v. Stewart*, 127 App. Div. 724, 111 N. Y. Supp. 734; *People v. Walsh*, 132 App. Div. 462, 116 N. Y. Supp. 839.

The failure of a defendant to pay promptly the alimony which he is ordered to pay by a judgment does not carry with it a contempt of court per se and ipso facto as the result of such failure; *Otilio v. Otilio*, 119 La. 965, 44 South. 799.

In *Gray v. Gray*, 127 Ga. 345, 56 S. E. 438, it was held that a failure or refusal to comply with an order of court requiring the payment of alimony and attorney's fees is a continuing contempt, and the court may enter a judgment that the party so refusing may be imprisoned until he shall comply. In such case the time of imprisonment is not within the limitation of the statute relative to a single act of contempt that the duration of imprisonment must not exceed twenty days. This followed the decision in *Tindall v. Nisbet*, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225.

III. Adoption of the Procedure.

As we have said, the procedure by attachment of the person is that most generally adopted where such person neglects or refuses to comply with the order of the court for the payment of alimony: *Murray v. Murray*, 84 Ala. 363, 4 South. 239; *Casteel v. Casteel*, 38 Ark. 477; *Galland v. Galland*, 44 Cal. 475, 13 Am. Rep. 167; *Lyon v. Lyon*, 21 Conn. 185; *Lewis v. Lewis*, 80 Ga. 706, 12 Am. St. Rep. 281, 6 S. E. 918; *Becker v. Becker*, 15 Ill. App. 247; *Twing v. O'Meara*, 59 Iowa, 326, 13 N. W. 321; *Lockridge v. Lockridge*, 3 Dana, 28, 28 Am. Dec. 52; *Russell v. Russell*, 69 Me. 336; *Foster v. Foster*, 130 Mass. 189; *Filer v. Filer*, 77 Mich. 469, 43 N. W. 887, 6 L. R. A. 399; *In re Fanning*, 40 Minn. 4, 41 N. W. 1076; *Carper v. Carper*, 94 Miss. 498, 136 Am. St. Rep. 588, 48 South. 186; *State v. Second Judicial District Court (Mont.)*, 36 Pac. 757; *Isaacs v. Isaacs*, 61 How. Pr. 369; *Ryer v. Ryer*, 67 How. Pr. 369; *Pritchard v. Pritchard*, 4 Abb. N. C. 298; *Compton v. Compton*, 11 App. Div. 923, 97 N. Y. Supp. 618; *Zimmerman v. Zimmerman*, 113 N. C. 432, 18 S. E. 334; *Sheafe v. Sheafe*, 36 N. H. 155; *O'Haley v. O'Haley*, 31 Tex. 502; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817; *Purcell v. Purcell*, 4 Hen. & M. 507; *State v. Smith*, 17 Wash. 430, 50 Pac. 52; *State v. Ditmar*, 19 Wash. 324, 53 Pac. 350; *Staples v. Staples*, 87 Wis. 592, 58 N. W. 1036, 24 L. R. A. 433. And the same procedure can be followed in temporary as in permanent alimony: *Ex parte Joutsen*, 154 Cal. 540, 98 Pac. 391; *Goss v. Goss*, 29 Ga. 109; *Russell v. Russell*, 69 Me. 336; *Haines v. Haines*, 35 Mich. 138; *Wood v. Wood*, 61 N. C. 538; *Ex parte Davis*, 101 Tex. 607, 111 S. W. 394, 17 L. R. A., N. S., 1140; and where the money is to be paid to a third person: *Ex parte Gordan*, 95 Cal. 374, 80 Pac. 561.

But where the payment was for the attorney's fee, and the decree had been made a lien on the husband's real estate, attachment did not lie: *Andrews v. Andrews*, 69 Ill. 609.

The fact of an appeal being pending does not free the husband from liability to attachment: *Dwelly v. Dwelly*, 46 Me. 377; or a motion to set aside the judgment: *Knauer v. Knauer*, 121 App. Div. 748, 106 N. Y. Supp. 491.

Under the New York Code of Civil Procedure, section 1773, it is provided that it must appear presumptively that payment of alimony cannot be enforced by sequestration or the statutory remedies before an order to show cause will be granted against the husband; but where the court is satisfied that such sequestration or other statutory remedy would be futile, they may grant the order without: *Uttal v. Uttal*, 140 App. Div. 255, 125 N. Y. Supp. 2. But it is necessary to show that the sequestration proceedings would be unavailing or the attachment will not be granted: *Conklin v. Conklin*, 125 App. Div. 280, 109 N. Y. Supp. 189.

Inasmuch as the contempt for nonpayment is not of the class of contempts committed before the eyes of the court, the proceedings must be regularly founded on proper affidavits and notice: *In re McCarty*, 154 Cal. 534, 98 Pac. 540.

IV. Notice to the Defendant and Demand.

An attachment is never granted as a matter of course. The courts, as in all cases where the liberty of the subject is involved, exercise a watchful care, that in a civil action all the conditions which would permit of the defendant's imprisonment have been exhausted. For that reason there must be proof both of his notice of the decree or order and of a demand for payment under it. In New York the practice is to serve him with a certified copy of the judgment and then make the demand, on refusal of which a case for an attachment has been made out. The reason for this is given in *Edison v. Edison*, 56 Mich. 185, 22 N. W. 264, and *Ryckman v. Ryckman*, 32 Hun, 193, that he could not, under the code provisions, be punished for a contempt simply for not paying the alimony; the court requires the foundation for the contempt of its order, that the defendant, knowing of such order, has refused on demand to comply with it.

The courts have almost uniformly recognized a due demand as a condition precedent to their action by attachment: *Potts v. Potts*, 68 Mich. 492, 36 N. W. 240; *Ervay v. Ervay*, 120 Mich. 525, 79 N. W. 802; *Delanoy v. Delanoy*, 19 App. Div. 295, 46 N. Y. Supp. 106; *Flor v. Flor*, 73 App. Div. 262, 76 N. Y. Supp. 813; *Compton v. Compton*, 125 App. Div. 859, 110 N. Y. Supp. 775; except in such cases as a contumacious declaration that he did not intend to pay, in which case the demand was held unnecessary: *Shaffner v. Shaffner*, 212 Ill. 492, 72 N. E. 447; *State v. Ditmar*, 19 Wash. 324, 53 Pac. 350; or where the demand was made by some person who did not show the husband that he was authorized to make the demand: *Conklin v. Conklin*, 113 App. Div. 743, 99 N. Y. Supp. 310.

It is necessary that the notice or order should be served upon the husband in general, by a copy of the order certified or otherwise, or in accordance with the rules of practice or the statutory provisions: *Lyon v. Lyon*, 21 Conn. 185; *Ryckman v. Ryckman*, 32 Hun, 193; *Carr v. Carr*, 64 Misc. Rep. 435, 118 N. Y. Supp. 625; but the want of such service may be cured by his subsequent appearance: *State v. District Court*, 42 Minn. 40, 43 N. W. 686; and a committal without notice

may be ordered: *Isaacs v. Isaacs*, 61 How. Pr. 369; and where the order to pay alimony has been personally served, service of the order to show cause on his attorneys was held sufficient: *Weich v. Weich*, 59 Misc. Rep. 238, 110 N. Y. Supp. 201.

It is not necessary that the notice of the proceedings be given before the issue of the attachment: *Ex parte Petrie*, 38 Ill. 498. It must not be wrongly inferred, however, that the demand need not be made. The case last named deals only with notice of the process. An order to show cause served on the husband's attorneys is insufficient: *Goldie v. Goldie*, 77 App. Div. 12, 79 N. Y. Supp. 268; *Keller v. Keller*, 100 App. Div. 325, 91 N. Y. Supp. 528, 103 App. Div. 609, 93 N. Y. Supp. 1136; although it was held in *Zimmerman v. Zimmerman*, 26 Abb. N. C. 366, 14 N. Y. Supp. 444, that in the absence of code provisions as to mode of service, such service was good if made on the husband's attorneys before final judgment had been entered.

An attachment may be said never to issue on an *ex parte* application, the defendant being entitled to be heard; and where the power to grant the order to show cause is by the creating statute given to the court, such order cannot be made by a judge: *Weich v. Weich*, 59 Misc. Rep. 238, 110 N. Y. Supp. 201. In *Stahl v. Stahl*, 59 Hun, 621, 12 N. Y. Supp. 854, the decree provided for an *ex parte* attachment. The court said: "Out of a multitude of points presented on behalf of the appellant one alone seems to be forcible, and that is that granting an *ex parte* application for process against the person of the defendant for nonpayment of alimony was not authorized by law, and could not be sustained, even when based on a decree which provides that an application may be made *ex parte* for such process if the defendant fails to obey its mandates. The application, under such circumstances, must necessarily rest upon the affidavit of the plaintiff or her attorney as to the nonpayment of the alimony. That, however, is not conclusive evidence, though *prima facie* sufficient to warrant an order to show cause, and does not become so until after the return of the order, and the omission of the party proceeded against to deny or explain." The authorities are all one way that the proceeding must be upon notice, and in process against the person, *audi alteram partem* is the almost invariable rule, and, we may add, in our opinion the correct rule: *French v. French*, 4 Mass. 587; *Slade v. Slade*, 106 Mass. 499; *Edison v. Edison*, 56 Mich. 185, 22 N. W. 264; *Isaacs v. Isaacs*, 61 How. Pr. 369; *In re Sims*, 57 Hun, 433, 11 N. Y. Supp. 211. In Illinois, however, the court has so pronounced itself as to create the impression that the wholesome rule of hearing the other side may at times be violated. It is not so, however, when the decisions are carefully read. In *Ex parte Petrie*, 38 Ill. 498, the court held the proceedings were not irregular because no notice was given the petitioner. "We recognize the principle," said the court, "that it is of the essence of all convictions or adjudications that the party accused should have an opportunity to be heard in his defense. But that principle does not controvert the regularity, in that regard, of this proceeding, for we find that the petitioner was given that opportunity in as ample a manner as was consistent with the nature of the case. It cannot be said that a party has no proper notice of a proceeding against him, merely because the first intimation he receives of it is by an arrest under a process of the court. In the case of an ordinary writ of *capias ad respondendum*, which is the first process in a cause under the proper state of facts, the very first notice the defendant receives of the proceeding is by an arrest under the writ. Yet it has never been sup-

posed that such a step in a cause contravened the rule that a party shall first have an opportunity to be heard in his defense before his rights shall be determined." In *Petrie v. People*, 40 Ill. 334, the court held that no notice was necessary where the appellant had been brought into court, had entered his appearance, had filed his demurrer and resisted the motion for alimony pendente lite only a few days previously, and was fully aware of the order and its requirements, and that he was in default under it and subject to attachment for a contempt for a noncompliance with the order. "While in the English courts the practice requires notice to be given to the opposite party, to his attorney or some officer of the court on his behalf, before any step is taken, and while in cases of this character it is perhaps the better practice, yet it has not been regarded as indispensable in our practice. After a party has been once brought into court, the presumption is that he is present and cognizant of every step taken in the cause until it is terminated, unless there has considerable time elapsed without taking any steps in the case." We echo and affirm that part of the opinion which says, "In cases of this character it is perhaps the better practice," leaving out the word "perhaps." It is undoubtedly the better and the safer practice. The instance of the writ of *capias* above set out is not quite happy, and while there is a case to be made out for dispensing with notice where a defendant is fully apprised of what consequences his default may cause, the case that can be established in favor of notice where the liberty of the subject is involved in what is regarded as a civil proceeding is so much stronger that it would render a comparison invidious. In pursuance of a spirit of timely admonition, we desire to impress this necessity for notice upon the lawyer, and possibly save him from the anxiety which invariably follows an arrest upon a doubtful process. The sentiment of fair play which is embodied in the old Roman "*audi alteram partem*" permeates most nations, it is still good law in the English courts, and it is one of our proper boasts that it has come down to us unsullied, to be jealously guarded and sacredly cherished in the records of our judicial system.

V. What Constitutes Contempt.

a. *Previous and Contumacious Refusal.*—When the husband has told his wife that he will not pay any of the alimony and defied her to take steps to compel payment, a formal demand on her part is unnecessary as a basis for proceedings for his attachment: *Potts v. Potts*, 68 Mich. 492, 36 N. W. 240. The case of *Slade v. Slade*, 106 Mass. 499, does not conflict with this decision. The court properly held there must be a contemptuous disobedience, as there was in the case first cited; the mere fact of nonpayment would not justify the issuance of the attachment: *Segear v. Segear*, 23 Neb. 306, 36 N. W. 536. The refusal must be deliberate and willful, or, in the language of the courts, contumacious: *Webb v. Webb*, 140 Ala. 262, 103 Am. St. Rep. 30, 37 South. 96; *Blake v. People*, 80 Ill. 11; *Blake v. Blake*, 80 Ill. 523; *State v. Dent*, 29 Kan. 416; *Slade v. Slade*, 106 Mass. 499. Where the failure to comply with the order for alimony does not arise from lack of means, the court may compel compliance by attaching him and imprisoning him until he obeys the decree. In *Lewis v. Lewis*, 80 Ga. 706, 12 Am. St. Rep. 281, 6 S. E. 918, Blandford, J., dealt with the question in forceful and plain language: "Where a court directs the payment of alimony by a husband to his wife, it is a duty he owes, not only to his wife, but to the public, to comply with

the order; and if he fails to perform that duty, we see no reason why the court cannot compel him to do so by an order of attachment, directing his imprisonment in the event of his failure to comply with the order. Of course, this is a power which should be carefully and cautiously exercised, and before granting the writ, the court ought to be satisfied that there is good ground for the attachment; and such appears to have been the case here. This is a case in which the old adage applies, that 'when a bird can sing and will not sing, he must be made to sing.' When it appeared to the court that this defendant had the money to comply with the decree, and that he failed to comply with it, we think the court had the right and the power to imprison him until he did comply with it." From these cases and others which we shall presently deal with, it will be clear that an attachment is designed to enforce compliance with the order and not to punish for being unable to perform it. The husband cannot escape, unless he is destitute both of means and ability, in which latter case the court would suspend the suit until provision was made for the wife. There must be something wrong in the case beyond the mere failure to pay the money: *Steller v. Steller*, 25 Mich. 159. In *Carlton v. Carlton*, 44 Ga. 216, McCay, J., said: "And very clearly, it (imprisonment) ought never to be resorted to except as a penal process, founded on the unwillingness of the party to obey. The moment it appears there is inability, it would clearly be the duty of the judge to discharge the party, since it is only the contempt, the disobedience, upon which the power rests." So that in such cases where there is a neglect or refusal to pay, coupled with an ability, the court is rightly exercising its discretion in sending the defaulter to prison until he does pay.

The power to commit for contempt in case of ability and persistent refusal is undoubted: *Barclay v. Barclay*, 184 Ill. 471, 56 N. E. 821; *Deen v. Bloomer*, 191 Ill. 416, 61 N. E. 131. And even where the order for alimony allows more than the proper share of the husband's estate, his contumacious refusal to pay it renders him liable to contempt proceedings: *State v. Jamison*, 69 Minn. 427, 72 N. W. 451.

In *Wallace v. Wallace* (App. Div.), 125 N. Y. Supp. 561, an action for a separation, the defendant had been ordered to pay the plaintiff, his wife, four dollars a week alimony. On his motion an order was subsequently made discontinuing the payment of such alimony. This last-mentioned order was reversed on appeal and the motion denied. Thereupon, after service of proper papers and a demand of the defendant for the unpaid alimony, which was refused, a motion was made to punish the defendant for contempt in not complying with the order. The court considered, evidently, that his conduct was contumacious, for they found "that the defendant has committed the offense charged, and that it was calculated to and actually did defeat, impair, impede and prejudice the rights of the plaintiff, and that for such misconduct the defendant pay a fine of sixty-four dollars, and in addition thereto that he be imprisoned until such fine is paid."

The husband is in contempt after service of the order and demand of the amount; but the order for his attachment must recite all the steps leading up to that conclusion: *Gunn v. Gunn*, 120 App. Div. 353, 105 N. Y. Supp. 340; *Krauss v. Krauss*, 127 App. Div. 743, 111 N. Y. Supp. 790.

Where it omitted that the failure to pay was calculated to defeat, etc., the rights of the plaintiff in accordance with Code of Civil Procedure sections 1773 and 2266, it was fatally defective: *Schweig v. Schweig*, 122 App. Div. 787, 107 N. Y. Supp. 905. In *Messervy v.*

Messervy, 86 S. C. 189, ante, p. 873, 67 S. E. 130, the doctrine is tersely expressed, that where it appears that the husband is able to comply with the order of the court and willfully refuses to do so, or has, in fraud of his wife, and in violation of the order of the court, brought about his inability to do so, he may be punished as for a contempt.

b. Bona Fide Refusal from Inability.—While the extraordinary power of personal attachment is conceded to rest in the courts, it is nevertheless subject to the limitation—as a rule, the constitutional limitation—that a party may not be imprisoned except in those cases in which it shall appear he has the pecuniary ability to enable him to comply with the decree, and his disobedience is willful. The court is empowered to punish willful obstinacy, in such cases, by imprisonment, but the spirit of the constitution forbids that the pecuniary inability of the party, not resulting from his fraudulent conduct to produce that condition, cannot be punished as a contempt by imprisonment: *O'Callaghan v. O'Callaghan*, 69 Ill. 552; but the onus lies on the defendant to prove his inability: *Zippe v. Zippe*, 143 Ill. App. 638; and the plea of poverty is not sufficient by itself: *Compton v. Compton*, 125 App. Div. 859, 110 N. Y. Supp. 775.

Where the neglect or refusal to perform the decree is not from mere contumacy, but from the want of means, the result of misfortune, not induced by any fraudulent conduct on the part of defendant, "the party will be compelled to adopt some mode other than imprisonment, to enforce the decree, consistent with the practice in the courts, either by execution or other final process, or by sequestration of real or personal estate, or by the exercise of such other powers as pertain to courts of chancery, and which may be necessary to the attainment of justice. It is not perceived in what respect decrees for alimony differ from other decrees for the payment of money. Imprisonment for non-compliance therewith, unless willful, or unless upon a refusal of defendant, upon proper demand made, to deliver up his estate in satisfaction of the decree, is within the inhibition of the constitution against imprisonment for debt": *Blake v. People*, 80 Ill. 11. So long as the nonpayment is the result of a bona fide inability to pay, the courts will refuse to imprison the husband: *Ex parte Silvia*, 123 Cal. 293, 69 Am. St. Rep. 58, 55 Pac. 988; *Pinckard v. Pinckard*, 23 Ga. 286; *Deen v. Bloomer*, 191 Ill. 416, 61 N. E. 131; *Kadlowsky v. Kadlowsky*, 63 Ill. App. 292; *Nixon v. Nixon*, 15 Mont. 6, 37 Pac. 839; *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653. Except his inability arises from his own acts directly aimed at preventing his compliance: *Ex parte Spencer*, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395; *McAtee v. McAtee*, 116 Ill. App. 511. It is no answer to the proceedings for him to show a withdrawal of previous similar proceedings on a stipulation to pay a certain sum, when he has not complied with his undertaking: *Davidson v. Davidson*, 29 App. Div. 629, 52 N. Y. Supp. 7. The practice in New York appears to be that on the motion to punish for the contempt, the husband cannot show by affidavit that his pecuniary circumstances are such as to render him unable to pay the moneys required to be paid: *Strobridge v. Strobridge*, 21 Hun, 288; *Young v. Young*, 35 Misc. Rep. 335, 71 N. Y. Supp. 944. To procure relief upon that ground he can move to be released from imprisonment: *Ryckman v. Ryckman*, 34 Hun, 235; *Young v. Young*, 35 Misc. Rep. 335, 71 N. Y. Supp. 944.

The decisions are abundantly clear that where the inability to pay is bona fide, the husband will not be compelled to go to work to earn money which is to be applied in payment of the order. *Webb v. Webb*, 140 Ala. 262, 103 Am. St. Rep. 30, 37 South. 96, has a very complete exposition of the law on this subject; and the opinion of Haralson, J., generally has commended itself to us for its quickness of both the grasp of the subject and facility in dealing with it. He said: "There seems to be no dispute about complainant being unable to pay the decree out of money or property, and the court so held. The only remaining insistence is, that he is able to work, and will not work, to earn the money to make the payment, and the court ought to commit him for default in this respect. It is difficult to understand how the desired result was thus to be accomplished, and how the court would go about it. If complainant would not labor, the court was without power to inflict corporal punishment to compel him. If it imprisoned him until he was willing to work, that would not have produced money, meantime, but would have entailed expense for the imprisonment; and if imprisoned and he should relent and come in and signify his willingness to labor, employment would have to be obtained for him, by the court, by himself or someone else; and how the court would have proceeded legally to hire him out, or supervise him if he hired himself, and collect the money for application to its decree, has not been made to appear. In any effort in this direction it might undertake, the court would be careful not to violate the law against peonage for the sake of earning money. Such an effort, if undertaken, might involve the court and its agents in trouble, into which we would not knowingly induce or compel them." The same conclusion was come to in *Ex parte Todd*, 119 Cal. 57, 50 Pac. 1071. Although the court will not compel the husband to labor or be committed, if an order has been made and the husband's only means of acquiring money is by his labor, the decree will not be disturbed: *Lester v. Lester*, 63 Ga. 356.

In *Uttal v. Uttal*, 140 App. Div. 255, 125 N. Y. Supp. 2, on the sole ground of the defendant's poverty, he was not required to pay any counsel fee, and for the support of his wife and family he was ordered to pay only four dollars a week. In such a case, the court decided, the presumption would arise that he had no property which would be reached through a receiver, but, making no proper answer to the proceedings for contempt, he was attached.

The inability to pay temporary alimony is not in itself an answer to the proceedings for attachment. The proper mode, if relief is sought, is to move for release from imprisonment: *Cahzin v. Cahzin*, 112 N. Y. Supp. 525.

In the principal case, ante, p. 873, the subject is very explicitly dealt with, and it was properly held that a judgment may be given against a husband for alimony, though he has neither property nor income, but is able by the use of his faculties to provide maintenance for his wife. In such case, as the court puts it, the wife is entitled to the judgment, though it may be impossible for her to enforce it. But the court cannot compel the husband, "who has no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and, by the exercise thereof, derive an income for the support of his wife." The court said it did not charge itself to make the thriftless thrifty, nor with the enforcement of purely moral obligations.

c. Bona Fide Refusal on Other Grounds.—There may exist other grounds for the refusal to pay than bona fide inability. There may be, for instance, a legal objection, as in *Ross v. Ross*, 47 Mich. 185, 10 N. W. 193, that the order allowing alimony is invalid. In that case the order did not show an absence of means on the wife's part, and the court held that it is only in cases where it is so made to appear, and that the husband has property, that the court would compel him to make a suitable allowance for her maintenance and to enable her to employ counsel: *Story v. Story*, Walk. Ch. 421. Under the Michigan law the presumption that the wife has no property is no longer raised, and as the order was silent on that point, the husband could not be deprived of his liberty as a means of enforcing obedience of it.

The pendency of an action to recover the alimony is not ground of opposition to the granting of an attachment: *Lyon v. Lyon*, 21 Conn. 185; *O'Callaghan v. O'Callaghan*, 69 Ill. 552; nor is the alleged uncertainty of the decree which directs payment during the wife's life or until modified by the court: *Ex parte Hart*, 94 Cal. 254, 29 Pac. 774; nor the fact that the wife's father is contributing to her support: *Schaffner v. Schaffner*, 212 Ill. 492, 72 N. E. 447; nor technical irregularities in the wife's proceedings: *Froman v. Froman*, 53 Mich. 581, 19 N. W. 193; nor the pending of a plea of former adjudication: *Filer v. Filer*, 77 Mich. 469, 43 N. W. 887, 6 L. R. A. 399. But where the parties became reconciled and the litigation ended, the court would not commit the husband for contempt in not paying counsel's fees ordered to be paid in the suit: *Dillon v. Shiawassee Circuit Judge*, 131 Mich. 574, 91 N. W. 1029.

The mere fact that the husband has a bona fide cause for the modification of the decree will not excuse him from the danger of committal for contempt in refusing to pay on that account: *Ronan v. Ronan*, 32 Misc. Rep. 467, 66 N. Y. Supp. 799. He should apply for a modification of the order: *State v. Second Judicial District Court*, 31 Mont. 511, 79 Pac. 13.

Where the husband had been ordered to pay alimony pendente lite in monthly payments, and a decree was made denying divorce to either party, but the wife moved for a continuance of the alimony and was refused, but the order denying it as not entitled thereto was not entered until some months later, when it was entered nunc pro tunc, the court refused to entertain proceedings for contempt. "We have no doubt," said the court, "that the question whether the original order is still in full force and effect is one which the defendant is entitled to have decided on a proper proceeding. But we are equally certain that contempt proceedings, under the circumstances disclosed by the record, may not be resorted to for that purpose. It would be altogether unreasonable to require the respondent judge to punish the plaintiff and his attorneys as for a contempt under the circumstances of this case": *State v. Smith (Mont.)*, 111 Pac. 732.

The fact that the husband has already been imprisoned for the contempt of nonpayment of alimony is a sufficient answer to subsequent proceedings for arrears accrued thereafter in New York, under Code of Civil Procedure, section 111, which provides that three months is the extreme limit of imprisonment for contempt in such cases where the amount to be paid is less than five hundred dollars, and that the defendant cannot be again imprisoned in the same suit upon like process: *People v. Walsh*, 132 App. Div. 462, 116 N. Y. Supp. 839; *Maran v. Maran*, 137 App. Div. 348, 122 N. Y. Supp. 9.

It is no answer to contempt proceedings that the wife is earning sufficient to maintain herself: *Sumner v. Sumner*, 118 Ga. 408, 45 S. E. 315; *Nipper v. Nipper*, 133 Ga. 216, 65 S. E. 405.

In Missouri under the Revised Statutes of 1899, sections 2926, 2927 and 4327a (Annotated Statutes 1906, pp. 1683, 1686, and 2376), it was held that an alimony decree was for a debt unenforceable by imprisonment in contempt proceedings under section 4635 (Annotated Statutes, p. 2552). Constitution, article 2, section 16, prohibits imprisonment for noncompliance with an order for payment of a debt: *Ex parte Kinsolving*, 135 Mo. App. 631, 116 S. W. 1068.

It is a good answer that all payments due under the decree have been paid, notwithstanding there are payments due on a post-decree contract which assumed to give the wife every legal remedy for the recovery of the contract sum: *Clark v. Clark*, 130 App. Div. 610, 115 N. Y. Supp. 500.

Where the defendant was arrested under a had order and paid under the duress, his right to attack the order was not impaired: *Stewart v. Stewart*, 127 App. Div. 724, 111 N. Y. Supp. 734.

A person brought into court on a rule for contempt cannot be called upon to answer for another and a later act than the one charged, even if the later act could be considered to be a contempt of court: *Otilio v. Otilio*, 119 La. 965, 44 South. 799.

VI. The Purging of the Contempt.

There is little or no difference in the manner of purging the contempt in divorce proceedings from any other civil proceeding: *Graley v. Graley*, 31 How. Pr. 475. The husband can show his compliance with the decree or such valid cause as exists for noncompliance: *Kernodle v. Cason*, 25 Ind. 362. Except sufficient cause be shown, the prisoner will not be released: *Baker v. Baker*, 116 Ga. 811, 43 S. E. 46. Surrendering all his property to the court has been held a sufficient ground: *Blake v. People*, 80 Ill. 11. It will not be sufficient for him to state his inability; he must show the reasons thereof and why he has not been able to earn the money: *Lansing v. Lansing*, 41 How. Pr. 248.

It is not a purging of the contempt where the wife fails to pay for the board of the prisoner under the Rhode Island Court and Practice Act of 1905, section 1152, and he is not entitled to his discharge from such imprisonment under General Laws of 1896, chapter 259, section 2, providing that in case of default in payment of such board the prisoner should be discharged from jail. He was not imprisoned for the debt, but for noncompliance with the decree of the court: *Ex parte Mowry*, 28 R. I. 242, 66 Atl. 575.

This adoption of the view that the imprisonment is for the contempt and not for the debt had been previously held in the last-named state in the case of *Mowry v. Bliss*, 28 R. I. 114, 65 Atl. 616, in which the district court had no jurisdiction to permit a husband imprisoned for a contempt to take the poor debtors' oath and obtain his discharge.

STATE v. ANDERSON.

[85 S. C. 229, 67 S. E. 237.]

WITNESSES—Examination by Judge.—A Judge may Propound to witnesses such questions as he thinks proper and necessary to ascertain the truth of the matter under investigation, but he should do so in a fair and impartial manner, and not by the manner of his questions indicate to the jury his opinion as to the facts or as to the weight or sufficiency of the evidence. (p. 889.)

HOMICIDE—Justification—Instructions.—Where the defendant in a homicide case interposes no plea of justification, it is not prejudicial error to charge that there is only one form of justifiable homicide. (p. 889.)

A NEW TRIAL for After-discovered Evidence Should be Denied when the evidence is merely cumulative and there is no showing that it could not by due diligence have been secured in time for the trial. (p. 890.)

NEW TRIAL—Review on Appeal.—The Decision of the circuit court on motions for new trials for after-discovered evidence in a law case cannot be reviewed by the supreme court except for errors of law. (p. 890.)

HOMICIDE.—A Sentence That the Accused be Hanged "at the usual place of execution," which is fixed by statute within the county jail or the inclosure thereof, is not a sentence "to be publicly executed." (p. 890.)

H. S. Blackwell and W. R. Richey, Jr., for the appellant.

R. A. Cooper, contra.

²³⁰ **HYDRICK, J.** The appellant was convicted of the murder of Josh Carter, his father in law.

The exceptions impute error to the circuit judge: 1. In not leaving the examination of witnesses wholly to the attorneys; 2. In charging that the only form of justifiable homicide known to our law is where the sheriff executes a man pursuant to the mandate of a court of competent jurisdiction; 3. In refusing to charge the law of self-defense; 4. In refusing a motion for a new trial on the minutes, because it appeared that defendant was not responsible for his acts; 5. In refusing a motion for a new trial on after-discovered evidence; 6. In sentencing appellant to be publicly executed.

In the early part of 1908, appellant shot the son of his employer, and became a fugitive from justice. His wife, ²³¹ with her nine children, moved to the home of her father. While evading the officers of the law, appellant occasionally visited his family. For some reason, not fully explained by the testimony, appellant had made some threats against Carter, and the relations between them were not friendly. Hence, on his first visit to his family, after they had moved to the home of Carter, before going into the house, he sent his oldest son in to inquire if he should come in. He was

told to come in, and did so. He testified that he asked Carter if he objected to his coming there to see his wife and children, and that Carter told him he was done with him, and had no further use for him. After that, he did not go into the house, but would call his wife and children out and see them. On one of these visits, according to his testimony, Carter became enraged at him, and shot at him with a gun, and he returned the fire with his pistol.

Some time in the spring he made arrangements to move his family to another place, and sent wagons for them, but they did not go. His wife testified that she did not go because he was "scouting," and could not take care of them, and because she and her children had been living off her father, and he had planted a larger crop than he would otherwise have planted, expecting them to help him cultivate it. The defendant thought Carter kept his family from moving.

In the late summer, two of his children died of fever—about a week apart. On the day the last to die was buried, he was in the church, whence the burial took place, and as Carter was entering the church, defendant passed him at the door, and without saying a word, and without a word having been said to him by Carter, or any demonstration against him having been made, he drew a pistol and shot Carter in the back, inflicting a mortal wound. And, according to the testimony of all the witnesses, except his own, he tried to shoot Carter's wife, his mother in law, snapping his pistol at her several times. When asked why he shot ²³² Carter, he replied: "Because he didn't give up my family, and kept them in that hobble against me, and I had notified him if he did not put them out, I would shoot him if I met him. He told me to do it now, and be done with it."

In support of the first ground, appellant relies upon the cases of *State v. Atkinson*, 33 S. C. 100, 11 S. E. 693, and *Wilson v. Ohio River etc. Ry. Co.*, 52 S. C. 537, 30 S. E. 406.

In the former, the report of the case shows that the trial judge practically took the cross-examination of some of the witnesses away from the solicitor, and showed clearly, by the questions he asked, his opinion as to the weight to be given to the testimony. In passing upon an exception upon that ground, the court said: "While such a course on the part of the circuit judge is, perhaps, unusual, and possibly not to be commended, we know of no law which forbids it, and, therefore, we cannot say that there was any error of law in this respect; and to that we are confined in cases of this kind."

In the case of *Wilson v. Ohio River etc. Ry. Co.*, the trial judge asked one of the witnesses several questions, which,

however, gave no intimation of his opinion as to the weight to be given the testimony, or as to the facts of the case, and, in response to an exception imputing error to the trial judge in not leaving the examination of witnesses solely to the attorneys, the court, after quoting the above language from Atkinson's case, and pointing out the fact that his case was tried under the constitution of 1868, which provided that "judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law," and that the case then under consideration was tried under the constitution of 1895, which provides that "judges shall not charge juries in respect to matters of fact, but shall declare the law," said: "While the foregoing sections are materially different as to the powers of a circuit judge in charging the jury, there are no changes as to his powers in the conduct of the trial of the case, which, of necessity, must be left in a large measure ²³³ to the discretion of the circuit judge. The exercise of this discretion is not the subject of appeal, unless it has been abused, which is not alleged in this case; but, as a matter of justice to the circuit judge, even if it had been alleged, this court is unable to discover any facts that would warrant such allegation": See, also, *State v. Driggers*, 84 S. C. 526, ante, p. 855, 66 S. E. 1042.

A grave responsibility rests upon a trial judge. It is his duty to see to it that justice be done in every case, if it can be done according to law; and if he thinks that the attorney for either party, either from inadvertence or any other cause, has failed to ask the witnesses the questions necessary and proper to bring out all the testimony which tends to ascertain the truth of the matter under investigation, we can see no legal objection to his propounding such questions; but, of course, he should do so in a fair and impartial manner, and should not by the form or manner of his questions, express or indicate to the jury his opinion as to the facts of the case, or as to the weight or sufficiency of the evidence.

The questions asked by the trial judge in this case brought out testimony as favorable to the defendant as to the prosecution, and no intimation can be gathered from the form or manner of them as to his opinion of the facts, or of the weight or sufficiency of the evidence.

As no plea of justification was interposed by defendant, the alleged error of charging that there is only one form of justifiable homicide known to our law could not have been prejudicial.

Under the undisputed evidence, a charge upon the law of self-defense would have been inapplicable to the case.

There was no testimony tending to show that appellant was not legally responsible for the crime committed.

The motion for a new trial for after-discovered evidence was properly refused. It was not supported by affidavit that ~~234~~ the evidence could not, by the exercise of due diligence, have been secured in time for the trial, and according to the statements of appellant's attorneys to the court as to the character of the alleged newly discovered evidence, it was merely cumulative. But, aside from this, the decision of the circuit court on motions for new trials on after-discovered evidence, in a law case, cannot be reviewed by this court, except for errors of law.

The appellant was not sentenced "to be publicly executed." The sentence was that he be hanged "at the usual place of execution," which is fixed by statute within the county jail, or the inclosure thereof: Crim. Code, sec. 660.

The judgment of this court is that the judgment of the circuit court be affirmed, and that the case be remanded to that court for the purpose of having a new day assigned for the execution of the sentence heretofore imposed upon the defendant.

The Judge has a Right to Interrogate a Witness in a criminal prosecution; but he has no right to usurp the place of the prosecuting attorney, and prescribe the order of the introduction of the witnesses, and become active in their examinations. Neither has he the right to assume the duties resting on the prisoner's counsel in the general conduct of the defense. He may, however, ask questions which the attorneys have a right to propound and fail to ask, when the answers to the same may tend to prove the guilt or the innocence of the accused: *Sharp v. State*, 51 Ark. 147, 14 Am. St. Rep. 27. On a trial for murder, the court may properly inquire whether the pistol with which the homicide is alleged to have been committed has been formally offered in evidence or not, in order to satisfy his own mind on that point: *Kearney v. State*, 101 Ga. 803, 65 Am. St. Rep. 345.

WILKES v. SOUTHERN RAILWAY.

[85 S. C. 346, 67 S. E. 292.]

CHATTEL MORTGAGE—Action by Mortgagor.—The mortgagor of a chattel may, after condition broken, maintain an action against a third person for negligent injury to it. (p. 891.)

CHATTEL MORTGAGE.—The Title of the Mortgagee of chattels, after condition broken, is not absolute in the strict legal sense of that term. (p. 891.)

CHATTEL MORTGAGE—Actions by Mortgagor or Mortgagee. The right of the mortgagee of a chattel, after condition broken, is superior to that of the mortgagor. Hence the pendency of an action by the mortgagee against a third person in respect to the property is a good plea in abatement to an action by the mortgagor, and a judg-

ment in an action by the mortgagee is a good plea in bar of an action by the mortgagor. (p. 893.)

CHATTEL MORTGAGE—Actions by Mortgagor or Mortgagee. After condition broken, a chattel mortgagee may bring an action himself against a third person in respect to the property, or the mortgagor may bring it by the consent, express or implied, of the mortgagee, or against his consent after demand and his refusal to bring it. (p. 893.)

McCants & McCants, for the appellant.

Ragsdale & Dixon, contra.

347 HYDRICK, J. Plaintiff recovered damages for injury to a mule, which was struck by one of defendant's trains. On cross-examination, he testified: "Mr. Ragsdale has small amount due on this mule under mortgage." The testimony further showed that this Mr. Ragsdale was a witness for the plaintiff at the trial, and had written a letter to the defendant's stock claim agent for the plaintiff, which was signed by the plaintiff, demanding payment to the plaintiff for the damage to the mule.

The sole question raised by the exceptions which this court can consider is: Did plaintiff have such property rights in the mule that he could maintain the action?

We think this question must be answered in the affirmative. It is well settled in this state that, after condition broken, the legal title to mortgaged chattels vests in the mortgagee. He may maintain an action to recover possession thereof even from the mortgagor, or from any other person in whose hands he may find them: *Martin v. Jenkins*, 51 S. C. 42, 27 S. E. 947, and cases cited. He may also recover of a third person damages for their conversion, injury or destruction: *Wylie v. Ohio River etc. R. R.*, 48 S. C. 405, 26 S. E. 676. The language of some of the cases is that his title is "absolute." But, on examination, these expressions will be found to be mere dicta. The cases above cited, and those therein referred to, agree that his title and right of possession are subject to the right of the mortgagor, or his vendee, or a subsequent mortgagee, to redeem before sale, or, after sale, to an accounting in equity for the surplus, if any, after payment of the mortgage debt and interest and the costs and expenses of seizure and sale. It cannot, therefore, be said that the title of the mortgagee, after condition broken, is absolute, in the strict legal sense of that term. In *Fleniken v. Scruggs*, 15 S. C. 88, the circuit judge charged the jury: "When there is a breach of the condition of a mortgage of personal property, the article mortgaged becomes the absolute property of the mortgagee, the possession of the mortgagor being thence merely permissive." Responding to an exception to this charge, the court said: "Whether it is true as an abstract proposition that the

mortgagee of personal property becomes the absolute owner, in the strict sense of that term, after condition broken, may, doubtless, well be questioned, but there can be no doubt that, after condition broken, the mortgagee may seize and sell the mortgaged property in satisfaction of his debt, and there is as little doubt that, while a public sale is the proper mode, yet, with the consent of the mortgagor, he may sell at private sale, and if he can do this, he certainly may authorize the mortgagor himself to sell or otherwise dispose of the mortgaged property free from the lien of the mortgage. For these purposes, the mortgagee, after condition broken, has all the rights of the absolute owner, and this is manifestly what the charge of the judge, properly construed, means."

³⁴⁹ It is sufficient to say that the legal title of the mortgagee and his right of possession, after condition broken, are absolute in him to the extent that he may preserve and protect his rights, under the mortgage, or he may waive them. But, as between the mortgagor and any other person, who has no interest in the property, the mortgagor has the right of possession and such special property in the mortgaged chattels that he may maintain such actions as may be necessary to protect his possession and his special right therein and thereto. It would, indeed, be an anomaly to hold that, after condition broken, mortgaged chattels might be taken from the possession of the mortgagor, or injured or destroyed by any trespasser, and the mortgagor could have no redress, except through the mortgagee. Suppose the mortgage covers numerous chattels, far more in value than enough to secure the debt, and part of the property mortgaged should be converted, injured or destroyed by a trespasser, and the mortgagee should refuse to bring action therefor, because of the sufficiency of the remaining chattels to secure his debt. The boast of the law is that there is no right without a remedy. In such a case, is the mortgagor to have no remedy? In 5 American and English Encyclopedia of Law, 999, it is said: "The mortgagor in lawful possession has the right to protect his possession against third parties by appropriate legal remedies; and even if he is in default, but still has possession, he has an interest sufficient to maintain an action against a third party wrongfully converting the property."

It is not necessary, under all circumstances, that the legal title to property, in regard to which an action is brought, shall be in the plaintiff. For instance, a mere bailee has such special property in the thing bailed that he may maintain such actions as may be necessary to protect it against wrongdoers: *Jones v. McNeill*, 2 Bail. 466; 3 Ency. of Law, 761.

As we have seen, the mortgagee may sue to recover the property or damages for its conversion, injury or destruction, and if the mortgagor may also sue therefor, the question ³⁵⁰ arises, Is the defendant, in such a case, to be harassed in two actions for the same thing? By no means. Certainly, both mortgagor and mortgagee cannot maintain different actions for the same cause at the same time. But, as we have seen, the right of the mortgagee, after condition broken, is superior to that of the mortgagor; therefore, the pendency of an action by the mortgagee would be a good plea in abatement of an action by the mortgagor, and a judgment in an action by the mortgagee would be a good plea in bar of an action by the mortgagor, for the same cause.

After condition broken, the mortgagee may either bring the action himself, or the mortgagor may bring it by the consent, express or implied, of the mortgagee, or against his consent, after demand and his refusal to bring it. In either event, he would be estopped by the judgment. The defendant in an action brought by the mortgagor can protect himself, either by requiring the plaintiff to prove the consent of the mortgagee, or by having him brought before the court under the provisions of section 143 of the Code of Procedure.

Judgment affirmed.

Mr. Justice Gary concurs in the result.

ACTIONS MAINTAINABLE BY THE MORTGAGOR OF CHATTELS AGAINST THIRD PERSONS, AFTER CONDITION BROKEN.

I. Legal Title, Ownership and Possession, 893.

II. Rights of Mortgagor.

- a. Former View, 894.
- b. Modern View, 895.

III. Actions Available.

- a. Rights and Remedies, 898.
- b. Trover, 899.
- c. Replevin—Claim and Delivery, 902.
- d. Detinue, 903.
- e. Trespass and Case, 903.

I. Legal Title, Ownership and Possession.

The right of an owner of property to maintain any given action in respect thereto depends primarily upon the character and extent of his ownership, and, indirectly, upon the nature of the action it is proposed to bring. It matters not how limited may be the ownership in question, or whether the property is real or personal, no distinction is to be discovered in the application of this uniform rule. Applying it to the case of a mortgagor of chattels, after condition broken, the right to maintain any specific action intended for the protection and preservation of whatever primary right may remain to him after hav-

ing parted with the legal title, and, possibly, possession itself, depends upon the character and extent of the ownership remaining.

Obviously, it is important to bear in mind the well-recognized distinction between ownership and legal title; for if the legal title has been parted with, and such title is to be regarded as synonymous with ownership, then it follows that no interest or remnant of ownership remains to the mortgagor after condition broken, and hence no right of action whatever.

To say, as is so often stated in the books and in judicial proceedings, that such a one is the owner and entitled to the possession of certain chattels, does not necessarily convey the idea that the person has the legal title thereto; nor does it always mean that he is the general or absolute owner: *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452; *Cumbey v. Lovett*, 76 Minn. 227, 79 N. W. 99. The word "owner" includes all the elements or indicia of title, possession, and enjoyment of property. It may be applied to one holding the legal title, either general or special, or it may be applied to mere possession: *Hornbein v. Blanchard*, 4 Colo. App. 92, 35 Pac. 187; *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377; *Keith v. Maguire*, 170 Mass. 210, 48 N. E. 1090; or to possession under some special title: *Lafin v. Svoboda*, 37 Neb. 368, 55 N. W. 1049. A general ownership includes dominion of every sort, and the right of possession and enjoyment to the exclusion of the whole world. A general owner may do as he pleases with his property. He may sell it, he may give it away, or destroy it, without question of anyone. His control is absolute and unrestricted. Assuming the existence of this degree of ownership, it may be divided, and its integral parts segregated. The legal title may be sold or given to one person, the possession may be transferred to another, while some special right of use or enjoyment may go to a third. Or the absolute owner may retain possession, along with a special right to have a reconveyance of the legal title, or to redeem the same, upon condition, and may transfer such legal title to another person: *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568.

This last is usually what happens in the case of a mortgage of chattels. It is true possession is not always retained by the mortgagor, but such is usually the case; and whether it is or not, there is always the reservation of a special right to redeem the legal title. A mortgage of chattels is a conditional sale to secure the payment of a debt or the performance of some other obligation. If the debt is paid or the obligation performed in accordance with the terms of the mortgage, the sale becomes void, and the mortgagee is divested of the title conveyed to him. If the conditions are not complied with, however, the rights of the parties are not so readily defined. There is a wide difference of opinion as to what really takes place, not only upon the execution of the mortgage, but also upon breach of condition, and a review of the authorities upon this point is necessary to an understanding of what has come to be recognized as the modern, as distinguished from the earlier, view, of the real nature of a chattel mortgage, and, in consequence, to a like understanding of the rights of the mortgagor in the premises.

II. Rights of Mortgagor.

a. **Former View.**—Formerly, and even at the present time in some jurisdictions, a mortgage was treated as something more than a con-

ditional sale. It was said that when a mortgagor failed to meet the conditions of the obligation as set forth in the mortgage, the title to the mortgagee became absolute. He might take possession, and if possession was refused, might sue for it. He might treat it as his own property, and sue in replevin: *Buddington v. Mastbrook*, 17 Mo. App. 577; or he might treat the refusal of the mortgagor to surrender possession as a conversion, and sue in trover: *Roach v. St. Louis Type etc. Co.*, 21 Mo. App. 118; *St. Mary's M. Co. v. National etc. Co.*, 68 Ohio St. 535, 96 Am. St. Rep. 689, 67 N. E. 1055, 64 L. R. A. 845. So far as the legal rights of the parties were concerned, if he once acquired possession, and the condition had suffered breach, it was held in a wide range of authorities that, quoting from *Jones on Chattel Mortgages*, section 1, "he may henceforth treat it as his own; he may sell it or give it away, squander it, or destroy it": *Blake v. Corbett*, 120 N. Y. 327, 24 N. E. 477; *Street v. Sinclair*, 71 Ala. 110; *Crocker v. Burns*, 13 Colo. App. 54, 56 Pac. 199; *Phillips v. Hawkins*, 1 Fla. 262; *Constant v. Mattison*, 22 Ill. 546; *Brass v. Green*, 113 Ill. App. 58; *Korman v. Henry*, 32 Kan. 49, 3 Pac. 764; *Brookover v. Hurst*, 1 Met. (Ky.) 665; *Melody v. Chandler*, 12 Me. 282; *Winchester v. Ball*, 54 Me. 558; *Alden v. Lincoln*, 13 Met. 204; *Badlam v. Tucker*, 1 Pick. 389, 11 Am. Dec. 202; *Tannahill v. Tuttle*, 3 Mich. 104, 61 Am. Dec. 480; *Gates v. Smith*, 2 Minn. 30; *Thornhill v. Gilmer*, 4 Smedes & M. 153; *Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145; *Buddington v. Mastbrook*, 17 Mo. App. 577; *Holmes v. Strayhorn etc. Co.*, 81 Mo. App. 97; *Tompkins v. Batie*, 11 Neb. 147, 38 Am. Rep. 361, 7 N. W. 747; *Provenchee v. Piper*, 68 N. H. 31, 36 Atl. 552; *Hall v. Snowhill*, 14 N. J. L. 8; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Brown v. Bement*, 8 Johns. 96; *Ackley v. Finch*, 7 Cow. 290; *Charter v. Stevens*, 3 Denio, 33, 45 Am. Dec. 444; *Cody v. First Nat. Bank*, 63 App. Div. 199, 71 N. Y. Supp. 277; *Stearns v. Oberle*, 47 Misc. Rep. 349, 94 N. Y. Supp. 37; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Judson v. Easton*, 58 N. Y. 664; *St. Mary's M. Co. v. National etc. Co.*, 68 Ohio St. 535, 96 Am. St. Rep. 677, 67 N. E. 1055, 64 L. R. A. 845; *McClendon v. Wells*, 20 S. C. 514; *Lockett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 723; *Martin v. Jenkins*, 51 S. C. 42, 27 S. E. 947; *Gifford v. Ford*, 5 Vt. 532; *Wood v. Dudley*, 8 Vt. 430; *Flanders v. Thomas*, 12 Wis. 410; *Illinois T. & S. Bank v. Alexander Stewart Lumber Co.*, 119 Wis. 54, 94 N. W. 777; *In re Haake*, Fed. Cas. No. 5883, 2 Saw. 231; *Pyeatt v. Powell*, 51 Fed. 551, 2 C. C. A. 367; *Mitchell v. Roberts*, 5 McCrary, 425, 17 Fed. 776.

b. Modern View.—Notwithstanding this array of authorities, covering the leading jurisdictions, to which might be added many others, the doctrine has never received universal or unqualified approval. In the states of Michigan, Minnesota and Oregon, the courts took occasion at an early period to depart therefrom, holding that a mortgage of chattels did not convey the title, but constituted no more than a lien, and that the mortgagor was not divested of his title by breach of condition, so that he might not retain possession and the right to redeem within a reasonable time prior to actual foreclosure: *Flanders v. Chamberlain*, 24 Mich. 305; *International Wrecking Co. v. McMorran*, 73 Mich. 467, 41 N. W. 510; *Wineman v. Fisher E. M. Co.*, 113 Mich. 636, 77 N. W. 245; *Moore v. Norman*, 43 Minn. 428, 19 Am. St. Rep. 247, 45 N. W. 857, 9 L. R. A. 55; *Chapman v. State*, 5 Or. 432; *Ayre v. Hixon*, 53 Or. 19, 133 Am. St. Rep. 819, 98 Pac. 515; *Swank v. Elwert* (Or.), 105 Pac. 901.

This example was followed, from time to time, in other states, and "nowhere is it now held that upon forfeiture the mortgagee may sell the property, give it away or destroy it, without reference to or consideration for any right or interest of the mortgagor": *Frankenthal v. Mayer*, 54 Ill. App. 160.

"Thus far the cases cited have tended to show that a mortgagor of chattels has a property in them until default in the payment of the mortgage money, which may be subjected to sale under process of execution or distress. But on what principle can it be held that his property terminates when the mortgage money becomes due and payable? The mortgage is, in substance, a mere security for the debt. It generally provides for payment at a specified day; but, in fact, in most instances, the time of payment is tacitly extended to accommodate the wants and conveniences of the parties. Frequently the forfeiture and day of payment are made dependent upon a contingency such as a levy under execution against the mortgagor, or an attempted removal out of the county. Why adhere to form, and sacrifice substance? In fact, the property in the chattels mortgaged does not become absolute in the mortgagee when his money becomes due. . . . If the mortgagee takes the chattels mortgaged into his possession, he cannot keep or dispose of them absolutely as his own. If he retain them, they will be liable to redemption by the mortgagor; and when the mortgagee's debt is satisfied, his title ceases: *Freeman v. Freeman*, 17 N. J. Eq. 44"; *Woodside v. Adams*, 40 N. J. L. 417. A private sale by the mortgagee after default is unauthorized; and if he so sells them, he must account to the mortgagor for their full value: *Bird v. Davis*, 14 N. J. Eq. 467. If, after possession, he sells part, and realizes sufficient to pay the debt and expenses, his title to the residue is extinguished, and if he makes a further sale, he will be liable in trover at the suit of the mortgagor: *Charter v. Stevens*, 3 Denio, 33, 45 Am. Dec. 444. "Courts of law, as well as courts of equity, regard a chattel mortgage as a mere security, and recognize an interest in the mortgaged chattels, subsisting in the mortgagor after default and possession taken until his rights are extinguished by foreclosure or sale, analogous to the rights of the mortgagor of lands after default and entry by the mortgagee, until his rights are extinguished by proceedings in foreclosure. The expression so frequently used in the opinions of courts and in the books, that a mortgagee of chattels after default has an absolute title, has only a qualified meaning since the common-law doctrine of the nature of a mortgage has been departed from. After his debt has become due, the mortgagee has the absolute legal title in the sense that he may resort to such remedies as a legal title draws to it for the enforcement and protection of his security, and to compel the payment of the mortgaged money, just as a mortgagee of lands after default is regarded as having a legal title for the purposes of an action of ejectment to recover possession of the mortgaged premises. But still the mortgagor is considered as having an interest in the chattels mortgaged, which continues, notwithstanding the mortgagee has recovered the chattels, or taken them into possession in virtue of his legal title, until the mortgagor's interest is extinguished by foreclosure or a sale in the manner provided by law": *Woodside v. Adams*, 40 N. J. L. 417.

Similar language has been used by the Illinois courts: "Nevertheless the mortgagor retains an interest in the goods until divested

thereof by sale under the provisions of the mortgage, or by lapse of time his right of redemption is lost": *Frankenthal v. Mayer*, 54 Ill. App. 16, which follows up a line of authorities commencing with *Dupuy v. Gibson*, 36 Ill. 197.

The modern view of the continuance of the mortgagor's interest beyond the time when his condition of payment has been broken by him, up to the moment the proper sale by the mortgagee divests him of the last shred of interest, has found widespread support, notwithstanding an occasional conflict which is lessening as the more liberal view finds favor: *Treat v. Gilmore*, 49 Me. 34; *Buddington v. Mastbrook*, 17 Mo. App. 577; *Masterson v. West End N. G. R. R. Co.*, 72 Mo. 342; *Demers v. Graham*, 36 Mont. 402, 123 Am. St. Rep. 384, 93 Pac. 268, 14 L. R. A., N. S., 431, 13 Ann. Cas. 97; *Musser v. King*, 40 Neb. 892, 42 Am. St. Rep. 700, 59 N. W. 744; *Gould v. Armogast*, 46 Neb. 897, 65 N. W. 1064; *Drummond Carriage Co. v. Mills*, 54 Neb. 417, 69 Am. St. Rep. 719, 74 N. W. 966, 40 L. R. A. 761; *Kerfoot v. State Bank of Waterloo*, 14 Okl. 104, 77 Pac. 46; *Litz v. Exchange Bank of Alva*, 15 Okl. 564, 83 Pac. 790; *Jercks v. Murphy*, 15 S. D. 425, 89 N. W. 1121; *Soell v. Haddon*, 85 Tex. 182, 19 S. W. 1087; *Hughes v. Smith* (Tex. Civ. App.), 129 S. W. 1142; *Byrd v. Forbes*, 3 Wash. Ter. 318, 13 Pac. 715; *Kerron v. Northern Pacific L. & M. Co.*, 1 Wash. 241, 24 Pac. 445; *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022.

Statutory provisions have, in some states, had a direct effect upon the question of a mortgagor's rights after condition broken. In California and New Mexico the mortgagor's right of possession remains, by operation of statute, and is not divested until formal foreclosure: *Summerville v. Stockton etc. Co.*, 142 Cal. 529, 76 Pac. 243; *Ely v. Williams*, 6 Cal. App. 455, 92 Pac. 393; *Kitchen v. Schuster*, 14 N. M. 164, 89 Pac. 261.

The concrete result of the changes and development in this branch of the law has been the adoption of an almost uniform policy throughout most of the jurisdictions of this country treating both chattel and realty mortgages as mere liens to secure the payment of debts, transferring no title, or, at most, transferring no title until breach of condition, and sometimes not until foreclosure. A clear interest, sometimes described as a special ownership, sufficient to support any action for its preservation and protection, is recognized, more or less independent of any possession which may be coupled therewith, or which may exist without regard thereto. In *Vaughan v. Thompson*, 17 Ill. 78, it was said: "Mortgagors of land, in possession, are regarded as the true and real owners of the estate, and their equity is liable to sale on execution: *Fitch v. Pinckard*, 4 Scam. 69. The mortgagor of personalty in possession must have at least a like and equal interest where the mortgage is duly recorded, and the absolute property where it is not, so far as creditors and subsequent purchasers are concerned, when liable to execution. The mortgagor's interest would be of little value to him under such circumstances if he could not maintain the usual actions for its protection." And in *Evans v. St. Paul H. Works*, 63 Iowa, 204, 18 N. W. 881, as to the right of the mortgagor to have protection from mere strangers and tort-feasors, it was said: "The mortgagor does not by the execution of the mortgage part with the ownership. . . . The rule of law by which the legal title is regarded as having passed by the mortgage to the mortgagee is designed to enable him to take and hold possession for his better protection. It

cannot inure to the benefit of third persons wrongfully interfering with the property. Where such interference takes place, the wrongdoer must be held liable to those whom he has wronged: *Holden v. Cox*, 60 Iowa, 449, 15 N. W. 269."

It needs no well-turned definition to describe this right. It matters little whether it is distinct from or dependent upon possession; but it is plain that it exists without regard to possession, and coexistent with the rights of the mortgagee, and is not affected by breach of condition. It is true the possession of the mortgaged chattel after condition broken is sometimes spoken of as a bailment, and the mortgagor as the representative of the mortgagee: *Rindge v. Inhabitants of Coleraine*, 11 Gray, 157; *Roach v. St. Louis Type Foundry*, 21 Mo. App. 118; *Chesley v. St. Clair*, 1 N. H. 189; *Smith v. James*, 7 Cow. 328; *Green v. Clarke*, 12 N. Y. 343; *Swift v. Hart*, 12 Barb. 530. He is sometimes described as a special owner, with possession. "Whenever one person owns the property, and another person has the management, care and control of it," the former is the actual owner, the latter the special owner: *Frazier v. State*, 18 Tex. App. 434. There can be no question as to his responsibility for the chattel so long as it remains in his possession. If it should be lost or destroyed it would be his loss, even though without his fault. "The destruction of the property does not pay the debt": *Evans v. St. Paul H. Works*, 63 Iowa, 204, 18 N. W. 881.

But the mortgagor has a special property which, manifestly, does not rest upon possession, whether it be with or without the mortgagee's consent, both because he has a right to make them his own by payment of the debt, and because, holding them for his own benefit, he is answerable to the mortgagee for them. In recognition of this right it has been held that a mortgagor is entitled to damages for deterioration for wrongful attachment, the value of his right of redemption being lessened thereby: *Carey v. Gunnison* (Iowa), 17 N. W. 881.

But whether as bailee, or special or qualified owner, or a possessor with a bare right, whatever may be the real character of the right of ownership or possession involved, this ownership and possession are entitled to protection and preservation upon the usual terms, that is, by the usual and customary forms of action available for that purpose, and it remains to show what those actions are; always having in view that the action may be brought by either mortgagor or mortgagee, but not by both, and that the defendant can protect himself against an action by the other when sued by either: *Wilkes v. Southern Railway*, 85 S. C. 346, 137 Am. St. Rep. 890, 67 S. E. 292.

III. Actions Available.

a. **Rights and Remedies.**—The common law has gradually provided remedial rights to match those primary rights which primeval society acclaimed. So perfectly adapted did the system ultimately become to the object in view, that it came to be recognized not merely that where there was a right there was also a remedy, but also that there was no right without a remedy. Rights and remedies were "convertibles." As expressed by Chief Justice Holt, in *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126, 1 Smith Lead. Cas. 342, 1 Eng. Rul. Cas. 521, where was shown the futility of any attempt to establish a right in the absence of a recognized remedy: "If the plaintiff has a right, he must of necessity have a means to vindicate and main-

tain it, and a remedy, if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."

And this is no less true at the present time than when Mr. Justice Chitty and Mr. Serjeant Stephen were living exponents of the science which, to them, possessed no obscurities. So that the rule is to be regarded as little short of axiomatic that if the issues of any given controversy are incapable of being presented by means of any of the usual forms of actions corresponding to the recognized common-law actions available for the purpose, the conclusion must be accepted as inevitable, not only that there is no remedy, but that there is no right. The primary right and the remedial right are reciprocal and convertible, the existence of the one implying the other.

b. **Trover.**—While it is true that the ancient forms of the different actions have been dispensed with, their substance has been preserved with more or less accuracy of detail in the different forms of the modern action under the codes. Trover, replevin, trespass and case, are recognized forms corresponding to the old actions bearing those names; and, with slight changes, rest upon the foundations which formerly supported them. Thus, it has been held that wrongful conversion consists in dealing with property in a manner inconsistent with the right of the person entitled to its immediate possession, and an intention to assert a dominion adverse thereto: *Sprague etc. Agency v. Spiegel*, 107 Ill. App. 508. Again, conversion is any wrongful act which deprives a person permanently of property to the possession of which he is entitled: *Phillippos v. Mihran*, 38 Wash. 402, 80 Pac. 527. Therefore, possession rather than mere title ownership, is the gist of this action, and the modern cases make this clear; and a favorite form of expression in this connection is that ownership and right of possession are the essentials, omitting reference to legal title: *Layman v. F. F. Slocomb & Co.* (Del.), 76 Atl. 1094; *Groover v. Her*, 1 Ga. App. 77, 57 S. E. 906; *Painter v. McGaha*, 6 Ga. App. 54, 64 S. E. 129; *Innovation Trunk Co. v. Platt*, 56 Misc. Rep. 645, 107 N. Y. Supp. 816; *Erlanger v. Sprung*, 113 N. Y. Supp. 16; *Joseph Dixon Crucible Co. v. Paul*, 167 Fed. 784. Possession, actual or constructive, is necessary: *Central Mfg. Co. v. Montgomery*, 144 Mo. App. 494, 129 S. W. 460; and sufficient: *Pacific Livestock Co. v. Isaacs*, 52 Or. 54, 96 Pac. 460. Possession or right of immediate possession (essentially constructive possession) is a prerequisite; mere ownership of legal title is insufficient: *Weeks v. Hackett*, 104 Me. 264, 129 Am. St. Rep. 390, 71 Atl. 858, 19 L. R. A., N. S., 1201, 15 Ann. Cas. 1156; *Schwald v. Brunjes*, 139 Mo. App. 516, 123 S. W. 472. A possessory right is essential to the maintenance of this action: *Munier v. Zachary*, 138 Iowa, 219, 114 N. W. 525, 18 L. R. A., N. S., 572, 16 Ann. Cas. 526. A present right of possession, independent of ownership of legal title is sufficient: *Barker v. Lewis etc. Co.*, 79 Conn. 342, 118 Am. St. Rep. 141, 65 Atl. 143. A lienholder in possession may maintain an action of trover; but one out of possession cannot: *Dekle v. Calhoun* (Fla.), 53 South. 14. Mere possession is sufficient to support the action against a stranger or mere wrongdoer: *Gunzberger v. Rosenthal*, 226 Pa. 300, 75 Atl. 418, 26 L. R. A., N. S., 840, 18 Ann. Cas. 572; for possession is prima facie evidence of right; and any interest, whether general or special, is sufficient to support that possession which is required in trover: *Union etc. Co. v. Union etc. Co.*, 157 Ala. 645, 47 South. 652; *Dekle v. Calhoun* (Fla.), 53 South. 14; *Rew v. Magnes*

(Iowa), 125 N. W. 804; *Weeks v. Hackett*, 104 Me. 264, 129 Am. St. Rep. 390, 71 Atl. 858, 19 L. R. A., N. S., 1201, 15 Ann. Cas. 1156; *Liebowitz v. Brinn*, 113 N. Y. Supp. 685; *Johnson v. Blaney*, 198 N. Y. 312, 91 N. E. 721; *Gunzburger v. Rosenthal*, 226 Pa. 300, 75 Atl. 418, 26 L. R. A., N. S., 840, 18 Ann. Cas. 572; *Hahn v. Sleepy Eye M. Co.*, 21 S. D. 324, 112 N. W. 843. Even a special property or a qualified interest is sufficient as against a wrongdoer: *Zimmerman M. Co. v. Dunn*, 151 Ala. 435, 44 South. 533; *Rew v. Magnes* (Iowa), 125 N. W. 804; *Liebowitz v. Brinn*, 113 N. Y. Supp. 685. Absolute ownership is not essential: *Weeks v. Hackett*, 104 Me. 264, 129 Am. St. Rep. 390, 71 Atl. 858, 19 L. R. A., N. S., 1201, 15 Ann. Cas. 1156.

From the principles stated is to be deduced the rule that a mortgagor may maintain trover against a third person, a mere wrongdoer, one who seizes the property without right and converts it to his own use, even though the condition of the mortgage has been broken, and the possession of the mortgagor, if he be in possession, is that of a mere bailee, or of one who holds the property by reason of the special or qualified interest arising from his right to redeem. For this there is ample authority. In *Buddington v. Mastbrook*, 17 Mo. App. 577, the court said: "Undoubtedly the title to a mortgaged chattel, after condition broken, passes to the mortgagee, so that he can maintain replevin for the same, as against the mortgagor, or any other person: *Lacy v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145; *Bowens v. Benson*, 57 Mo. 26; *McCandless v. Moore*, 50 Mo. 511. But it does not follow from this that if the mortgagee chooses to allow the mortgagor to remain in possession, the latter does not retain such a special property in the chattel as will enable him to maintain an action in the nature of trover against a third person who has wrongfully converted it. It is elementary knowledge that such an action could be maintained at common law. Indeed, the rightful possession of a chattel was sufficient at common law to enable the possessor to maintain trover in respect of it against anyone except the rightful owner. This has not been doubted since the leading case of *Armory v. Delemirie*, 1 Strange, 504, 1 Smith Lead. Cas. 374, where it was ruled that the finder of a jewel might maintain trover for a conversion thereof by a wrongdoer. This doctrine has been either ruled or recognized by our supreme court, both before and since the code: *Vanzant v. Hunter*, 1 Mo. 71; *Turley v. Tucker*, 6 Mo. 583, 35 Am. Dec. 449; *Parker v. Rodes*, 79 Mo. 88. 'Trover,' said Napton, J., 'may be maintained for taking goods wherever trespass will lie': *Ireland v. Horseman*, 65 Mo. 511. 'Possession,' said Bakewell, J., 'is sufficient to enable the possessor to maintain trespass. Proof of actual possession by the plaintiff at the time of the trespass, in all cases suffices to maintain the action against a mere wrongdoer—a naked possessor who shows no title': *Hickey v. Hazard*, 3 Mo. App. 480." The mortgagor of a chattel, after condition broken, stands toward the mortgagee in the attitude of a trustee of an express trust. The general ownership of the chattel has passed by operation of law to the mortgagee; the mortgagor, thereafter, so long as he is permitted by the mortgagee to hold it, holds it in trust for the mortgagee; and he must have it forthcoming whenever the mortgagee demands possession, or he is answerable to the mortgagee in damages for its conversion: *McCandless v. Moore*, 50 Mo. 511. "It is no defense to such an action for the mortgagor to show that the chattel was taken wrongfully from him by a third person, unless he can also show that he has used reasonable diligence, by

resorting to legal process or otherwise, to protect his possession of it, in order that the mortgagee may have it when he demands it. Whether, then, the mortgagor is regarded in respect of his special property in the chattel, and his right to the possession thereof as against all persons save the mortgagee, or whether he is regarded as a trustee of an express trust in respect of the chattel for the mortgagee, it clearly appears that he may maintain an action for damages for its conversion against any other person than the mortgagee": *Buddington v. Mastbrook*, 17 Mo. App. 577.

In *Golden v. Moore*, 126 Mo. App. 518, 104 S. W. 481, which was an action in the nature of trover for the conversion of mortgaged personalty, it was said that "the rule of the common law still obtains that, where the mortgagor is suffered to retain possession of the mortgaged property after condition broken, his special interest therein will support a cause of action in his favor against a wrongdoer, who seizes it. 'Possession is sufficient to enable the possessor to maintain trespass. Proof of actual possession by the plaintiff at the time of the trespass in all cases suffices to maintain an action against a mere wrongdoer': *Buddington v. Mastbrook*, 17 Mo. App. 577; *Bigler v. Leonori*, 103 Mo. App. 131, 77 S. W. 324."

In *Axford v. Matthews*, 43 Mich. 327, 38 Am. Rep. 185, 5 N. W. 377, where the question of possession became involved upon a somewhat equivocal state of facts, it was left to the jury, and decided against the mortgagor, but the principle was recognized by the court in the following language: "By necessary construction the possession and right of possession, as against the plaintiff, were in the mortgagees, and, of course, the implication is unavoidable, on the facts, that the plaintiff was not in actual possession. His position did not bring him within the law of trover, and the remedy was not applicable."

In *Swank v. Elwert* (Or.), 105 Pac. 901, it was held that a mortgagor might maintain trover for conversion of chattels mortgaged by him, against purchasers thereof at an irregular foreclosure sale, although he had lost possession. The decision was placed upon the ground that the general title of the mortgagor was not extinguished until the mortgage was regularly foreclosed: *Backhaus v. Buells*, 43 Or. 558, 72 Pac. 976, 73 Pac. 342.

In *Bigler v. Leonori*, 103 Mo. App. 131, 77 S. W. 324, it was held that after condition broken, but prior to demand for possession by the mortgagee, the mortgagor might maintain trover against a warehouseman for conversion for refusal to deliver the goods upon demand. In *Stossel v. Van De Vanter*, 16 Wash. 9, 47 Pac. 221, it was held that a mortgagor might sue for conversion though the mortgage purports to be an absolute conveyance.

It is a familiar dictum that either title or possession is sufficient to maintain this action. Language which may be fairly said to convey this meaning is to be found in *Groover v. Iler*, 1 Ga. App. 77, 57 S. E. 906; *Painter v. McGaha*, 6 Ga. App. 54, 64 S. E. 129; *Parker v. Rodes*, 79 Mo. 88; *Myers v. Hale*, 17 Mo. App. 204; *Johnson v. Blaney*, 198 N. Y. 312, 91 N. E. 721; *Simmons v. McConville* (N. D.), 125 N. W. 304; *Pacific Livestock Co. v. Isaacs*, 52 Or. 54, 96 Pac. 460. As between the owner of the legal title, or of the right of possession, and a mere tort-feasor, who seizes the chattel wrongfully, and converts it to his own use, either of the former would unquestionably prevail: *Swank v. Elwert* (Or.), 105 Pac. 901. But in a controversy between.

the legal owner and the possessor with right, he who seeks wrongly to exercise exclusive dominion over the chattel in question is himself a tort-feasor, and neither his legal title nor his right of possession, as the case may be, will enable him to escape the consequences of an act of conversion. It has been held that a foreclosure sale by the mortgagee to himself, in gross, in contravention of the terms of the mortgage, which provided for a sale in lots, constituted, as to the mortgagor, an act of conversion, for which he might maintain trover: *Kellogg v. Malick*, 125 Wis. 239, 103 N. W. 116, 4 Ann. Cas. 893. A sale by the mortgagee, of the mortgaged property, before foreclosure, has been held to be an act of conversion for which he is liable in trover to the mortgagor: *Mathews v. Fisk*, 64 Me. 101; *Spaulding v. Barnes*, 4 Gray, 330. A refusal on the part of the mortgagor to relinquish possession of the mortgaged chattels upon demand after condition broken has been held to be an act of conversion, for which he would be liable to his mortgagee: *Roach v. St. Louis Type etc. Co.*, 21 Mo. App. 118; and *St. Mary's M. Co. v. National etc. Co.*, 68 Ohio St. 535, 96 Am. St. Rep. 689, 67 N. E. 1055, 64 L. R. A. 845.

In *Axford v. Matthews*, 43 Mich. 327, 38 Am. St. Rep. 185, 5 N. W. 377, it was held that the assignees of a mortgagor, having neither possession nor right thereto, could not maintain trover.

c. **Replevin—Claim and Delivery.**—Investigation discloses the application of similar principles with reference to other forms of action. The companion action of replevin, which corresponds closely in some jurisdictions to the statutory action of claim and delivery (*Freeman v. Trummer*, 50 Or. 287, 91 Pac. 1077), may be maintained by the mortgagor, even after condition broken, against third persons, practically without limitation by reason of the mortgage, or breach of condition. Replevin is essentially a possessory action: *Roach v. Curtis*, 191 N. Y. 387, 84 N. E. 283. The present right of possession is the sole issue: *McWhirter v. Penny*, 82 Ark. 244, 101 S. W. 742; *Liver v. Mills*, 155 Cal. 459, 101 Pac. 299; *Reardon v. Higgins*, 39 Ind. App. 363, 79 N. E. 208; *Walker v. Appleman*, 44 Ind. App. 699, 90 N. E. 35; *Weber Imp. Co. v. Dunard*, 140 Mo. App. 476, 120 S. W. 608; *Robinson & Co. v. Stine*, 26 Okl. 272, 109 Pac. 238; hence, it has been said that right of possession is all that is required to support the action: *McWhirter v. Penny*, 82 Ark. 244, 101 S. W. 742; *Ely v. Williams*, 6 Cal. App. 455, 92 Pac. 393; *Richbourg v. Rose*, 53 Fla. 173, 125 Am. St. Rep. 1061, 44 South. 69, 12 Ann. Cas. 274. As to whether mere title without possession, or the right to the immediate possession, would be sufficient to maintain the action, it is believed that the same principle controls as in trover. A title which carries with it the right to the immediate possession of the chattel, whether coupled with the actual possession or not, is sufficient; and actual possession, even without supporting ownership, other than a special or qualified interest which carries with it the right to the possession as against all the world except the title owner, is sufficient: *Taylor v. Brown*, 49 Or. 423, 90 Pac. 673; and that sole ownership is not essential, as against a mere stranger, if the plaintiff has any interest whatever, however qualified, and is entitled to possession: *Swenson v. Wells*, 140 Wis. 316, 122 N. W. 724. As a rule, one having a general or a special interest, and a right to the immediate and exclusive possession may maintain the action: *Stafford v. Williams* (Del.), 76 Atl. 626; *McDonald v. Daniels*, 76 Kan. 388, 92 Pac. 51; *Indiana U. T. Co.*

v. Bick, 40 Ind. App. 451, 81 N. E. 617; **O'Brien v. Purry & Whyte**, 110 Minn. 533, 137 Am. St. Rep. 563, 127 N. W. 411; **American Metal Co. v. Dougherty**, 204 Mo. 71, 102 S. W. 538; **Moriund v. Johnson**, 140 Mo. App. 345, 124 S. W. 80; **Meeks v. Clear Jack etc. Co.**, 141 Mo. App. 648, 124 S. W. 1084; **Sullivan v. Girson**, 39 Mont. 274, 102 Pac. 320; **Boswell v. First Nat. Bank**, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661; but one having neither title nor right of possession cannot maintain it: **La Salle etc. Co. v. Coe**, 126 Ill. App. 308; **Clark v. Anderson**, 103 Me. 134, 68 Atl. 633.

d. Detinue.—As with trover and replevin, so with the almost obsolete action of detinue. Where it is an existing form of action there can be no question of the same application of principle. "A person who has a right of property in goods, and also the right of immediate possession, may support this action, although he has never had the actual possession. But if the plaintiff's interest be only in reversion, and he have not the right of immediate possession, he cannot sustain the action. One who has only a special property, as a bailee, may also support the action, where he delivered the goods to the defendant, or where they were taken out of his custody. Detinue lies wherever a specific chattel is unlawfully withheld by a wrongdoer, whether it were originally taken lawfully or unlawfully": *Perry on Common-law Pleading*, p. 57.

e. Trespass and Case.—The courts have consistently recognized the right of the mortgagor to maintain both trespass and case, even though the law day of the mortgage has passed. In **Vaughan v. Thompson**, 17 Ill. 78, it was held that a mortgagor in possession might maintain trespass against the officer who wrongfully seized the mortgaged chattel. In **Tallman v. Jones**, 13 Kan. 438, which was also a case of seizure under execution, the court said: "The mere fact that Mrs. Jones mortgaged said goods does not authorize any person except her mortgagee, or some person claiming under him, to take the property from her; and if such person other than the mortgagee, or some person claiming under him, does so take said property, he is liable for more than mere nominal damages." A stranger or mere trespasser sued in trespass by the mortgagor cannot set up the mortgage and default: **Frankenthal v. Mayer**, 54 Ill. App. 160; **Adams v. Hessian**, 11 Ind. App. 598, 39 N. E. 530; **Evans v. St. Paul H. Works**, 63 Iowa, 204, 18 N. W. 881; **Collett v. Jones**, 2 B. Mon. 19, 36 Am. Dec. 536; **Copp v. Williams**, 135 Mass. 401; **Parkhurst v. Jacobs**, 17 Mich. 302; **Vandiver v. O'Gorman**, 57 Minn. 64, 58 N. W. 831; **Weir Plow Co. v. Armentrout**, 9 Tex. Civ. App. 117, 28 S. W. 1045, 29 S. W. 405.

The particular adaptability of case as a remedy available by a mortgagor for injury to his reversionary interest or right of redemption was clearly outlined in the case of **Frankenthal v. Mayer**, 54 Ill. App. 160: "The action of case is a proper proceeding for an injury to property when the interest in it is in reversion. Such action is an appropriate remedy for a mortgagor when property has been injured while in the possession of the mortgagee: **Woodside v. Adams**, 40 N. J. L. 417; **Turrell v. Jackson**, 39 N. J. L. 329; **Jones on Chattel Mortgages**, sec. 683; **Leach v. Kimball**, 34 N. H. 568; **Russell v. Butterfield**, 21 Wend. 300; **Schalk v. Kinsley**, 42 N. J. L. 32. It is urged that after default the mortgagor has no legal estate whatever, and that the law knows no such thing as the remainder or reversion of a chattel. Doubtless this was once the rule. It is unnecessary to discuss whether

a right of reversion may or may not exist in a chattel, or whether any legal estate remains in the mortgagor after condition broken. In this action we are not called upon to consider where the legal estate in the mortgaged goods is, but, a valuable pecuniary interest in them existing in the mortgagor, the question is, Can he maintain an action upon the case against one who willfully destroys them? Actions upon the case do not depend upon the holding by the plaintiff of a legal estate in the thing, for an injury to which the action is brought: Chitty's Pleading, tit. Actions on the Case; Yates v. Joyce, 11 John. 136; Schalk v. Kingsley, 42 N. J. L. 32; Newman v. Tynieson, 3 Wis. 191."

A mortgagor's right to maintain suit for injury or destruction of the mortgaged chattel due to negligence of the defendant has never been seriously denied. The principal case, Wilkes v. Southern Ry. Co., 85 S. C. 436; ante, p. 890, 67 S. E. 292, illustrates its application, and the reasons therefor. In City of Topeka v. Tuttle, 5 Kan. 311, it was held that a mortgagor in possession might maintain action for injury to chattels, though the mortgage was past due, and was for a sum in excess of the value of the property. In Logan v. Wabash Ry. Co., 43 Mo. App. 71, it was held that possession by the mortgagor, coupled with the beneficial interest, was sufficient to enable him to maintain the action. In Huss v. Wabash Ry. Co., 84 Mo. App. 111, it was held that inasmuch as the mortgagee did not take any action, the mortgagor might do so. In Gallatin & N. Turnpike Co. v. Fry, 88 Tenn. 296, 12 S. W. 720, the mortgagor's right to maintain the action was upheld.

LOWE v. SOUTHERN RAILWAY.

[85 S. C. 363, 67 S. E. 460.]

EVIDENCE—Written Admission—Signature.—Where a plaintiff has admitted his signature to a paper, and afterward questions but does not completely withdraw his admission, the writing should be submitted to the jury with an instruction to determine upon the evidence whether he actually signed it, and the evidence of his genuine signature is admissible for comparison. (p. 907.)

EMPLOYERS' LIABILITY—Insufficient Number of Men.—Under the North Carolina statute providing that an employé of a railroad company who suffers injury by the negligence of another employé or by defects in the machinery or appliances, shall be entitled to maintain an action against the company, a member of a bridge gang injured while obeying the foreman's orders, and while the number of hands furnished is insufficient to do the work with safety, may recover from the company. Assumption of risk is not a defense. (p. 908.)

EMPLOYERS' LIABILITY—Contributory Negligence.—The North Carolina statute providing that an employé of a railroad company who suffers injury by the negligence of another employé or by defects in the machinery or appliances, may maintain an action against the company, does not render the defense of contributory negligence inapplicable to an action by an injured employé. (p. 908.)

TRIAL.—On Motion for Nonsuit or Its Counterpart, the direction of a verdict, the evidence for the plaintiff must be accepted as true and construed in the light most favorable for him. (p. 909.)

NEGLIGENCE—When a Question for Jury.—Where more than one inference may be drawn from testimony by fair-minded men, the court may submit issues of negligence with an instruction that it is the province of the jury to say whether the party whose conduct is in question has met the test rule of the prudent man. (p. 909.)

EMPLOYERS' LIABILITY.—The Youth and Inexperience of an employé should be considered in determining whether he should have declined to obey a foreman's order to handle heavy timbers, on account of the risk in so doing. (p. 910.)

EMPLOYERS' LIABILITY—Contributory Negligence of Boy. Where an inexperienced youth of nineteen years was ordered by his foreman to hand up a block of timber which it is usual for two men to handle, and the timber crushes him down to his injury, the issue of contributory negligence is properly submitted to the jury. (p. 910.)

EMPLOYERS' LIABILITY—Obeying Dangerous Orders.—An instruction is erroneous which in effect authorizes the jury to acquit an employé of contributory negligence, even though they should conclude that in obedience to an order of his superior he exposed himself to a danger so obvious that no reasonably prudent man would have done it. (p. 911.)

EMPLOYERS' LIABILITY—Obeying Dangerous Orders.—If there is ground for reasonable difference of opinion as to the danger, an employé is not bound to set up his judgment against that of his superior whose orders he is required to obey, and he may rely on the judgment of his superior, but he cannot recklessly or carelessly obey orders requiring him to do an obviously dangerous act. (p. 911.)

Sanders & De Pass, for the appellant.

Blackwood & Harmon and Wilson & Osborne, contra.

³⁶⁴ **JONES, C. J.** On May 6, 1907, while in the employment of the defendant company and engaged in doing carpenter work with a bridge force in repairing a chute for supplying coal to the Cannon Manufacturing Company, at Concord, North Carolina, plaintiff was directed by the defendant's foreman to hand up a piece of timber to a man on the chute.

The complaint alleged that while carrying out the orders of his superior he fell under the weight of the timber, the same breaking his left arm and otherwise bruising and injuring him. It was alleged that the injury was the result of ³⁶⁵ defendant's negligence, "(1) in ordering plaintiff, a lad, young and inexperienced, alone and unaided, to handle such heavy timber, weighing more than one hundred and fifty pounds; (2) in not furnishing a safe and suitable place to work, the ground where he was being rough and rugged and impeded with obstacles dangerous to the safety of plaintiff working and bearing a load as he was; (3) in failing to furnish suitable and sufficient help to aid in carrying out the orders of his superiors; (4) in ordering plaintiff, a youth inexperienced, to do that which the captain knew or ought to have known would be attended with great danger, and without instructing him concerning the same."

Besides a general denial defendant plead assumption of risk and contributory negligence.

The jury rendered a verdict for plaintiff for five hundred dollars.

Appellant's first exception alleges error in excluding an alleged written statement by the plaintiff purporting to be as follows:

"Statement of L. E. Lowe, Injured at Concord, N. C.,
May 7, 1907.

"Between ten and eleven o'clock on May 7th, I went to hand Elbert Shippey, colored, a block at coal trestle of Cannon Mfg. Co., when my foot slipped, causing me to fall backward on my left arm, breaking both bones.

(Signed) L. E. LOWE.

"J. H. KINARD,
"Witness."

Plaintiff had testified that he was ordered to hand up a piece of timber eight by six inches square and four and one-half feet long and weighing about one hundred and fifty pounds, that his foot did not slip, but that the timber was too heavy for him, and that he first set the timber on its end, then threw it up on his shoulder and while straightening up fell under the weight of the timber.

On cross-examination of plaintiff the defendant sought to prove the execution of the above paper. This occurred:

"Q. You can read, can't you? A. Yes, sir.

"Q. Is this your signature; did you write that? A. Yes, sir.

"Q. You signed that paper, didn't you? A. I don't know whether I signed that paper or not.

"Q. Is that your signature? A. I don't think so.

"Q. Just now you said it was. A. I never have signed anything like that; I never have had my pen on that; they sent a release to me at Fair Forest, but I never signed it.

"Q. This is not a release. A. If I signed it I don't know it.

"Q. Will you kindly write your name right there? (Witness complies.)"

Paper marked Exhibit "A," for identification.

When this witness was recalled, the following occurred:

"Q. I showed you this paper a little while ago; do you still say you did not sign it? A. No, sir, I don't think I did; if I did I don't remember it.

"Mr. Sanders.—We offer this in evidence.

"Mr. Wilson.—We object. We do not think you can offer that in evidence when the witness does not admit it.

“The Court.—I don’t think you can introduce it.”

The plaintiff having admitted his signature to the paper, it should have been submitted to the jury, with instruction to determine upon the evidence whether plaintiff actually signed it. His testimony, given after his admission, did not amount to a complete withdrawal of his admission, but at most left the matter in doubt as to whether he signed it or not. In this situation it was permissible also for the defendant to introduce in evidence the genuine signature of the plaintiff for comparison with the alleged signature: *Benedict v. Flanigan*, 18 S. C. 506, 44 Am. Rep. 583. The testimony was material and its exclusion harmful. It is true there was oral testimony by one or two witnesses for defendant that plaintiff stated to them that he slipped and fell, but plaintiff’s own statement in writing as to how the injury occurred, if he signed the writing voluntarily, would have ⁸⁰⁷ greater probative force, as against a different statement by plaintiff on the trial.

The defendant made a motion for direction of verdict in its favor on the grounds: (1) That the contract of employment was made in South Carolina and contemplated employment in South Carolina, and therefore the relative rights of plaintiff and defendant were controlled by the law of South Carolina and not by the law of North Carolina, where the injury occurred; (2) because the evidence showed conclusively that plaintiff contributed to his injury by his own negligence; (3) because the evidence showed conclusively that plaintiff assumed the risks. In this connection we may notice the fifth exception, which assigns error in withdrawing the defense of assumption of risk from the jury.

Upon the argument appellant abandoned the question whether this case should be tried under the law of North Carolina or South Carolina, and concedes that it should be tried under the law of North Carolina.

The statute of North Carolina, act of February 23, 1897, alleged in the complaint and admitted, provides:

“Sec. 1. That any servant or employé of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant, or employé, who shall have suffered death, in the course of his service or employment with said company, by the negligence, carelessness or incompetency of any other servant, employé or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against the company.

“Sec. 2. That any contract or agreement, expressed or implied, made by any employé of said company to waive the benefit of the aforesaid section, shall be null and void.”

The decision of the supreme court of North Carolina, construing this statute, hold that it applies to "employés, in some department of its work, of a railroad which is being ³⁶⁸ operated": *Nicholson v. Transylvania R. Co.*, 138 N. C. 516, 51 S. E. 40; *Sigman v. Southern R. R.*, 135 N. C. 181, 47 S. E. 421; *Mott v. Southern R. R.*, 131 N. C. 234, 42 S. E. 601. As the injury in this case occurred to an employé of a railroad company while repairing a trestle or coal-chute upon which the railroad was operated in the conduct of its business, the case falls within the statute, unless otherwise excluded by its terms. It is claimed in this case that the injury occurred by the negligence of an agent of the company, directing the services of plaintiff. The exceptions do not contest the claim that the foreman or captain directing the work was negligent in giving the order, in the attempt to comply with which plaintiff sustained his injury.

This would bring the case within the statute without determining whether the terms, "defect in the machinery, ways or appliances of the company," would include an insufficiency of human instrumentalities to perform the work with reasonable safety.

We have not been cited to any decision of the supreme court of North Carolina construing the statute in this regard, but by the decisions of this court the terms of the statute would be regarded broad enough to cover the failure to supply a force of hands sufficient to do the work required with reasonable safety: *Bodie v. Charleston & W. C. R. R. Co.*, 61 S. C. 468, 39 S. E. 715; *Hicks v. Southern Ry.*, 63 S. C. 559, 41 S. E. 753; *Hyland v. Southern etc. Tel. Co.*, 70 S. C. 315, 49 S. E. 879. Moreover, the alleged negligent order of the foreman and the alleged insufficient force of hands are so interlaced in this case as to be inseparable. Hence, we conclude the case falls within the statute. This being so, under the construction given the statute by the courts of North Carolina, assumption of risk is not available to defendant as a defense: *Coley v. North Carolina R. R. Co.*, 128 N. C. 252, 39 S. E. 43, 57 L. R. A. 817; same case on rehearing, 129 N. C. 407, 40 S. E. 195; *Mott v. Southern R. R.*, 131 N. C. 234, 42 S. E. 601, and other cases that might be cited.

³⁶⁹ There was no error, therefore, in the refusal to grant nonsuit on the ground of assumption of risk and in the charge withdrawing such defense from the jury.

The statute, however, does not render the defense of contributory negligence inapplicable: *Coley v. North Carolina R. R.*, 128 N. C. 252, 39 S. E. 43, 57 L. R. A. 817; also, 129 N. C. 407, 40 S. E. 195.

It therefore remains to consider whether verdict for defendant should have been directed on this ground. The

rule in North Carolina, the same as in this state, is "that on a motion for nonsuit or its counterpart, the direction of a verdict, the evidence for the plaintiff must be accepted as true and construed in the light most favorable for him": *Hopkins v. Norfolk & S. R. R. Co.*, 131 N. C. 463, 42 S. E. 902; *Biles v. Seaboard A. L. R. Co.*, 139 N. C. 528, 52 S. E. 130. "Where more than one inference may be drawn from the testimony by fair-minded men as to the controverted question . . . the court may submit issues of negligence with instruction that it is the province of the jury to say whether the party whose conduct is in question has met the test rule of the prudent man": *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387, 26 S. E. 23.

"When the facts are known and only one inference can be drawn from them, negligence is a question for the court": *Foy v. City of Winston*, 135 N. C. 439, 47 S. E. 466.

Applying these rules, we cannot say the circuit court committed error in submitting the case to the jury, although the case is one lying very close to the dividing line. The testimony of the plaintiff tended to show that he was nearly nineteen years old at the time of the injury, that he weighed one hundred and twenty pounds and was stout for his size, that the piece of timber he was ordered to hand up was eight by six inches square and four and one-half feet long and weighed about one hundred and fifty pounds, that the chute was about eight feet above the ground where he took up the timber, that he had been in the employment of the defendant company for four or six weeks, that he had not done that kind of work ³⁷⁰ before, that the bridge force, which was ordinarily thirteen men, was reduced to three at the time of the injury, that it was usual for two men to hand up such blocks and that he was attempting to do the work of two men, that he felt it to be his duty to try to obey the order of his superior, that he had been employed to work by this same superior, that after getting the timber to his shoulder and while attempting to straighten up he was crushed down by its weight.

When asked why he did not throw it off when he felt it was so heavy, he answered that he was obeying orders. The foreman, Kinard, testified that plaintiff had carried several of these blocks before he got hurt, while the plaintiff testified that he had not done such work before, but possibly plaintiff meant that he had not done such work before that day. While the handling of these blocks was a simple operation involving strength rather than skill, the weight of this particular block, as compared with plaintiff's strength, was possibly not made manifest to him until he had it upon his shoulder. Perhaps he had taxed his strength

in his previous work more than he thought, or perhaps he overestimated his strength to carry up the particular block. The youth and inexperience of plaintiff were factors to be considered; especially in determining whether he should have declined to carry out the order of the foreman, who had employed him. On the whole, we think the issue was properly submitted to the jury.

The remaining exception is to the following charge to the jury: "Now, I charge you that when a man is directed to perform an order, to carry out an order in the performance of his work, and is directed to carry it out by a superior officer, or one who has direction and control over him, and it is such an order as is obviously and apparently dangerous to do, and that a reasonably prudent man would not have done it, why then it would be for the jury to say whether or not it would be carelessness on his part to obey the order. Of course, ordinarily an employé must⁸⁷¹ obey the orders of his superior, but where it appears that he himself knows that to undertake an order, to carry it out is a dangerous thing to do, obviously dangerous, that is plainly dangerous, and nevertheless goes on and does it, why then the question will be whether or not you will acquit him of negligence for having carried out that order. Of course, employés, as a rule, ought not to refuse to perform orders which come from their employers, the failure to perform which might result in disaster, but where the employé has knowledge and does know that the thing was dangerous, and likely to result in injury to him, and goes and does it, then you would have to say whether or not you will fix that on him as negligence. If you do, and if you find that the negligence on his part contributed to his injury as a proximate cause, even though you find that the giving of the order was negligent, you cannot give him damages in the case; you would have to find what is known as contributory negligence on his part and throw out the case."

The specifications of error are involved in the following: "That his honor in so charging submitted to the jury a question of law and instructed the jury in substance that when a servant is directed by a superior officer to perform a piece of work, and that such work is obviously and apparently dangerous, and such as a reasonable man would not undertake, that then it is for the jury to say whether or not it would be carelessness on his part to obey the order, instead of instructing that it was not the duty of a man to obey an order requiring him to perform a piece of work that was obviously and apparently dangerous, and that if a man did undertake, in obedience to the order, without any emergency being upon him, and without any duress

or coercion, to perform a piece of work which was obviously and apparently dangerous, and such as a reasonable and prudent man would not perform, that then he would be guilty of contributory negligence."

We think the charge was erroneous. Its effect was to authorize the jury to acquit plaintiff of contributory negligence, ³⁷² even though they should conclude that in obedience to an order of his superior he exposed himself to a danger so obvious that no reasonably prudent man would have done it.

In 26 Cyc. 1245, it is stated: "Where a young or inexperienced servant undertakes dangerous work in obedience to the commands or threats of the master or his authorized agent, he will not be held guilty of contributory negligence, unless the danger was so manifest and glaring that it must have been known to one of his age and experience that he could not do it without injury."

At page 1241, the same author says: "Where a danger is as open and obvious to the servant as to the master, or where the servant has better means of knowledge than the master, he will be charged with such negligence as to bar a recovery." If there is ground for reasonable difference of opinion as to the danger, the servant is not bound to set up his judgment against that of his superiors whose orders he is required to obey, and he may rely on the judgment of the superior, but the servant cannot recklessly or carelessly obey an order of his superior requiring him to do an obviously dangerous act: *Stephens v. Southern Ry.*, 82 S. C. 542, 64 S. E. 601.

Such is the rule which prevails generally, and we do not understand that the rule in North Carolina is different. The law in that state is thus expressed in *Mason v. Richmond etc. R. Co.*, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845. "If the servant acts upon a well-grounded fear of losing his place, the reason of the rule would be met and he should be declared free from culpability, *unless the plaintiff recklessly exposed himself to manifest peril*, or chose to subject himself to danger when another safe mode of discharging his duty was open to him." (Italics ours.)

The judgment of the circuit court is reversed and the case remanded for a new trial.

Mr. Justice Gary dissents.

The Right of an Employé to Recover for Injuries Received in Obeying Orders which involve him in danger is discussed in the note to *Houston etc. Ry. v. De Walt*, 97 Am. St. Rep. 896. As a rule, employés acting under the immediate orders of their superior have a right to rely upon his judgment, unless the work is so manifestly dangerous that a person of ordinary prudence would not undertake it: *Pittsburg etc. Ry. Co. v. Schaub*, 136 Ky. 652, 136 Am. St. Rep. 273.

PARKER v. MAYES.

[85 S. C. 419, 67 S. E. 559.]

JOINT NOTE.—Parol Evidence is not Admissible in favor of a joint and several maker of a note to show an understanding at the time he signed it that he was to be liable for only one-half the amount thereof. (p. 913.)

RELEASE.—Payment of Less Than Sum Due.—A Joint and Several maker of a note cannot show, in an action thereon, that when demand was made on him he denied liability except for one-half the amount, whereupon the holder agreed to release him from all liability on his paying one-half of the note. (p. 913.)

RELEASE.—The Payment of a Smaller Sum Than a Liquidated debt in pursuance of an agreement, not under seal, to accept such sum in satisfaction, cannot be satisfaction of the whole, but operates only as payment pro tanto. (p. 913.)

PLEADING.—A Motion to Amend an Answer is Addressed to the discretion of the trial judge, and his action is not subject to review unless there has been an abuse of discretion. (p. 914.)

PLEADING.—Showing Payments Under General Denial.—Where the complaint in an action on a note alleges credits and that there is a specified balance due, the defendant may show other payments under a general denial. (p. 914.)

Eugene W. Able, for the appellant.

Lyles & McMahan, contra.

420 JONES, C. J. This is a suit upon a promissory note dated February 29, 1904, signed by the defendants, who jointly and severally promised to pay to the order of S. C. Cook twelve hundred dollars sixty days after date. Cook indorsed and delivered the note to S. M. French before maturity, but, as matter of fact, the note was taken for property belonging to French and sold by Cook as his agent, and French was real owner of the note when it was executed. French became bankrupt, and plaintiff became owner and possessor of the note as trustee in bankruptcy. The defendant, Anderson, was not served, and judgment was not demanded against him.

Upon the trial, Judge Dantzler directed a verdict against defendant, Mayes, for eight hundred and forty-seven dollars and thirty-eight cents.

Upon a previous motion Judge Shipp made order striking out from defendant's answer after the word "herein" on second line down to and including "payment" on last line of the following, which constitutes the second defense.

"1. That he admits that he signed the note, as set out in the complaint herein, but alleges that it was understood and agreed by all parties at the time that he signed it that he was liable for one-half thereof only, and that this defendant is informed and believes and alleges that S. M. French, the

party to whom the note was transferred by S. C. Cook, was advised of and fully knew all these facts when he acquired the aforesaid note.

"2. That when the said S. M. French caused the said note to be presented to this defendant for payment, this defendant denied liability for any amount of the said note save and except one-half thereof, and advised the aforesaid S. M. French that he would resist payment, if necessary, by litigation; whereupon, said French agreed with this ⁴²¹ defendant that if he would pay the one-half thereof, said amount would be accepted in full of all this defendants' liability thereon, and he would be released from all further liability thereon; whereupon, and in consideration of this agreement and understanding between the defendant and the said S. M. French, this defendant paid to the order of the said S. M. French one-half of the said note. That the said amount was accepted with this understanding, and with a memorandum of the same made on the check that this defendant gave in payment."

In appealing from the judgment on verdict, appellant assigns error to the order of Judge Shipp.

Even if we should waive the point that appellant should have appealed from the order of Judge Shipp, there was no error. The allegation as to the contemporaneous agreement was in conflict with the well-established and salutary rule which forbids parol testimony to vary or contradict the terms of a written instrument. The note was both joint and several, "We or either of us promise to pay," and the alleged agreement was to the contrary. Parol evidence of contemporaneous, collateral or independent agreement is only admissible when it does not vary or contradict the writing: *Virginia-Carolina Chemical Co. v. Moore*, 61 S. C. 166, 39 S. E. 346; *Ashe v. Carolina & N. W. R. R. Co.*, 65 S. C. 134, 43 S. E. 393; *Earle v. Owings*, 72 S. C. 362, 51 S. E. 980; *Clarke v. Home F. L. Ins. Co.*, 79 S. C. 494, 61 S. E. 80.

The subsequent agreement alleged could not avail defendant. As declared in *Ex parte Ziegler*, 83 S. C. 78, 64 S. E. 513, 916, 21 L. R. A., N. S., 1005, the rule derived from *Pinnel's Case*, Coke, 117, is enforced in this state. "The payment of a sum smaller than a liquidated debt in pursuance of an agreement, not under seal, to accept such sum in satisfaction cannot be satisfaction of the whole. Such payment, notwithstanding the agreement, operates only as a payment pro tanto."

After this, and before trial, motion was made before Judge Dantzler to amend the answer so as to allege that ⁴²² defendant "has paid in full all his liability on the note

described in the complaint, and that he is fully discharged from all further liability or responsibility on account of the said note by reason of said payment," which motion was refused, and exception is now taken to such refusal.

"Such motions are addressed to the discretion of the circuit judge, and his action is not subject to review by this court unless there has been an abuse of discretion": *Clerks' B. Union v. Knights, etc.*, 70 S. C. 548, 50 S. E. 206.

We see no abuse of discretion in this case.

There is nothing in the record to show that it was made to appear to the court that the amendment sought to plead payment otherwise than as attempted in the matter previously stricken out. Moreover, since the complaint alleged credits and that there was a specified balance due, defendant could have shown other payments under the general denial.

The foregoing conclusions control the remaining exceptions to the exclusion of testimony, for the excluded testimony merely related to the alleged defense stricken out by the order of Judge Shipp.

The exceptions are overruled and the judgment of the circuit court is affirmed.

The Acceptance of Part of a Debt or Claim as a Satisfaction of the Whole is discussed in the note to *Harris v. Henderson*, 100 Am. St. Rep. 409. Where a claim is disputed and unliquidated, the acceptance of part in settlement thereof is a satisfaction of the demand, and a release in full given upon the settlement is conclusive: *Harvey v. Denver etc. R. R. Co.*, 44 Colo. 258, 130 Am. St. Rep. 120. See, also, *Canadian Fish Co. v. McShane*, 80 Neb. 551, 127 Am. St. Rep. 791, and cases cited in the cross-reference note thereto.

Parol Evidence of Conditions in Notes and bills is the subject of a note to *Hughes v. Crooker*, 129 Am. St. Rep. 609.

Subsequent Parol Agreements to Vary Writings are discussed in the note to *Harris v. Murphy*, 56 Am. St. Rep. 659.

BROWN v. WESTERN UNION TELEGRAPH COMPANY.

[85 S. C. 495, 67 S. E. 146.]

CONTRACTS.—The Law of the State Where a Contract to transmit a telegraphic message is made, and is to be performed, either in whole or in part, governs as to its nature, validity and interpretation. (p. 918.)

TELEGRAPH COMPANY.—Where a Telegraph Company Neglects to transmit a message promptly, the failure to convey the information from the sender to the addressee, and not the wrongful act of an agent at any particular point prior to the delivery, constitutes the delict. (p. 918.)

TELEGRAPH COMPANY.—A Telegram is in Transit not only while it is being sent over the wires, but during the time it is in

the hands of a messenger for delivery after it reaches the place where the addressee resides. (p. 918.)

TELEGRAPH COMPANY—Mental Anguish—Conflict of Laws. A telegraph company undertaking to transmit a message from a point in South Carolina to a place in the District of Columbia is liable in South Carolina for mental anguish for failure to deliver promptly at the destination, although the law in the District of Columbia does not permit such a recovery except accompanied by bodily injury. (pp. 915, 918.)

TELEGRAPH COMPANY—Conflict of Laws.—It is Against Public Policy to require the plaintiff, in an action against a telegraph company for negligence in the transmission of an interstate message, to prove at what point on the line the failure occurred, or to permit the defendant to show that the message was delayed at some specific place, thus making the plaintiff's right of recovery dependent upon the laws of that place. (p. 918.)

TELEGRAPH COMPANY—Reckless Disregard of Rights.—A telegraph company is liable in exemplary damages for a reckless or willful disregard of the rights of a party to a telegram in failing to deliver it at the destination without the state. (p. 920.)

TELEGRAPH COMPANY—Mental Anguish—Conflict of Laws. Where a telegraph company delays the transmission and delivery of a message sent from a point in South Carolina to a place without the state, and part of the delay takes place within the state, the company is liable for mental anguish under the law of that state. (p. 920.)

Logan & Grace, for the appellants.

Geo. H. Fearons and Mitchell & Smith, contra.

⁴⁹⁶ **GARY, J.** This is an action for damages, alleged to have been sustained by the plaintiff, Rosa Brown, through the wrongful acts of the defendant in failing to deliver the following telegram: "Summerville, S. C., January 22, 1908. Mrs. W. M. Brown, No. 72 Canal St., S. W., Washington, D. C. Come at once. Your sister died this morning. Frederika Alston." The appeal is from the charge of his honor, the presiding judge, directing the jury to render a verdict in favor of the defendant.

The complaint alleges that there was not only a failure to deliver the message within a reasonable time, but that it was not delivered at all. The defendant sets up as a defense "that, if there was any delay in the transmission of the said message, and damage caused thereby to the plaintiff, said delay occurred at Washington, in the District of Columbia, and outside the state of South Carolina, in which district the law prevails which does not permit a recovery for mental anguish, unaccompanied by bodily injury." The act of 1901 (page 748) provides: "That all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury, for negligence in receiving, transmitting or delivering messages."

⁴⁹⁷ The issue presented by the defense set up in the defendant's answer is similar to the question determined in the case of *Walker v. Western Union Tel. Co.*, 75 S. C. 512, 56 S. E. 38. In that case a telegram, which was sent from South Carolina to a father in Louisiana, informing him that his child was desperately ill, was received in such an altered condition as to mislead the father, who brought an action in South Carolina for mental anguish. The jury rendered a verdict in his favor, and the telegraph company appealed, one of the exceptions being as follows: "Because his honor refused to direct a verdict, on the ground that the testimony showed that the cause of action did not arise in the state of South Carolina, and in holding: 'I shall leave it to the jury to say what point along the route, if any, it was changed and the words entered here, into the words in which it was delivered yonder'—whereas, his honor should have held, as a matter of law, that the cause of action did not arise in South Carolina, because the uncontradicted testimony showed that the message was transmitted correctly from Edgefield to the relay office in Augusta, Georgia, and from Augusta to Atlanta, Georgia. This fact being uncontradicted, it was error to submit the question to the jury." In disposing of this exception the court used the following language: "This question is a serious one. To answer that this tort of the defendant is to be so construed as to locate the duty of delivery to take place alone at New Orleans, Louisiana, would necessarily destroy plaintiff's right of action. It would virtually hold that it was the plaintiff's duty to be able to locate the spot at which the disaster to the telegram occurred. Such cannot be the law. The defendant relies upon the cases of *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. Rep. 934, 40 L. ed. 1105, and *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. Rep. 1126, 30 L. ed. 1187, to support the doctrine that the South Carolina statute cannot be made effectual beyond the limits of this state, in regard to transmission and delivery of telegrams sent from this state to be delivered in ⁴⁹⁸ Louisiana; but, as has been held, a contract made in Iowa for transmission of a telegram from a place in that state to a place in Missouri is governed by the law of Iowa, making the proprietor of the telegraph company liable for all mistakes in transmission: *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904, 34 L. R. A. 492, the court saying: 'The contract was made in Iowa, and according to its terms it was to be partially performed in that state.' Does the circumstance that it was to be performed partly in Missouri exempt it from the laws of Iowa? We think most clearly not. The statute in no sense attempts to regulate interstate communication

by telegraph. It has also been held thus in the case of *Liverpool & G. W. Steam Co. v. Phenix Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469, 32 L. ed. 788, that the nature, the obligation, and interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it had some other law in view. Our own state has also held, in *Frasier v. Charleston & W. R. R. Co.*, 73 S. C. 140, 52 S. E. 964: 'That the law of a state where a contract is made and is to be performed, either in whole or in part, governs as to its nature, validity and interpretation.' "

In the case of *Balderston v. Western Union Tel. Co.*, 79 S. C. 160, 60 S. E. 435, a message was sent from Pennsylvania to the addressee at Aiken, South Carolina. The following language of the court shows that it is immaterial at what point along the line the delay may have occurred: "No act of negligence or of willfulness can be said to occur until there is a failure to put the message into the hands of the person to whom it is addressed. As was said in the case of *Western Union Tel. Co. v. Lacer*, 122 Ky. 839, 121 Am. St. Rep. 502, 93 S. W. 34, 5 L. R. A., N. S., 751, a message is a thing 'which could not be hurt, much less destroyed, in its transmission. Nothing but the failure to deliver it in due time could affect its value to the sendee. There cannot be a segregation of liability on the undertaking. It is whole, single, and susceptible of becoming ⁴⁹⁹ fixed only in the final act contemplated.' Such is the inference from our own cases of *Hellams v. Western Union Tel. Co.*, 70 S. C. 83, 49 S. E. 12, and *Harrison v. Western Union Tel. Co.*, 71 S. C. 386, 51 S. E. 119. It cannot be denied that such a doctrine is a just and reasonable one. The plaintiff cannot be expected to determine the point on defendant's line where the failure of duty occurred, nor do we think it consonant with public policy to permit the defendant to show that the message was delayed or failed at some specific point on its line, and thus make plaintiff's right to recover to depend upon the laws of that place. Such a holding would, in nearly every case, lead to much uncertainty, to say nothing of the broad field that would thus be opened to fraud. What the company contracts to do is to convey the information from the sender to the addressee, and the failure to do this constitutes the breach of duty for which it is held responsible."

In a note to *Howard v. Western Union Tel. Co.*, 7 Ann. Cas. 1065, a number of cases are cited to sustain the principle that, "where a contract is made in one state for the transmission and delivery of a telegram addressed to a person in another state, and the state wherein the contract is made allows a recovery of damages resulting solely from mental anguish, caused by an actionable breach of the con-

tract, but the laws of the state to which the message is directed precludes a recovery of damages for mental suffering, unaccompanied by physical injury, the rights and liabilities of the parties under the contract are determined by the laws of the state where the contract is made." The principle is thus stated in 1 Wharton's Conflict of Laws, 1082, 1083: "The general rule seems to be that a contract, made in one state, or country, for the transmission of a telegram from a point in that state, or country, to a point in another, is governed by the law of the state or country in which the contract is made, and from which the telegram is sent, rather than by that of the state in which it is received. By the application of this rule it has been held that a statute of the ⁵⁰⁰ state from which the telegram is sent, making telegraph companies liable for all mistakes in transmission, and for all damages resulting from a failure to perform any of the duties required by law, is applicable, notwithstanding that the telegram is to be delivered in another state. Likewise, by the application of this general rule, the rule prevailing in the state from which the telegram was sent, permitting a recovery of damages for mental anguish, has been applied, though the rule was otherwise in the state in which the telegram was delivered."

These authorities sustain the following propositions: (1) That the law of the state where the contract is made, and is to be performed, either in whole or in part, governs as to its nature, validity and interpretation. (2) That the failure of the company to convey the information from the sender to the addressee, and not the wrongful act of an agent at any particular point prior to the delivery of the message to the addressee, constitutes the delict. A message is in transit, not only while it is being sent over the wires, but during the time it is in the hands of the messenger for delivery, after it reaches the place where the addressee resides; and there is no sound reason why the company should be liable when the agent in the state from which the message has been sent, or an agent along the line, is guilty of negligence, and yet not be liable for an act of negligence on the part of the messenger to whom the telegram is handed for delivery by the agent of the terminal office. (3) That it would be against public policy to require the plaintiff to prove at what point on the defendant's line the failure occurred, or to permit the defendant to show that the message was delayed at some specific point on its line, and thus make the plaintiff's right of recovery dependent upon the laws of that place. (4) There cannot be a segregation of liability on the undertaking of the company, for the reason that it is whole and single, and by this construction the parties know, when they enter into the contract, by what law its nature, validity and inter-

pretation ⁵⁰¹ are to be governed. It is against public policy for the interpretation of a contract to be ambulatory and uncertain. The presiding judge, therefore, erred, when he instructed the jury to find a verdict in favor of the defendant.

But, even if the delict took place within the District of Columbia, it does not follow that the ruling of the circuit judge was free from error. The complaint contains two causes of action—one for compensatory damages, based upon negligence, and the other for punitive damages, arising out of a reckless disregard of the plaintiff's rights. While the defendant interposed as a defense that the law prevailing in the District of Columbia does not permit a recovery for mental anguish unaccompanied by bodily injury, it does not plead that the defendant is exempt under the laws of said district from liability for malice, wantonness, or a reckless disregard of the rights of a party injured by the failure to deliver a telegram. The appellant's attorneys, however, rely upon the case of *Rosemand v. Southern Ry.*, 66 S. C. 91, 44 S. E. 574, which holds that: "In the absence of allegations, in an action arising in tort in another state, as to the rule of law applicable to the facts underlying the cause of action, the court will presume that the common law prevails in that state."

The ruling of the presiding judge in regard to punitive damages was as follows: "According to my view of this case, I think there is ample evidence to go to the jury here on the question of punitive damages. The undisputed evidence is that the telegram was received in Washington, and that the company, through one of its boys, undertook to deliver it, it being the duty of the telegraph company to deliver it to the party to whom it was sent; and the evidence shows that he not only did not deliver it to the party to whom it was sent, but he did not even find the party's residence there, in a town where it was easy to have found it, but he goes to a number that he knew was not the number, and there he delivers it, ⁵⁰² and delivers it, not to the party who was entitled to it, and not at No. 72. That is testimony upon which the jury might infer willfulness or recklessness, or a total disregard of the rights of others, but on this other question as to its being received in a reasonable time, I believe the testimony is that it got there at 2 o'clock, in ample time to have been delivered to this party in time for him to have taken the train and come here, and the evidence shows that there was no delict in the transmission; it got there in a reasonable time, and the delict occurred in that jurisdiction. They were possibly guilty of willfulness, but all that occurred outside of this jurisdiction, and under this evidence I will grant the motion. According to my judgment you cannot maintain this action here; I say the whole delict occurred in jurisdiction of Wash-

ington, District of Columbia, and I hold that you cannot maintain that action here. Therefore I direct the jury to find a verdict for the defendant." The error on the part of the presiding judge was in supposing that defendant is not liable, even at common law, for a reckless disregard of the rights of the party injured, whether the reckless conduct arose out of the failure to deliver a telegram, or to perform some other duty.

In the case of *Lewis v. Western Union Tel. Co.*, 57 S. C. 325, 35 S. E. 556, decided prior to the enactment of the statute, allowing damages for mental anguish unaccompanied by physical injury, it was held that the telegraph company was liable for punitive damages, for wantonness, willfulness, or reckless disregard of the rights of the party suffering injury. The decision was founded upon the right of recovery existing at common law.

It is true the defendant introduced testimony for the purpose of showing that punitive damages, in such cases as the present, are not recoverable unless the principal participated in the wrongful act of the agent, or expressly or impliedly authorized or ratified it. The testimony in this respect was quite lengthy; and, after carefully considering it, we cannot say that it leaves the question free from doubt as to the law ⁵⁰³ of the District of Columbia. Therefore it, at least, should have been submitted to the jury.

There is another reason why there was error in directing the jury to find a verdict in behalf of the defendant. There was testimony tending to show that there was a delay of thirty minutes at Summerville, South Carolina, in forwarding the message, thus showing that the delay in part took place in this state, where the contract was entered into between the parties, and that the case in any event comes within the rule announced in *Fail v. Western Union Tel. Co.*, 80 S. C. 207, 60 S. E. 697, 61 S. E. 258, in which it was held that for a delay of two hours in this state at the initial office, in forwarding a message to be delivered in Georgia, damages for mental anguish were recoverable, even though they could not be recovered under the laws of Georgia.

There is still another reason why there was error in directing a verdict for the defendant: There was testimony to the effect that on the 24th of January, 1908, the plaintiff received a letter telling her of the illness of her sister, and that as soon as she received the letter she immediately left for Summerville, and on her arrival heard for the first time that her sister was dead. It will thus be seen that her mental anguish, arising from the failure of the defendant to deliver the message promptly, was suffered in this state, and that in any event the delict arose here.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

Per CURLAM. After careful consideration of the petition herein, this court is satisfied that no material question of law or fact has either been overlooked or disregarded.

It is therefore ordered that the petition be dismissed and that the order heretofore granted, staying the remittitur, be revoked.

Damages Against Telegraph Companies for Mental Suffering occasioned by their negligent delay in transmitting or delivering messages are, according to the better rule, recoverable: *Shepard v. Western Union Tel. Co.*, 143 N. C. 244, 118 Am. St. Rep. 796; *Western Union Tel. Co. v. Saunders*, 164 Ala. 234, ante, p. 35; note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 301. In some states, however, a contrary doctrine prevails, and therefore the question often arises as to what law governs in the case of an interstate telegram. For recent authorities on this point, see *Western Union Tel. Co. v. Lacer*, 122 Ky. 839, 121 Am. St. Rep. 502; *Johnson v. Western Union Tel. Co.*, 144 N. C. 410, 119 Am. St. Rep. 961; *Western Union Tel. Co. v. Waller*, 96 Tex. 589, 97 Am. St. Rep. 936; *Gray v. Telegraph Co.*, 108 Tenn. 39, 91 Am. St. Rep. 706, and note on conflict of laws as to measure of damages.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

WADKINS v. STATE.

[58 Tex. Cr. 110, 124 S. W. 959.]

INDICTMENT—Election Between Counts by State.—Where an indictment charges both rape and incest, but the same act constitutes the offense in either case, the state is not required to elect between the counts. (p. 923.)

INCEST—Illegitimate Daughter.—Incest can be committed between a man and his illegitimate daughter. (p. 923.)

INCEST—Proof of Relationship of Parties.—In a prosecution of a man for incest the relationship of the parties may be shown by his statements and recognition that the woman is his illegitimate daughter. (p. 923.)

INCEST—Woman as Accomplice.—If sexual intercourse between a man and his illegitimate daughter is voluntarily entered into by her, she is his accomplice, and the jury should be in terms so instructed. (p. 925.)

INCEST—Accomplice.—An Instruction in a prosecution for incest is erroneous which permits a conviction if there is evidence tending to corroborate the prosecuting witness, who is an accomplice, and establishing the fact that the defendant committed the offense, and which fails to state that before the jury can convict on the testimony of the prosecuting witness, they must believe that it is true and shows the defendant guilty. (p. 925.)

E. J. Gibson, for the appellant.

John A. Mobley, assistant attorney general, for the state.

¹¹² **RAMSEY, J.** By indictment filed in the district court of Navarro county appellant was charged with the offense of rape committed upon one Rittie Wadkins, and in a separate count, that appellant had carnal intercourse with said Rittie Wadkins, she being then and there his daughter. Upon a trial had in said court on the twelfth day of April, 1909, appellant was convicted of the offense of incest, and his punish-

ment assessed at confinement in the penitentiary for a period of five years.

For the most part the case was well tried, and few grounds set out in appellant's motion for a new trial, or matters evidenced by bills of exception, require attention. We think the charge of the court on the subject of incest, except in so far as it relates to the matter of accomplice testimony, when taken in connection with special charge No. 3, given at the request of counsel for appellant, fairly and well presents all the issues arising under the evidence.

1. Objection was made on the trial that the court erred in not requiring the state to elect as to which count in the indictment a conviction would be sought. The refusal of the court so to do is rested on the safe ground that the transaction and occurrence with reference to which both rape and incest were charged occurred at the same time, and were one and the same transaction. It therefore follows, if the intercourse was shown, and it was by force, it would be rape. The intercourse being shown, in the absence of proof of force, or if consent were shown, and the relationship being proven, it would be incest. Under the circumstances an election was not required.

2. It seems well settled in this state that the crime of incest can be committed between a father and an illegitimate child: *Clark v. State*, 39 Tex. Cr. 179, 73 Am. St. Rep. 918, 45 S. W. 576; 2 McClain's Criminal Law, sec. 1120. It seems also to be well settled by the authorities that it is competent to introduce, as proof of such relationship, admissions and statements of the defendant: 16 Am. & Eng. Ency. of Law, p. 140; *Morgan v. State*, 11 Ala. 289; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672. It seems also to be the rule that relationship between the parties may be shown by reputation: *State v. Bullinger*, 54 Mo. 142; *Ewell v. State*, 6 Yerg. 364, 27 Am. Dec. 480; though the contrary to this view has been held in Alabama: *Elder v. State*, 123 Ala. 35, 26 South. 213. In this case testimony was introduced by the state to the effect, in substance, that when the complaining party, Rittie Wadkins, was an infant, and soon after the death of her mother, to whom she was born out of wedlock, appellant claimed her as his own child, took her into his home, and recognized and treated her as such. Some proof was introduced by the state of intimate relations between appellant and the mother of the child, rendering it probable that in fact she was his child. Recognition of her as his child was shown practically without contradiction. All this testimony was admissible in proof of the fact alleged. Its weight, of course, was a question for the jury, and like any other evidence, it was before them for their consideration; ¹¹³ nor was appellant entitled to instructions with reference to the effect

or value or insufficiency of any single and isolated part of this evidence. We think none of the questions raised on the appeal, therefore, will entitle appellant to a reversal of the case except the charge of the court on the subject of accomplice testimony.

3. On accomplice testimony the court thus instructed the jury:

"A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense. The accomplice, as the word is here used, means anyone connected with the crime committed either as principal offender, as an accomplice, as an accessory, or otherwise. It includes all persons who are connected with the crime by an unlawful act or omission on their part, conspiring either before, at the time, or after the commission of the offense.

"Now, if you are satisfied from the evidence that the witness, Rittie Wadkins, was an accomplice to the act of carnal knowledge, or you have a reasonable doubt as to whether she was or was not an accomplice, as that term is defined in the foregoing instructions, then you are further instructed that you cannot find the defendant guilty upon her testimony alone unless you are satisfied that the same has been corroborated by other evidence tending to establish that the defendant did in fact commit the offense."

This instruction was excepted to at the time by proper bill, and was also made a ground of the motion for new trial, and its accuracy questioned for the following reasons:

1. Because said charge was upon the weight of the evidence, and, in effect, instructed the jury to find the defendant guilty if the testimony of the prosecutrix, Rittie Wadkins, was corroborated by other evidence tending to establish that the defendant committed the offense.

2. Because said charge only defined an accomplice in the abstract, whereas, under the facts of the case, the court should have told the jury in express words that, if there was an offense committed, Rittie Wadkins was an accomplice.

3. Because the court, in said charge, assumed that a carnal act was committed between prosecutrix and the defendant.

4. Because said charge left it to the jury to determine whether or not the prosecutrix, Rittie Wadkins, was an accomplice, when, as a matter of fact, the evidence left no room for any other conclusion.

5. Because the charge of the court, as given, failed to instruct the jury that they could not convict on the testimony of the prosecutrix, Rittie Wadkins, although they believed

she told the truth, and that the testimony made out a case against the defendant, unless there was other evidence besides her testimony that connected the defendant with the offense, which was believed by the jury to be true.

6. Because said charge of the court should have gone further and ¹¹⁴ charged on the character of corroboration required, viz., not only the commission of the act of carnal intercourse, but proof of defendant's paternity.

We think the charge of the court is inaptly expressed, and is inaccurate in several particulars. In the first place, it is undeniably true that if the intercourse, as the verdict affirms, was voluntarily entered into by Rittie Wadkins, she was in law an accomplice, and the jury should in terms have been so instructed. The charge was also erroneous because it permitted a conviction if there was other evidence tending to corroborate Rittie Wadkins, and establishing the fact that appellant had committed the offense, and was further inaccurate in that it failed to instruct the jury that before they could convict on the testimony of the prosecuting witness, Rittie Wadkins, they must believe that her testimony was true, and that it showed that appellant was guilty of the offense charged. The inaccuracy of this charge has been pointed out in very many cases by this court, notably in the cases of *Oates v. State*, 50 Tex. Cr. 39, 95 S. W. 105, and *Fruger v. State*, 56 Tex. Cr. 393, 120 S. W. 197; *Bell v. State*, 39 Tex. Cr. 677, 47 S. W. 1010; *Jones v. State*, 44 Tex. Cr. 557, 72 S. W. 845; *Garlas v. State*, 48 Tex. Cr. 449, 88 S. W. 345; *Hart v. State*, 47 Tex. Cr. 156, 82 S. W. 652; *Crenshaw v. State*, 48 Tex. Cr. 77, 85 S. W. 1147; *Washington v. State*, 47 Tex. Cr. 131, 82 S. W. 653; *Barton v. State*, 49 Tex. Cr. 121, 90 S. W. 877; *Dixon v. State* (Tex. App.), 90 S. W. 878; *Morawitz v. State*, 49 Tex. Cr. 366, 91 S. W. 227; *Reagan v. State*, 49 Tex. Cr. 443, 93 S. W. 733; *Oates v. State*, 48 Tex. Cr. 131, 86 S. W. 769; *Barrett v. State*, 55 Tex. Cr. 182, 115 S. W. 1187; *Newman v. State*, 55 Tex. Cr. 273, 116 S. W. 577; *Tate v. State*, 55 Tex. Cr. 397, 116 S. W. 604.

We have recently in the cases of *King v. State*, 57 Tex. Cr. 363, 123 S. W. 135, and *Brown v. State*, 57 Tex. Cr. 570, 124 S. W. 101, commended and approved certain charges on the law of accomplice testimony, and in the more recent case of *Campbell v. State*, 57 Tex. Cr. 301, 123 S. W. 583, we set out in *haec verba* an approved charge on this subject with a view of furnishing trial courts with an accurate instruction on this question.

For the error pointed out, the judgment of conviction is set aside and the cause remanded for another trial.

Reversed and remanded.

McCord, J., not sitting.

That the Crime of Incest may be Committed by a Father With His Illegitimate Daughter, see the note to *Tagert v. State*, 111 Am. St. Rep. 21.

Incest—Accomplice Testimony.—A woman who voluntarily yields herself to an incestuous intercourse is regarded as an accomplice with the man, and her testimony is governed by the law of accomplice testimony. But it is otherwise if she is the victim of force, threats, duress, fraud or undue influence, so that she does not join in the intercourse with the same intent that he does: See notes to *Stone v. State*, 98 Am. St. Rep. 178; *Tagert v. State*, 111 Am. St. Rep. 17.

WYATT v. STATE.

[58 Tex. Cr. 115, 124 S. W. 929.]

CRIMINAL TRIAL—Evidence on Former Trial.—The absence or inaccessibility of a witness, who is not shown to be dead or without the state, does not render admissible the evidence which he gave on a former trial. (p. 927.)

CRIMINAL TRIAL—Allusion by Counsel to Former Conviction.—For the prosecuting attorney to ask the defendant, "Have you not been convicted and given ten years in this case?" is reversible error, although the court promptly stops and reprimands him, and instructs the jury that the question is improper and not to be considered. (p. 927.)

ROBBERY—Assault With Violence—Variance.—Evidence in a robbery case that the accused struck his victim over the head with a revolver, using the weapon only as a bludgeon, will sustain an allegation in the indictment of robbery by means of an assault and violence. The accused cannot complain that the state should have charged robbery by means of firearms or deadly weapons. (p. 929.)

No brief for the appellant.

John A. Mobley, assistant attorney general, for the state.

¹¹⁵ DAVIDSON, P. J. This conviction was for robbery, the punishment assessed being fifteen years' confinement in the penitentiary.

The former appeal is reported in 55 Tex. Cr. 73, 114 S. W. 812. A bill of exceptions was reserved which recites matters with reference to the absence of appellant's father, and the circumstances are set forth in the bill of exceptions in regard to his absence as a predicate for offering his testimony given on a former trial. Without going into a detailed statement of these matters, the evidence in regard to the absence of the father excludes the idea that he is beyond the jurisdiction of the state. The testimony was excluded upon the ground that a sufficient predicate had not been shown that the witness was either dead or absent from the state, that is, beyond the jurisdiction of the court. There was no error in this

ruling. We have not been furnished with a brief in the case, nor are any authorities cited in support of this ¹¹⁶ alleged error. We have been unable to find any authorities which support this contention of appellant. Under no provision of our statute was this testimony admissible as a matter of law or right. Nor have we been able to find a rule of evidence which would justify its introduction. Had the father been absent from the state or dead, a very different proposition would have been presented. Provision has been made in the Code of Criminal Procedure authorizing the accused to take depositions of witnesses when beyond the jurisdiction of the state, or to introduce depositions of such witness when taken in the state before his departure from the state, but that is not the question here involved or contended for by appellant. We are here confronted with the proposition that the mere absence of a witness from court or his inaccessibility would justify appellant in asking for a reproduction of the testimony of the absent witness, although within the jurisdiction of the court and within the state. There was no error in excluding this testimony.

2. Another bill of exceptions was reserved to the action of the court in respect of impaneling the jury. This question was decided adversely to appellant in the case of *Martin v. State*, 57 Tex. Cr. 595, 124 S. W. 681, decided at the present term. It is, therefore, unnecessary to discuss that question.

3. Another bill discloses that while the assistant county attorney was cross-examining the defendant, he propounded this question: "Have you not been convicted and given ten years in this case?" The court immediately interrupted and stopped the attorney, and remarked to him: "Don't ask such questions as that. You know you have no right to ask such questions, and if you do it again the court will punish you." The court then turned to the jury and instructed them that the question was not in evidence, and that it was illegal and improper, and that they should not consider it for any purpose whatever. After this reprimand appellant's counsel objected to the question of the attorney for the state, and asked that they be allowed to take a bill of exception, and complained of the conduct of the state's counsel, etc. We are of opinion this conduct was of such a nature and character that under the statute would require this court to reverse the judgment. It is true there was no answer to the question, but it was stated in such manner that the jury did not fail to understand what was meant, and this view of it is emphasized by the statement of the court and reprimand of the attorney, and admonition to the jury not to consider it. These matters manifested the fact that it was understood by the court and counsel, and the jury, and the whole matter emphasized the fact that it was an allusion to the former con-

viction; and this bill demonstrates the further fact that it was an intentional allusion by the attorney asking the question to the former conviction. The manner and promptness of the court's interference were such as to carry convincing weight to the jury that he knew, and that the fact was that appellant had been convicted before this. True, the trial ¹¹⁷ court did his utmost to minimize the wrong done in asking the question. While not answered in terms, in the light of the entire record the jury knew the fact from the question and all that occurred as certainly and as truly as if it had been answered in the affirmative. It is unfortunate that we should, under such circumstances, be required to reverse a case. But we cannot consent to the impairment or infringement of a right which the law in express terms gives every defendant, however humble. In *Baines v. State*, 43 Tex. Cr. 490, at page 498, 66 S. W. 847, Judge Brooks, delivering the opinion of the court, used this language: "Evidently the intent and purpose of the statute was to guard appellant against the use by the state of his former conviction as evidence of his guilt, and it may be that any intentional allusion to a former conviction ought to afford ground for reversal." In that case, as in this, the infraction of article 822 of the Code of Criminal Procedure was under consideration. That article provides as follows. "The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt; nor shall it be alluded to in the argument." *Baines v. State*, 43 Tex. Cr. 490, 66 S. W. 847, lays down a correct rule, and, we think, applicable to the case at bar. This statute was provided by the legislature for the purpose indicated by its terms. If we give that statute the construction that its words would indicate or import, this conduct of the prosecuting officer was an infraction of the legislative will in regard to this question. Appellant nor his counsel were in any manner responsible for this conduct, did not provoke it, and it is evident that it was an intentional allusion for whatever advantage it might have before the jury in impressing them with the fact that on a former trial appellant had been given ten years in the penitentiary. The verdict this time was for fifteen years, and enhanced the punishment on this trial of five years over the former conviction. We, therefore, are of opinion that this judgment should be reversed: *Hatch v. State*, 8 Tex. App. 416, 34 Am. Rep. 751; *House v. State*, 9 Tex. App. 567; *Moore v. State*, 21 Tex. App. 666, 2 S. W. 887; *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108; *Richardson v. State*, 33 Tex. Cr. 518, 27 S. W. 139; *Clark v. State*, 23 Tex. App. 260, 5 S. W. 115; *Pickett v. State* (Tex. App.), 51 S. W. 375; *Hargrove v. State*, 33 Tex. Cr. 431, 26 S. W. 993; *Baines*

v. State, 43 Tex. Cr. 490, 66 S. W. 847. See, also, Hood Brown v. State, 57 Tex. Cr. 269, 122 S. W. 565, decided at present term of this court.

4. Another bill of exception presents the matter of variance. The evidence discloses that appellant struck Dixie Harrie over the head with a six-shooter at the time of the robbery. Appellant's contention is that this was a robbery with firearms, and this being true, it constituted a variance because the indictment only charged that the robbery occurred by means of an assault and violence by putting Harris in fear of his life and bodily injury. The indictment does charge the assault was made by violence. While the pistol was used in making the assault, it was used as a bludgeon only and not for the purpose of ¹¹⁸ shooting. Concede that under this state of facts the state would have been justified in charging robbery by means of deadly weapons, still we are of opinion that under the circumstances appellant cannot be heard to complain that the state did not so charge, but only prosecuted him for robbery by means of an assault and violence. An assault was committed, and violence was used by means of striking with the pistol, but the mere fact that this was done by the use of a pistol as a bludgeon would not, in our judgment, constitute a variance. The facts met and established the allegation in the indictment that this robbery was by means of an assault and violence. The pistol was not fired at the time, nor used as firearms, but was only used as a bludgeon. Subsequently to the robbery, and after appellant had separated from his victim, and had gone about a block or such matter, there was a pistol fired, but not at the assaulted party, and this was subsequent to the robbery. We are, therefore, of opinion that this contention is without merit. Discussion of the ruling refusing the continuance is pretermitted.

There was some criticisms of the charge, but we think these are without merit. In fact, we are of opinion the charge favorably presents the issues of the case for appellant.

The judgment is reversed and the cause is remanded.
Reversed and remanded.

McCord, J., not sitting.

Misconduct of Counsel other than in argument is the subject of a note to Cleveland etc. R. R. Co. v. Pritschau, 100 Am. St. Rep. 689. The former conviction of the defendant must not be alluded to in argument by counsel, where it has been set aside on appeal and a new trial granted: See the note to McDonald v. People, 9 Am. St. Rep. 567. It is improper for the county attorney in his argument to the jury to refer to the fact that the case has once before been tried and a verdict of guilty returned which has been reversed on appeal: State v. Matheson, 142 Iowa, 414, 134 Am. St. Rep. 426.

The Crime of Robbery is the subject of a note to Brown v. Commonwealth, 135 Am. St. Rep. 474.

DOUGLAS v. STATE.

[58 Tex. Cr. 122, 124 S. W. 933.]

BILL OF EXCEPTIONS.—A Qualification or Explanation of the court appended to a bill of exceptions will control the recitals in the bill in so far as it modifies them. (p. 932.)

BILL OF EXCEPTIONS—Qualification of Judge.—Where counsel accepts a bill of exceptions with the qualification of the judge indorsed thereon, and files the same, he estops himself from claiming it to be unfair and injurious to his case. (p. 932.)

BILL OF EXCEPTIONS.—The Mere Statement of a Ground of Objection in a bill of exceptions is not the certificate of the judge that the fact stated is true. (p. 932.)

DIVORCE—Collateral Attack.—Where a Woman Who has Obtained a divorce marries another man, and the record in the divorce case does not affirmatively show lack of jurisdiction, the decree cannot be assailed collaterally by the former husband so as to disqualify her to testify against him in a criminal case. (p. 933.)

JUDGMENT—Collateral Attack—Jurisdiction.—The judgment of a court of competent jurisdiction cannot be collaterally attacked, unless the record affirmatively shows lack of jurisdiction. (p. 933.)

JUDGMENT—Collateral Attack—Recital of Service.—A recital in a judgment of service of citation on the defendant involves absolute verity in a collateral proceeding. (p. 933.)

DIVORCE—Collateral Attack—Waiver of Citation.—Where the defendant in divorce signed a waiver of citation three days prior to the date of filing the suit, it must be assumed in a collateral attack on the decree, if there is nothing to negative the fact, that the waiver was filed by him or under his authority after the institution of the action. (p. 933.)

JURY—Misconduct in Criminal Case—Review.—Matters regarding the misconduct of the jury in reaching a verdict in a criminal case are particularly cognizable by the trial court, and unless the conclusion reached thereon by it on the hearing is clearly wrong and unsupported by the testimony, an appellate court will not interfere. (p. 935.)

DYING DECLARATIONS—Rule of Admissibility.—Before dying declarations can be admitted in evidence it is essential, and is a preliminary fact to be proved by the party offering them, that they were made under a sense of impending death. But it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of his mind. (p. 936.)

L. N. Frank and Robert L. Thompson, for the appellant.

John A. Mobley, assistant attorney general, for the state.

¹²³ **RAMSEY, J.** Appellant was convicted on a charge of murder in the district court of Erath county, on July 12, 1909, the jury fixing the grade of murder as murder in the second

degree and assessing his punishment at confinement in the penitentiary for a period of forty-one years.

The appeal in the case raises some very interesting and novel questions, and in view of the penalty as well as character of the questions raised in the record we shall treat the case at more length, perhaps, than the difficulty of the questions presented by the record might ordinarily seem to require. All the parties were negroes. The evidence shows that one Vina Phillips, who was the wife of deceased at the time he was killed, had for some years theretofore been the wife of appellant. The deceased, Jim Phillips, had also been married before. The record tends to show that about January 31, 1909, Vina Phillips, secured in the district court of Erath county a divorce from appellant, and that some two or three days after that the deceased, Jim Phillips, secured a divorce from his then wife, and that Jim Phillips and Vina, a short time thereafter, married and for some little time before the difficulty, with the knowledge of appellant, were living together as husband and wife and seem in good faith to have occupied that relation, and that for some considerable time appellant not only manifested no resentment or expressed any disappointment over their relations, but his attitude was one of friendliness. The testimony of the state is to the effect in substance that on the day of the homicide and late in the afternoon, while Phillips and his wife were returning from the house of one Lee Means, appellant, armed with a pistol, without excuse or provocation, shot Phillips, inflicting a mortal wound upon him, continuing to fire upon him until he had fired some four or five shots, pursued deceased into the bushes and repeatedly stabbed him with a knife, during all of which time deceased was calling for help, imploring appellant not to kill him and saying to him that he could have the woman. Appellant presents by his testimony a case ¹²⁴ of self-defense which, however, as we view the record, was neither satisfactory nor reasonable. This matter, as well as all the issues in the case, the court submitted to the jury. That this charge, neither in matters contained in it nor omitted therefrom, is not in any respect the subject of complaint is the strongest demonstration of its accuracy. There is no complaint that the court misdirected the jury in any matter, or that he failed to submit any issue to the jury raised in the evidence. All the questions presented relate to other matters which we will now examine.

1. When the witness, Vina Phillips, was sworn and her testimony was offered, appellant objected to her testifying in the case and urged that she was disqualified by law from so doing. The bill of exceptions touching this matter thereupon proceeds as follows: "Defendant by his counsel at the time objected to any and all testimony that might be given by said

witness in the case, and showed to the court that at the time of the alleged killing of deceased, Jim Phillips, said witness Vina was in law and in fact the wife of defendant, Ben Douglas, and that said witness is now in law and in fact the wife of defendant, Ben Douglas, and that therefore said witness is incompetent to testify against the defendant herein. Defendant showed to the court, on said objection, that the alleged judgment and decree of divorce between the said Vina and defendant was and is a nullity and void, and of no force or effect in law in this: That in the proceedings in which said alleged divorce judgment was granted by this court the petition of the said Vina Douglas was filed in this court on the thirty-first day of January, 1909, and that no citation was ever issued or served on the defendant therein, the said Ben Douglas, but that a waiver of citation, signed by said defendant, Ben Douglas, at least three days prior to said thirty-first day of January, 1909, was filed in said cause on said thirty-first day of January, 1909, the same being executed by the defendant at least three days before the filing of said petition and the judgment of divorce thereon, and the defendant says that no judgment of divorce could have been rendered thereon having any force or effect in law, and that same was null and void, and that, therefore, the witness Vina is incompetent in law to testify against the defendant in this case, she being his wife at this time." The bill is allowed with the following qualification: "That the court does not certify to the truth of the grounds of objection, but only that they were urged." It has been held by this court and seems to be the settled law that the qualification or explanation of the court appended to a bill of exceptions will control the recitals in the bill in so far as such explanation modifies same: *Hardy v. State*, 31 Tex. Cr. 289, 20 S. W. 561. And that where counsel accepts a bill of exceptions with the qualification of the judge indorsed thereon and files the same, he estops himself from claiming it to be unfair and injurious to his case: *Jones v. State*, 33 Tex. Cr. 7, 23 S. W. 793. It is also the settled rule of practice in this state that the mere statement of a ground of objection in the bill is not the certificate of the judge that ¹²⁵ the fact stated is true: *Fuller v. State*, 50 Tex. Cr. 14; *Bigham v. State*, 36 Tex. Cr. 453, 37 S. W. 753; *Hamlin v. State*, 39 Tex. Cr. 579, 47 S. W. 656; *McKinney v. State*, 41 Tex. Cr. 434, 55 S. W. 341; *Burt v. State*, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330, and *Benson v. State* (Tex. App.), 69 S. W. 165. It seems also to be the settled rule of law in this state that a bill of exceptions cannot be aided either by statements in reply to a motion for new trial, nor by the statement of facts: *McGlasson v. State*, 38 Tex. Cr. 351, 43 S. W. 93; *Howerton v. State* (Tex. App.), 43 S. W. 1018; *Cline v. State*, 34 Tex. Cr. 347, 30

S. W. 801; Texas & R. R. v. Gay, 88 Tex. 111, 30 S. W. 543; Buchanan v. State, 24 Tex. App. 195, 5 S. W. 847; Smith v. State, 4 Tex. App. 626; Hamlin v. State, 39 Tex. Cr. 579, 47 S. W. 656; Edens v. State, 41 Tex. Cr. 522, 55 S. W. 815; McAnally v. State (Tex. App.), 57 S. W. 832; Price v. State, (Tex. App.), 43 S. W. 96; Carter v. State, 40 Tex. Cr. 225, 47 S. W. 979, 49 S. W. 74, 619; Ogle v. State (Tex. App.), 58 S. W. 1004; Diaz v. State (Tex. App.), 53 S. W. 632; Hopkins v. State (Tex. App.), 53 S. W. 619; Brown v. State, 43 Tex. Cr. 293, 65 S. W. 529; Schweir v. State, 50 Tex. Cr. 119, 94 S. W. 1049. And further that the bill of exceptions controls even the statement of facts: Briscoe v. State, 27 Tex. App. 193, 11 S. W. 113; Ezzell v. State, 29 Tex. App. 521, 16 S. W. 782; Arcia v. State, 28 Tex. App. 198, 12 S. W. 599. However, if the matter could be considered and the objections urged as a ground of disqualification of the witness could be assumed to be true, still we think the testimony shows that the objections urged are not tenable. By the judgment of the district court of Erath county, Vina Phillips and appellant had heretofore, by decree duly entered, been divorced. She and deceased had thereafter been married and were recognized and treated by appellant and by all the world as husband and wife. This in a sense fixed their status. To declare such relations to be adulterous and that the divorce theretofore obtained void in a collateral proceeding such as this is not to be done lightly or inconsiderately, and can only be so treated if under the well-settled principles of law no other judgment or conclusion is permitted. It is the settled law of this state that the judgment of a court of competent jurisdiction cannot be collaterally attacked unless the record affirmatively shows lack of jurisdiction: Williams v. Haynes, 77 Tex. 283, 19 Am. St. Rep. 752, 13 S. W. 1029, and that a recital in a judgment of service of citation on a defendant involves absolute verity in a collateral proceeding: Finch's Heirs v. Edmonson, 9 Tex. 504; Mikeska v. Blum, 63 Tex. 44; Davis v. Robinson, 70 Tex. 394, 7 S. W. 749. Taken more strongly in favor of appellant, it appears from the matters stated in the bill that the waiver of citation was signed by him some three days prior to the date when the suit for divorce was filed. It is not made to appear when this waiver of citation was filed into court. We must and should assume that the court rendering the judgment would have made inquiry and satisfied himself that service on defendant had been obtained by the means provided by law, or that proper waiver had been made, and in the absence of anything to the contrary, where such fact is not in terms negatived, we would assume in aid of the jurisdiction ¹²⁶ of the court below that if signed three days before the filing of the suit that the waiver of citation was filed by him or under his authority

after the suit for divorce had been instituted. The cases cited by appellant are not in point. The case of *McAnelly v. Ward*, 72 Tex. 342, 12 S. W. 206, was a case where the regularity of the service was a matter of inquiry on appeal from a judgment theretofore rendered, and, of course, such being the case, the court was required to take cognizance of any irregularity in the matter of obtaining service or touching the filing of a waiver irregularly and not in accordance with the law. Nor, as we believe, does the case of *O'Neal v. Clymer*, 21 Tex. Civ. App. 386, 52 S. W. 619, support appellant's contention, but rather is an authority against him. In discussing that case, after quoting articles 1240, 1241, 1348 and 1349 of our Revised Civil Statutes, Judge Finley, speaking for the court, says: "The article last recited (article 1349) plainly prohibits the acceptance and waiver of service of citation and the agreement for judgment before the institution of the suit. This statutory prohibition rendered the agreement indorsed on the petition illegal and void, and it could not have the effect to give the court jurisdiction of the defendants in that suit. It being manifest upon the face of the judgment that the court rendering it had no jurisdiction of the defendants in the suit, the judgment was unauthorized and void, and could not be the basis of a valid execution." In this case it does not affirmatively appear from the judgment itself that same is invalid. The farthest that the proof goes is that the waiver was signed before the suit was filed. It may well be doubted whether in any case where a judgment is sought to be collaterally attacked for want of service, its invalidity may be shown by parol. This would indeed institute a dangerous doctrine.

2. The next question of importance presented as a ground for the motion is the supposed misconduct of the jury. This was based upon the allegation and claim that while the jury were deliberating upon the case, Mr. East, foreman of the jury, made in the presence and hearing of all the other jurors the following statement: "I have heard so much criticism of the juries of this county that I am getting tired of it, and think we should give him, the defendant, a stiff penalty. I have heard a great deal of criticism of the jury in the Baum case, and think that we should give this man a high penalty"; and that this was misconduct of the jury in that they were guided in making up their verdict by the popular sentiment of the community, and by referring to other cases heretofore tried in this court. It is further averred that a number of the jurors in the case were originally for a much lower penalty than that finally agreed upon, and that by reason of the argument made by Mr. East and the criticism of the verdicts of juries theretofore made in the court, and especially the criticism of the jury in the Baum case, this had the effect

to influence the jury in this case to assess a much higher penalty against the defendant than they might otherwise have done had they not been threatened with public censure¹²⁷ if they should render a lower penalty, and that the effect of this misconduct of the jury was to greatly increase the punishment of the appellant and to increase same far above what many of the jurors thought the merits of the case required. In support of this ground of appellant's motion the court heard evidence from the jurors. One of the jurors, Joe Hughes, testified in substance that during their consultation in the jury-room he heard Mr. J. C. East say that he was tired of hearing jurors criticised for their low verdicts, and that he thought we should give a higher verdict in this case on that account, and he also stated that when this remark was made the jury had agreed on the grade of murder that the appellant was guilty of, but that the jurors were divided on the amount of punishment to be assessed, ranging all the way from thirty-four years to fifty years as a penalty against the defendant. The juror states that the remarks made by Mr. East did not have any influence upon him in arriving at his verdict and fixing the amount of the penalty against appellant; that he arrived at and rendered his verdict solely upon the charge of the court. This is the strongest evidence in the record in support of the motion. A number of jurors introduced say that they heard no such remark made by Mr. East or any other person as that testified to by Hughes. Others of them in a vague way say that something was said along that line, without being able to state just what it was. Appellant introduced only three of the jurors, Hughes, Williams and Palmer. Palmer expressly denied hearing any of the remarks testified to by Hughes or the other juror. Mr. East was produced by the state, who expressly and unequivocally denied making any remark of the kind attributed to him or any remark similar thereto, and he is supported by others of the jury introduced by the state, the remainder of whom, who were not theretofore introduced, were examined on behalf of the state. We have not infrequently held that matters of this sort are particularly cognizable by the trial court and unless the conclusion reached by the court on the hearing of same is clearly wrong and unsupported by the testimony, we ought not to and cannot interfere: *Benevidas v. State*, 57 Tex. Cr. 170, 121 S. W. 1107; *Holt v. State*, 51 Tex. Cr. 15, 100 S. W. 156; *Fox v. State*, 53 Tex. Cr. 150, 109 S. W. 370; *Goodman v. State*, 49 Tex. Cr. 185, 91 S. W. 795; *Mayes v. State*, 33 Tex. Cr. 33, 24 S. W. 421; *Cockerell v. State*, 32 Tex. Cr. 585, 25 S. W. 421; *Driver v. State*, 37 Tex. Cr. 160, 38 S. W. 1020, and *Shaw v. State*, 32 Tex. Cr. 155, 22 S. W. 588. In the light of the entire record we are not prepared to say and hold that the conclusion of the court

before whom this matter was fully investigated was wrong, and we would certainly be without warrant in concluding from this distance that it was so clearly wrong as to justify us in reversing and setting aside his judgment after hearing in person the evidence.

3. During the trial the state offered and was permitted to read in evidence a written statement made by deceased touching the circumstance of the assault upon him. This was offered as a dying declaration. ¹²⁸ Its admission was strenuously objected to and this objection was based upon the ground therein stated that said written statement was not properly or sufficiently verified as the dying statement of said deceased. The court approves this bill of exceptions with this explanation: "Drs. Keith and McGaughey both testified on the predicate that they had told deceased he could not live. That he had bled profusely, and he stated that he was going to die. They also testified as to the nature of the wounds, deceased's throat being cut, and as to the shot wounds." It is also shown, if we may look to the statement of facts, that the admissibility of this testimony is rendered even clearer. It shows that he was much weakened by loss of blood; that his mind was clear; that the matter of making a statement in view of his approaching death was discussed; that he was advised of the impossibility of his recovery and in the light of all these suggestions dictated the statement which, when reduced to writing, was thereafter read over to him, and with the knowledge of its contents he deliberately signed it. We had occasion in the case of *Morgan v. State*, 54 Tex. Cr. 542, 113 S. W. 934, to consider and discuss at some length the subject of dying declarations. We there stated the rule to be as follows: "The rule is universal that, before dying declarations can be admitted in evidence it is essential, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but Mr. Greenleaf says (section 158) it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." We have no doubt of the correctness of the rule there stated, and that tested by such rule that the statement was admissible as a dying declaration.

4. There are some other questions raised in the record, but they relate to matters of mere practice and other questions not of vital or important character. These we have carefully considered and have concluded there is no other error in any

of them. The matters heretofore discussed are the serious questions raised in the appeal, and in view of the lengthy opinion we pretermit a discussion of the other matters. The evidence clearly supports the verdict and in view of the full and fair submission of the issues, and that there was no improper evidence admitted against him, we believe the judgment of conviction, serious and severe as it is, ought to be and must be affirmed, which is accordingly done.

Affirmed.

McCord, J., not sitting.

Collateral Attack upon Judgments is discussed in the note to *Falls v. Wright*, 29 Am. St. Rep. 78. A judgment of a court of general jurisdiction cannot be collaterally attacked unless the record affirmatively shows want of jurisdiction: *Sodini v. Sodini*, 94 Minn. 301, 110 Am. St. Rep. 371. Every fact not negatived by the record is presumed in support of a judgment of a court of general jurisdiction: *Kalb v. German Sav. etc. Soc.*, 25 Wash. 349, 87 Am. St. Rep. 757. To the same effect, see *Burke v. Interstate Sav. etc. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416; *Gulickson v. Bodkin*, 78 Minn. 33, 79 Am. St. Rep. 352; *Crown Real Estate Co. v. Rogers' Committee*, 132 Ky. 790, 136 Am. St. Rep. 202.

The Competency of Husband or Wife to Testify for or against each other in criminal prosecutions is the subject of a note to *State v. Burt*, 106 Am. St. Rep. 763.

EX PARTE STRITTMATTER.

[58 Tex. Cr. 156, 124 S. W. 906.]

VAGRANCY—Constitutionality of Statute Defining.—A statute is constitutional which provides that all able-bodied persons who habitually loaf, loiter and idle in any city, town, railroad station, or other public place for the larger portion of their time, without any regular employment and without any visible means of support, are vagrants. (pp. 938, 939.)

Ed Haltom, for the relator.

John A. Mobley, assistant attorney general, for the state.

¹⁵⁷ RAMSEY, J. Relator was convicted in the justice court, precinct No. 1, of Bexar county, in November of last year, upon a complaint charging him with vagrancy under paragraph "d" of section 1 of the General Laws of the Thirty-first Legislature, chapter 59, page 111. Some time thereafter he presented his petition for writ of habeas corpus to Honorable Edward Dwyer, judge of the thirty-seventh judicial district, and upon hearing relator was remanded to the custody of the sheriff of Bexar county.

The sole question here presented is as to the constitutionality of paragraph "d" of the act named above. This paragraph of the act in question is claimed to be invalid: First, because in contravention of the thirteenth amendment to the federal constitution, which provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." It is also urged that the act in question is contrary to the spirit, if not the tenor, of sections 13 and 19 of the Bill of Rights. These sections are as follows: "Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All the courts shall be open, and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law." "Sec. 19. No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Said act is also claimed to be invalid in that it is uncertain, and must fail of its intent for that, as provided by article 6 of the Penal Code: "Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed, or from some other written law of the state, such penal law shall be regarded as wholly inoperative." Fourth, the act in question is claimed to be invalid in that it is against common right and reason. In support of his contention counsel for appellant has filed a learned and well-considered brief. His contentions, we think, however, are not sound, and our conclusion is that there is no such infirmity in the law as would entitle relator to his discharge.

If the power of the legislature, in the absence of constitutional mandate, could be made a matter of serious contention, the issue is placed beyond dispute by the terms of our constitution, which, in section 46 of article 3, thus provides: "The legislature shall at its first session after the adoption of this constitution enact effective vagrant laws." Much attention is directed in the brief of counsel to the common-law¹⁵⁸ definitions of vagrancy. However interesting as a mere matter of learning these views may be, it has not infrequently been held by many courts that the statutes, both in England and America, have so much and so frequently dealt with the subject of vagrancy, that the common law on the subject has become unimportant: 29 Am. & Eng. Ency. of Law, p. 568; *People v. Forbes*, 4 Park. C. C. (N. Y.) 611. That it is within the power of the legislature in this state to define, subject to certain broad limitations, what is a vagrant, can admit of no sort of doubt, and statutes which have classed prostitutes,

professional gamblers and others of that class as such have always been upheld. With the growth of the state and the congestion in our large cities where the idle, the vicious and the depraved congregate around many public places, it was essential to the peace of the state and the protection of society that some further extensions of this definition should be made. It is not to be denied that the act in question, in some of its definitions, goes very far, and we are not called on now to decide whether in their entirety these definitions are so limited and framed as to be free from criticism or condemnation by the courts. The only question we have for consideration is the validity of paragraph "d" of this section. It will be noted that by this article all able-bodied persons who habitually loaf, loiter and idle in any city, town or village or railroad station, or any other public place in this state for the larger portion of their time, without any regular employment and without any visible means of support are classed and defined as vagrants. The want of visible means of support is usually made an essential element of the offense of vagrancy, and when it is so made an ingredient of the offense it must be shown: *Welborn v. State*, 119 Ga. 429, 46 S. E. 645; *State v. Cummins*, 78 Ind. 251. - What is meant by the term able-bodied and ability to work has been the subject matter of judicial review not infrequently, but are not words, as we believe, difficult of definition or construction, nor are they so general as to invalidate the statute. The following cases illustrate and involve the construction of this term: *Price v. State*, 67 Ga. 723; *Commonwealth v. Carter*, 108 Mass. 17. In the case of *McHenry v. State*, 42 Tex. Cr. 469, 60 S. W. 880, it was in effect held that it became a question of fact under such a charge and allegation as to whether one was in fact a vagrant within contemplation of the laws and statutes of the state.

To the objection that the second sentence of the paragraph in question undertakes to establish a rule of evidence that would prevent the court from making inquiry or ascertaining whether the lack of employment was purposeful or the result of viciousness and indolence, we cannot accede. We think the true intent of this sentence is to be gathered only when read in connection, not only with the preceding sentences, but with the entire act of which it is a part. Therefore, before a conviction could be had under this section, we think it would have to appear and be shown that the person charged was able to work, and that being so able he habitually loafed, loitered and idled in the ¹⁵⁹ city, town, or village, or at a railroad station or other public place for the larger part of his time, without any regular employment and without any visible means of support. We think the terms "loiter, loaf and idle" are wholly at variance with the occasional or even

frequent presence at such public places by deserving persons who may be for the time being unemployed. It is difficult in matters of this sort by any language which the legislature could have employed to have laid down a rule so definite and precise as not to be the subject matter of criticism. In constructive legislation of this sort, along new lines, some difficulty will be found in so framing the definition as not by a strained construction, or even perhaps by a literal construction, to place improper and grievous burdens on deserving persons. We think the term "larger portion of their time," as used in this section, is not so vague as to render the law invalid when read in connection with what follows, that is to say, that one is not relieved from a charge of vagrancy who habitually loaf, loiters and idles if he is without visible means of support by the mere fact that only occasionally he has employment at odd jobs. We think, indeed, that the law is a wholesome one, well within the power of the legislature, and that none of the objections are tenable. That in its practical administration, cases of imposition or hardship may arise may be true, but under the liberal rule laid down by this court in the case of *McHenry v. State*, 42 Tex. Cr. 469, 60 S. W. 880. it is unlikely, if not in truth inconceivable, that any good and deserving man or woman should suffer punishment under this act who is not in fact guilty under its terms.

Finding no error in the proceedings of the court below, it is ordered that the judgment be and the same is hereby affirmed.

Affirmed.

VAGRANCY.

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I. Historical Sketch.

a. As Known to the Ancients.—The laws against vagrancy and regulating the punishment thereof stand from a date far anterior to that "beyond which the memory of man runneth not." It needs but little research or observation to note the revolt of the workers of the world against the drones. It is seen in another animal life besides the human. Almost any entomological work will contain the regulations of the ant kingdom; and we can therefore the more readily understand how the resentment of primeval man against primeval loafer manifested itself in both precept and punishment without going deeply into the evolution of sociological movements; we can easily glean that in the time when might alone was right, the argumentum ad baculum was of more frequent use than the argumentum ad hominem, and that while the ancient chief possessed the power of life and limb, the wisdom begotten of ruling was illustrated in the gradual rather than the heroic treatment of first the idle, then the disorderly, and their combined product, the rogue, the vagabond in all his varieties, all under the name of vagrancy. The evidence of this is to be found in the great record of the wise sayings of our forefathers which the Holy Bible contains and which makes the Bible the beloved of the student, entirely apart from the holy interest with which piety and a reverent search for the source of the light of the world invests it. In Genesis, c. iv, we find, "A fugitive and vagabond shalt thou be in earth"; in the Psalms, 109, "Let his children be vagabonds and beg and let them seek their bread out of their desolate places"; in the Proverbs, 6, "Go to the ant thou sluggard; consider her ways and be wise"; in the Proverbs, 20, "The sluggard will not plow; therefore he shall beg in harvest." A difference will be found in the authorized and the revised versions, "vagabond" being used in the one while "wanderer" is substituted in the other. Those wise ones who recorded the thoughts of the wisest, or wrote down the first rules under divine inspiration, were merely the first exponents of the scheme of public economy which the habitation of the world demanded. As everything created was for use, so every man had his life work allotted to him, and whether the statute that his bread was to be earned by the sweat of his brow was written for a punishment to the first man mentioned in Holy Writ, whether it was written six thousand years ago or uttered sixty thousand years ago, matters little; what does matter is, that it was promulgated when it became necessary by reason of the increase of population to disseminate the determination of authority that the citizen owed a duty to the state as

well as to his God. Blackstone with his infinite research found among the many Solomon-like maxims of the Chinese—and Confucius was, among other vocations, their Solomon—that if there be a man who does not work, or a woman that is idle, in the empire, somebody must suffer cold or hunger; the produce of the lands being no more than sufficient, with culture, to maintain the inhabitants; and therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. He tells us also that the court of the Areopagus at Athens punished idleness, and exerted an inquisitorial jurisdiction over every citizen as to how he was using his time; “the intention of which was, that the Athenians, knowing that they were to give an account of their occupations, should follow only such as were laudable, and that there might be no room left for such as lived by unlawful acts.” Under the civil law all sturdy vagrants were compelled to leave the city.

b. **As Known in England.**—Under the laws of England idle persons or vagabonds, described in the old statutes as “Such as wake on the night and sleep on the day, and haunt customable taverns, and alehouses, and routs about; and no man wot from whence they come ne whither they go,” were continually the subject of what was attempted to be made an improving legislation. The laws relating to them were at length consolidated, and in 17 George II, chapter 5, they were arbitrarily divided into three main classes—idle and disorderly persons, rogues and vagabonds, and incorrigible rogues; all these were regarded as “offenders against the good order, and blemishes in the government, of any kingdom.” The punishment gives a good indication of the weight of heinousness attached to each class. Idle and disorderly persons were punishable with one month’s imprisonment in the house of correction; rogues and vagabonds with whipping and imprisonment not exceeding six months; and incorrigible rogues with the like discipline and confinement, not exceeding two years. An escape from confinement of a prisoner of either of the classes below that of incorrigible rogue made him ipso facto an incorrigible rogue; and if an incorrigible rogue broke jail, it was a felony punishable with seven years’ transportation. These laws were consolidated later by statute 5 George IV, chapter 83, and amended by 1 and 2 Victoria, chapter 38. Blackstone concludes his sketch by dealing with aiders and abettors of such offenders. “Persons harboring vagrants are liable to a fine of forty shillings, and to pay all expenses brought upon the parish thereby; in the same manner as, by our ancient laws, whoever harboured any stranger for more than two nights, was answerable to the public for any offense that such his inmate might commit, LL. Edw., c. 27, Bracton, l. 3, tr. 2, c. 10, sec. 2.”

c. **As Known in the United States.**—In *James v. Commonwealth*, 12 Serg. & R. 220, Judge Duncan in delivering the opinion of the court, which is enshrined and treasured among the archives of Pennsylvania, dealt at learned and lucid length on that class of offenses which were to be dealt with under the laws brought originally from England. The particular case referred to dealt with the legality of the cucking-stool or ducking-stool as a mode of punishment for those women who were convicted of being common scolds, and properly and humanely decided that the particular implement of degradation and torture was not the punishment for a common scold, at all events, in that state. He took the opportunity of expressing in that opinion,

which is the more valuable on that account, and which is also discovered to be the more valuable the more it is read, that our ancestors did not bring with them from England all the common-law offenses. "For instance, that of champerty and maintenance, this court decided in *Stoever v. Whitman's Lessee*, 6 Binn. 416, did not exist here. I do not find the rule on this subject more satisfactorily laid down anywhere than by the chief justice in *The Guardians of the Poor v. Greene*, 5 Binn. 554. Every country, he observed, had its common law—ours is composed partly of the common law of England, and partly of our own usages. Our ancestors, when they emigrated, took with them such of the English principles as were convenient for the situation in which they were about to place themselves. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants; until, before the Revolution, we had formed a system of our own, founded, in general, on the English constitution, but not without considerable variation; and in nothing was the variation greater than in the trial and punishment of crimes. Judge Chase, in *United States v. Worrall*, 2 Dall. 384, Fed. Cas. No. 16,766, 1 L. ed. 426, on the same subject, thus expresses himself: 'When the American colonies were first settled by our ancestors, it was held, as well among the settlers as by the judges and lawyers of England, that they brought hither, as their birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances; but each colony judged for itself what part of the common law was applicable to its new condition, and by various modes—by legislative acts, by judicial decisions, or by constant usage—adopted some parts and rejected others.'" In *United States v. Royall*, 3 Cranch C. C. 620, Fed. Cas. No. 16,202, the subject of the translation of the common-law offenses and their punishments is dealt with by Chief Judge Cranch in a precisely similar case—the punishment of the ducking-stool. From these early discussions in 1825–29, it will be apparent that our people would not be content to leave in an unsatisfactory condition laws relating to a pernicious class in the community. Lofty ideals founded on common sense, the spirit of self-improvement, the necessity for showing the old world the material the new world had produced, all combined to foster speedy and efficient legislation to cope with the circumstances which presented themselves. As Justice Ramsey well put it in *Ex parte Strittmatter*, 58 Tex. Cr. 156, ante, p. 937, 124 S. W. 906, that it was within the power of the legislature to define what vagrancy was, was beyond a doubt, and those statutes which have placed prostitutes, professional gamblers and others of those classes within the pale have always been upheld. Everyone must agree with the learned judge when he says, "With the growth of the state and the congestion in our large cities, where the idle, the vicious, and the depraved congregate around many public places, it was essential to the peace of the state and the protection of society that some further extensions of this definition should be made." As we have shown in England the offense is regulated by statute, and in the United States the watchfulness of the states, not only over the welfare of their orderly citizens but over the behavior of those black sheep which are popularly supposed to be found in every flock, the wastrels of society, the loafers, the lazy loiterers, those viciously inclined, who unless deterred would develop into criminals, has done much to repress

the offense within proper limits, and by judicious treatment in prisons and reformatories, by the salvation which lies in the health yielding, if enforced, application to honest labor, by the firm and kindly administration of the laws which are so framed for that purpose, the number of vagrants in the United States bears to its population an infinitesimal proportion. That ratio, the law will see to it, shall not be increased, but rather, with the advance of civilization and the progress of our humanitarian efforts, annually diminished. The forecast may be Utopian, but it is justified by the dearth of cases our reporters are called upon to record.

II. Definitions.

a. **Webster's Dictionary.**—Vagrancy is defined to be the quality or state of being a vagrant; a wandering without a settled home; an unsettled condition; vagabondism.

b. **At Common Law.**—Vagrancy at common law is the wandering or going about from place to place by an idle person who has no lawful visible means of support, and who subsists on charity and does not work for a living though able so to do: *In re Jordan*, 90 Mich. 3, 50 N. W. 1087 (in the course of an opinion dealing with another aspect of the case on habeas corpus). The charge on which the prosecution relied for the common-law punishment was that the prisoner had slept in a barn one night, and for eight days before that was going from place to place in the township without any visible means of support. The court rightly said that sleeping in a barn for one night and going about the township was not per se vagrancy. In *Re Way*, 41 Mich. 299, 1 N. W. 1021, it is said that vagrancy, when not defined by statute, must be considered as such vagabondage as fairly comes within the common-law meaning of the word. There must be something more than a mere going about from place to place in a neighborhood or township without visible means of support. "A vagrant is defined by Bouvier to be, in the common meaning of the statutes, 'a person who refuses to work or goes about begging.' A person may be going about in the community without any visible means of support and yet be guilty of no offense. This girl, for aught that is stated in this charge, might have been going about from place to place seeking work, with an honest intent to gain thereby a livelihood. To make such going about vagrancy, it must further appear that the person is idle, and seeking to live upon the charity of others, unwilling, although able to do so, to work for his or her maintenance": *In re Jordan*, 90 Mich. 3, 50 N. W. 1087.

c. **By Statute.**—Where the legislature has taken upon itself the regulation of vagrants by statute, the words therein must bear the interpretation thereby made or intended. In *Matter of Ways*, 41 Mich. 299, 1 N. W. 1021, it appeared that the police justice was empowered to adjudge any person confined in the station-house guilty of vagrancy, disorderly conduct, or any violation of the city ordinances relative to breaches of the peace. While the court did not feel called upon to attempt a complete definition of vagrancy, yet they said that the common council could not enlarge the term or include in it anything that was not vagrancy under the statutes. "Vagrancy is distinguished expressly from disorderly conduct generally, and from breaches of the peace. It can only reach such cases of vagabondage as come fairly within the common-law meaning of the word, which

was possibly designed to protect the public from expense quite as much as from disorder."

While it would not be practicable to give the description of those who come within the class as vagrants in every state, some of those which have come up for judicial interpretation will be found instructive. The ordinances of the city of St. Louis in relation to the police of the city contain provisions very similar to the English statute, 32 George III, chapter 17. Ordinance 2364 declares: "All able-bodied persons, who not having visible means to maintain themselves live idly, without employment; or are found loitering or rambling about, or wandering about and lodging in groceries, tippling-houses, beer-houses, outhouses, sheds or stables, or in the open air, and not giving a good account of themselves; or wandering about and begging; or going about from door to door begging; or placing themselves in the streets or other thoroughfares, or in public places to beg or receive alms; all keepers or exhibitors of any gambling-table or device; all persons who for the purpose of gaming travel about or remain on steamboats, or go from place to place; and all persons upon whom shall be found any instrument or thing used for the commission of burglary or for picking locks or pockets, and who cannot give a good account of their possession of the same, shall be deemed vagrants": *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97.

In California the Penal Code, section 647, has one of the most comprehensive of the code descriptions, and may be taken as a fair model for most of the modern definitions. It provides that—1. Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him; or 2. Every healthy beggar who solicits alms as a business; or 3. Every person who roams about from place to place without any lawful business; or 4. Every person known to be a pickpocket, thief, burglar, or confidence operator, either by his own confession, or by his having been convicted of either of such offenses, and having no visible or lawful means of support, when found loitering around any steamboat landing, railroad depot, banking institution, broker's office, place of amusement, auction-room, store, shop, or crowded thoroughfare, car, or omnibus, or at any public gathering or assembly; or 5. Every idle, or lewd, or dissolute person, or associate of known thieves; or 6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; or 7. Every person who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; or 8. Every person who lives in and about houses of ill-fame; or 9. Every person who acts as a runner or capper for attorneys in and about police courts or city prisons; or 10. Every common prostitute; or 11. Every common drunkard, is a vagrant, and is punishable by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

III. Synonyms.

The terms "tramp," "vagabond" and "vagrant" are colloquially used as synonymous, and in many legal treatises of the olden time no nice distinction is made between them. There is also to be found a differ-

ence in the authorized and the revised versions of the Bible, the old form of "vagabond" being rendered as wanderer in Genesis, c. iv: Historical Sketch, I, a, ante. Bouvier defines "tramp" as one who roams about from place to place, begging or living without labor or visible means of support; a vagrant. He defines "vagrant" as one who lives idly, without any settled home—a person who refuses to work, or goes about begging. "Vagabond" is defined as one who wanders about idly, and who has no certain dwelling.

Although these words are popularly synonymous, they are not legally so. While in some jurisdictions tramps are vagrants, in others laws have been framed specially for them, and though the constitutionality of such laws has been drawn in question, they have been established as valid. In Ohio, a statute providing that any tramp who threatens to do injury to the person or property of another shall be imprisoned in the state penitentiary was held not unconstitutional, as being arbitrary class legislation, nor as depriving persons of liberty without due process of law, nor as denying to them the legal protection of the law, nor as depriving them of the right to seek and obtain happiness and safety, nor as prescribing a cruel and unusual punishment. It was also held immune from attack as not being uniform in its operation and for providing a punishment for an offense committed in one county different from punishment for a like act in another county, inasmuch as the offense of threatening to do injury to the person or property of another in a county other than that of the residence of the accused may be punished by incarceration in the penitentiary, while if done in the county of his residence is at most a misdemeanor. A law providing that a tramp found carrying a firearm or other dangerous weapon shall be imprisoned in the penitentiary is not unconstitutional, as a denial of the right to bear arms: *State v. Hogan*, 63 Ohio St. 202, 81 Am. St. Rep. 626, 58 N. E. 572, 52 L. R. A. 863. From the tramp laws of the different states it may be gathered that a tramp is a vagrant away from his own city or county, or a nonresident committing one of the various acts of vagrancy such as are prohibited by the statute. In *City of Des Moines v. Polk County*, 107 Iowa, 525, 78 N. W. 249, Granger, J., said: "We are referred to definitions to show that the words 'tramps' and 'vagrants' are synonyms. The statute contains a definition of each word, and we think that is the place to look for a correct understanding of the question." In the Iowa statute, chapter 43, Acts Twenty-third General Assembly, section 2, a tramp is thus defined: "Any male person sixteen years of age or over who is physically able to perform manual labor, and is a vagrant within the purview of section 4130 of the Code, who is found wandering about practicing common begging, or is wandering about having no visible calling or business to maintain himself, and is unable to show reasonable effort and in good faith to secure employment shall be deemed a tramp." The section 4130 of the Code contains an enumeration of the acts of vagrancy very much on the lines of the California code referred to. The opinion in the case last named continues: "It will be seen that while all tramps are vagrants, all vagrants are not tramps; as a person under sixteen years old may be a vagrant, but not a tramp. To be a tramp, one must be physically able to perform manual labor; while one unable to do so may be a vagrant. There are other distinctions. Chapter 43—that we are considering—treats alone of tramps,

and makes no reference to vagrants." As we have already shown, Blackstone treats of vagrants and vagabonds together, but in *Johnson v. State*, 28 Tex. App. 562, 13 S. W. 1005, it was held that where the word "vagabond" had been used in an indictment, and such word was not used in the statute defining the offense, it could not be regarded as equivalent to the statutory word "vagrant." Under the statute, common prostitutes and professional gamblers are vagrants but not necessarily vagabonds, and a motion to strike out the word "vagabond" as surplusage should have been sustained.

IV. What has Been Held to Constitute Vagrancy.

a. **Lewdness.**—Having thus defined vagrancy in all its possible interpretations, we shall proceed to discuss the judicial interpretations not only of the various statutes, but of those acts of persons which have called for judicial inquiry as to the extent of their tendency to bring the actors within the reach of the vagrancy laws. In *Taylor v. State*, 59 Ala. 19, the defendant was charged with being "a common prostitute, or keeper of a house of prostitution, and had no honest employment whereby to maintain herself." There was evidence that she was a lewd woman, was a minor, and was supported by her parents, who had an honest occupation. Under such circumstances she was entitled to an instruction that if the jury believed the evidence, it was sufficient answer to the charge.

In *State v. Canton*, 43 Mo. 48, the interpretation placed upon the St. Louis ordinance No. 5421, article 4, section 1, subdivision 9, was sufficiently wide in its application to prevent conduct calculated to injure the public morals. The ordinance referred to said that a vagrant under the meaning and provisions of the ordinance should be deemed to be any prostitute, courtesan, bawd, or lewd woman, or any female inmate of any bawdy-house, house of prostitution, house of assignation, brothel, or house of bad repute, who shall be found wandering about the streets in the night-time, or frequenting dramshops or beer-houses, or any such lewd woman having the reputation of a prostitute who shall be found employed as a beer-carrier, or waiting, attending, or carrying beer, or any other thing, in any beer or drinking saloon, either in the day or night time, or who may be found employed in singing or dancing in a lewd or indecent manner in such a house. The defendant was a constable, who had arrested a woman under the section above cited, and he was indicted for an assault and battery. The evidence disclosed that four women were engaged in selling intoxicating liquors at a saloon in the city, and were the owners and proprietors of the saloon; that they were all prostitutes and lewd women, and had such reputation, and that on the night of the assault and battery such saloon was attended by a large number of customers, men and boys, but was conducted in an orderly manner, and that while the prosecutrix was engaged in carrying beer to her customers the defendant arrested her for vagrancy, the act charged being that she, a prostitute, was found employed in a saloon as a beer-carrier. The court found that the ordinance in question was passed to prohibit the practice, which had grown prevalent, of employing abandoned females in saloons to hand around beer and wait upon customers, and which was found to corrupt and injure the morals of many young men in the community, and that the city

council had the power to pass the ordinance. "When it was seen that disreputable women and prostitutes congregated in these low haunts of vice, and there, under the ostensible employment of handing around beer and waiting on customers, attracted large crowds by their lewd and lascivious behavior, it would have reflected little credit on the city government had not an earnest and energetic effort been made to break up the practice and suppress the evil." The point the prosecution sought to establish was that as the woman was the proprietress of the saloon, she could not be said to be found employed in it. It was met by the familiar principle of law that what cannot be done directly cannot be done indirectly. The court added: "Will the law sanction this attempted evasion of its plain reason and intention? The sole object was to destroy, uproot, and exterminate a most mischievous and demoralizing habit—an unmixed evil. But if the persons employed in the degrading avocation can pursue their career with impunity by appearing to be principals, the law is a nullity—it is laughed to scorn." The etymological signification of "employment" was taken as not necessarily importing an engagement or rendering of services to another, but that a person might as well be employed about his own business as in the transaction of the same for a principal. The court, having in view both the facts and the intention of the legislature and the remedy desired—the suppression of the mischief—said that the law would level its power against any one of the class of persons designated "found employed" in saloons carrying beer, whether they were proprietors or servants, and the police officer was exonerated from the charge of assault and battery.

In *Re Forbes*, 11 Abb. Pr. 52, 19 How. Pr. 457, the construction of the statute of 1833, which declares "All common prostitutes who have no lawful employment whereby to maintain themselves," was held not to cover the conviction as a vagrant of "a common prostitute and idle person." These and the like forms of charges have met with short shrift at the hands of courts of appeal. The simplicity of following the words of the statute seems to meet with an unaccountable resentment in those charged with the duty of drawing the necessary documents. If the condition of a person brings him within the description of any of the statutes declaring who and what are vagrants, it makes no difference whether it is his misfortune or his fault, he may be convicted. "His individual liberty must yield to the public necessity or public good; but nothing but public necessity or the public good can justify these statutes and the summary conviction without a jury and in derogation of the common law authorized by them. They are constitutional, but they should be construed strictly, and executed carefully in favor of the liberty of the citizen": In *re Forbes*, 11 Abb. Pr. 52, 19 How. Pr. 457. In such an elastic charge as vagrancy described from time immemorial in vague terms, not only generically but particularly as to the persons who are to be charged and the uncertain offenses of which it may be supposed they are guilty, the magistrate is perforce like the *cadi* who dispenses justice according to the Koran, left much to his discretion in dealing out justice to the parties. They have it in their power to misdeal out arbitrary oppression or careless cruelty. The opinion in the case last cited contains this excellent admonition: "The magistrate, in acting under the act, has no right to drop or disregard one

word of that description. He has no right, I think, to say or determine that a common prostitute is a vagrant within this act, merely because she is also idle or an idle person, without proof of any other fact or circumstance. To be a vagrant within the act, the common prostitute must be without any lawful employment whereby to maintain herself. . . . The object of this act is not to punish common prostitution as a sin or moral evil, or to reform the individual, but to protect the public against the crimes, poverty, distress and public burdens which experience has shown common prostitution causes or leads to."

The main object of the statute should be kept in view, and the magistrate should be careful before convicting to see that the person charged with being a vagrant is shown either by his or her confession, or by competent testimony, to come exactly within the description of one of the statutes. "No statute of this state has yet declared common prostitution or idleness to be a crime."

The recent case of the City of San Antonio v. Salvation Army (Tex. Civ. App.), 127 S. W. 860, has placed on record a most interesting decision upon unique grounds. A suit was instituted by the Salvation Army against the city of San Antonio and its officers to restrain them from interfering with the Salvation Army and its contractor in constructing a building to be used as a rescue home for fallen women. The suit was instituted on the 4th of September, 1909, and on the 7th of September, 1909, an ordinance was passed by the city rendering it unlawful to erect a building "for the gathering, care, or refuge of persons denounced as vagrants, under an act of the Thirty-first Legislature, approved March 17, 1909 (Acts 31st Leg., c. 59)." The court declared the ordinance void. The statute referred to in the ordinance classifies vagrants, and among the classes are "common prostitutes," the only ones to whom the proceedings had reference, and the court said that the statute could be applied only to those persons who answered the description at the time the charge was made under it. "For instance," said the court, "every able-bodied person who shall go begging for a livelihood is declared to be a vagrant; but suppose he leaves off begging, it is clear that at once he is removed from the list of those who are denounced as vagrants, and if someone should build a house, and put a number of able-bodied men, who had been begging for a livelihood, at work in it, would that house be considered, under the terms of the ordinance, 'a building, home, or institution for the gathering, care or refuge of persons denounced as vagrants'? The answer could not be other than in the negative." The opinion continues with the same good law, that when a common prostitute, denounced as a criminal by the laws of the state, renounces her vicious and degrading vocation, and enters a place set apart for her uplifting and reformation, she, eo instanti, ceases to be a vagrant and under the ban of the law. She is not in the refuge to ply her trade, but having forsaken it, she enters where are thrown about her influences for a higher and better life. The city council could not be heard to denounce those who had left a life of sin and shame either as vagrants, a menace to society, or without the pale of sympathy or support. An eloquently worded opinion concludes a fine period in these words: "Rather would it not be the humanitarian part, in keeping with our boasted civilization, to draw the veil of charity and forgetfulness over their lives, and in the

language of the Nazarene say, 'Neither do I condemn thee; go and sin no more.'" The ordinance was held to have no reference to the past lives of the unfortunate class of women described, but only to their present lives and pursuits.

b. **Leaving Wife and Children Without Means of Subsistence.**—In Alabama, the General Acts of 1903, page 244, make a man who quits his house and leaves his wife and children without means of subsistence guilty of vagrancy. In *Crawley v. State*, 146 Ala. 145, 41 South. 175, it was held that the act did not apply where the desertion occurred prior to the passage of the act, though it continued after it. To constitute the offense there must be an actual desertion followed by a failure or refusal to provide, and after a completed act of desertion, there could not be a new act of desertion until the circumstances were such that there was another going away—a return before another act of leaving. A parallel case to this will be found in *Gay v. State*, 105 Ga. 599, 70 Am. St. Rep. 68, 31 S. E. 569. In that case under a statute providing that it is a misdemeanor for any father to willfully and voluntarily abandon his child, leaving it in a dependent and destitute condition, it was held that to constitute the offense of abandonment, there must be an actual desertion, followed by a refusal to support; and that the absence of either would prevent the offense from being made out, as, if after a completed act of desertion a father has been convicted under the statute, there can be no new act of abandonment until a return to the discharge of the parental obligation, and no new offense of abandonment until such a return, followed by another act of desertion, and this although the original abandonment is willfully and voluntarily continued and the child remains dependent and destitute.

c. **Begging.**—Under the Penal Code of California, section 647, quoted ante, it is an offense for a healthy beggar to solicit alms as a business. In *People v. Denby*, 108 Cal. 54, 40 Pac. 1051, it was laid down that for a beggar to ask assistance on one occasion only does not make him a vagrant, nor justify his arrest by a private person for the commission of the public offense of vagrancy in his presence.

The question of silent begging was raised in the *Matter of Haller*, 3 Abb. N. C. 65, 12 Hun, 131. In that case the defendant was a crippled boy of ten years of age, unable to stand, and obliged to move on his hands and legs. His habit was to pass along the sidewalk and hold out his hand to those whom he thought charitably disposed, but he was not heard to ask for alms, and it was contended that this dumb motion was not "begging alms" or "soliciting charity" within the meaning of the statute. There was nothing in the statute that necessarily required proof of spoken words to constitute begging, although such words might in many instances be the best evidence of the offense. The remarks of the court on silent begging are instructive and interesting. "The act of begging alms or soliciting charity is the offense condemned by the law, in whatever form that act may be committed, and in many instances words are far less effective to accomplish the end than simple acts. The deaf and dumb man, real or pretended, who stands with a placard on the breast, and with extended hat or hand, is a solicitor of charity as completely as though he spoke to the passers-by; and so is everyone whose diseased

or crippled condition appeals to sympathy, if he places himself in a position to attract attention, or passes along the street calling attention by sign, act or look to his unhappy condition, and receives from those who observe him the charity which he is obviously seeking. Indeed, the class of silent beggars who exhibit deformities, wounds or injuries which tell plainer than words their needy and helpless condition are the most successful of solicitors for charity, and especially is this so when the object of alms is a young and helpless child." There can be no doubt about the correctness of this position and the view that it is the intention of the law by its statutes to punish them is wholly untenable. It rather seeks to protect and provide for their necessities in an appropriate manner—certainly not by allowing an infraction of the statute in the oblique manner in which it was sought to evade the evident intention of the legislature.

d. **Unlawful Callings.**—We have already dealt ante with the case of *State v. Canton*, 43 Mo. 48, in which the unlawful calling of prostitutes and lewd women being found employed in carrying beer in a saloon was discussed in its bearing on the position when such a woman was the owner of the saloon. In *Re Smith*, 54 Kan. 702, 39 Pac. 707, it was held that the operating or carrying on of a lottery is included under the words, "engaged in any unlawful calling whatever," as used in section 368 of the Criminal Code: Gen. Stats. 1889, par. 2509. In that the conviction really turned on the construction of the section, it is of importance. The section says that "Any person who may be found loitering around houses of ill-fame, gambling-houses, or places where liquors are sold or drunk, without any visible means of support, or shall be the keeper or inmate of a house of ill-fame or gambling-house, or engaged in any unlawful calling whatever, or any able-bodied married man who shall neglect or refuse to provide for the support of his family shall be deemed a vagrant." It was contended for the defendant that the words "engaged in any unlawful calling whatever" should be construed with reference to the preceding language, and, giving them such a construction, that the operating or carrying on of a lottery was not an unlawful calling, and that such a calling was neither within the letter nor the spirit of the statute. The court adopted the familiar rule of construction, that when there are general words following particular and specific words, the former must be confined to things of the same kind, and applied it to the section. "We are of the opinion that not only is the operation or carrying on of a lottery an unlawful calling, but that it is of like kind to the keeping or carrying on of a gambling-house. Section 3 of article 15 of the constitution of the state ordains that lotteries and the sale of lottery tickets are forever prohibited." Although the constitution did not provide the punishment, its declaration was clear, and it was decided in *State v. Mercantile Assn.*, 45 Kan. 351, 23 Am. St. Rep. 727, 25 Pac. 984, 11 L. R. A. 430, that the legislature cannot charter or license the carrying on of lotteries or the sale of lottery tickets, which was unlawful also at the common law: *Ex parte Blanchard*, 9 Nev. 101; 4 Blackstone's Commentaries, 168.

e. **Disobedient Children.**—As we have said, the convicting court or magistrate must see to it that what is charged as a statutory offense is within the four corners of the act. In the Matter of

Conroy, 54 How. Pr. 432, the defendant was convicted of vagrancy, and it appeared he was an incorrigible son, who disobeyed the lawful commands of his mother and absented himself from home without her consent, and was so charged. No language either in the act of 1824, under which the House of Refuge was incorporated, or the laws of 1833 and 1860, which relate principally to the powers and duties of the police justices and define with great particularity the class of persons to whom the term "vagrant" shall be applied, could possibly cover the offense charged or entitle it to be brought within them, and the conviction could not be sustained.

f. **Idle and Disorderly Persons.**—To no class more than idle and disorderly persons have the provisions of the various vagrancy acts been applied with more or less successful persistence. The difficulties of establishing, to say nothing of defining and construing, idleness have given law and police officers perennial attention. We have shown how in *Re Jordan*, 90 Mich. 3, 50 N. W. 1087, the court had to decide, in the absence of a definition of vagrancy in the statute, that it must be considered as such vagabondage as the common-law meaning usually implied, and illustrations of statutory definition have been given ante. It can easily be seen that the idle man may use sufficient cunning to enable him to evade the penal provisions of the law. In *Daniel v. State*, 110 Ga. 915, 36 S. E. 293, the accused, charged with vagrancy, on August 10, 1899, showed that in the spring of that year he cut and corded twenty-five cords of wood; that he chopped ten acres of cotton for one man, at fifty cents an acre, hoed cotton for two days for another, and received therefor one dollar, and cut some wheat and oats for another. He was a fisherman and spent much time fishing. It was shown that he did not work regularly, and that he was idle a considerable portion of his time. The court could not sustain the conviction, and said: "The law does not say how many days in a month a man shall devote to labor. The statute was enacted to prevent men able to work from idling and wandering about the community, and becoming drones or thieves or charges upon the public. If a man is able to work, but is idle and has no means of support, there is a great temptation to steal, in order to relieve his hunger and supply his bodily necessities. It is to keep him from this temptation that the law commands him to work for his own support." This case was cited in *Cody v. State*, 118 Ga. 784, 45 S. E. 622, where the evidence established that the defendant had no visible means of support, was able to work, but lived an idle, immoral, and a profligate life. The fact that she occasionally did a little work, and earned small sums of money, insufficient to support her, was no answer to the general state of idleness in which she was shown to live. The case just cited is important in ruling that proof of the commission of any one of the acts prohibited by Penal Code of 1895, section 453, relating to vagrancy, will support a conviction. In *Commonwealth v. Doherty*, 137 Mass. 245, the defendant was charged under the Public Statutes, chapter 207, section 29, with being an idle and disorderly person, and with neglecting all lawful business, and habitually mispending her time by frequenting houses of ill-fame, gaming-houses and tippling-shops. The evidence disclosed that she was seen at all times of the day and night frequenting the class of places named, and in one instance in a house of ill-fame, and standing in the door of a house, on more than one occasion,

soliciting men passing by, who were strangers to her, to enter the house in which she stood; and that during such time she was not seen engaged in any lawful occupation or work of any kind. No specific evidence of her means or their insufficiency for her maintenance was offered by the prosecution, nor that she had refused opportunities to work which had been offered. The jury found her guilty and the defendant alleged exceptions. The opinion contains excellent matter for guidance. Holmes, C. J., said: "When a material fact is not proved by direct testimony, but is left to be inferred from the facts directly sworn to, the inference need not be a necessary one. There is a case for the jury, unless the inference either is forbidden by some special rule of law, or is declared unwarranted because too remote, according to the ordinary course of events. If there is a case for the jury, they are at liberty to use their general knowledge in determining what inferences are established beyond a reasonable doubt; and the facts inferred by them are as properly proved as if directly testified to. We cannot say that men of the world are not at liberty to infer, from the testimony in this case, that the defendant was in the tippling-shops and dance-halls mentioned for other than lawful purposes, and that she frequented houses of ill-fame. Neither can we say that the jury might not properly infer from the fact that the defendant was engaged as and where she was, and from her own evidence, that she did not possess independent means of support, that she was physically able to work, and could have found opportunities, but neglected to do so."

In *Fleming v. District of Columbia*, 34 App. Cas. D. C. 5, the defendant, a moral pervert, was convicted under the vagrancy law, and the evidence was his soliciting another male person to commit a shockingly immoral act. His conviction was reversed on the ground that proof of a single immoral act did not bring him within the act. The person accused, the court held, must not only lead an idle, immoral and profligate life, but must also have no property to support him, and be able to work without doing so. In the case referred to such proof was not given.

In *Ex parte Strittmatter*, 58 Tex. Cr. 156, ante, p. 937, 124 S. W. 906, it will be noted that the words "loiter, loaf and idle . . . for the greater part of their time," as used in General Laws, 31st Legislature, chapter 59, section 1, paragraph d, call for proof that the defendant charged with vagrancy was able to work, and being so able habitually loafed, loitered and idled in the city for such greater part of his time, without employment or visible means of support. As the court properly put it, the terms referred to, "loiter, loaf, and idle," are not covered by an occasional or even frequent presence at such public places by deserving persons, who may for the time being be unemployed. The court, too, recognized the difficulty of laying down, in such language as might be at the command of the legislature, a definite and precise rule which should be above and beyond criticism. Constructive legislation along new lines invariably produces obstacles in the shape of new-made definitions, which may unintentionally interfere with a class of deserving persons, concerning whom the intention of the legislature was remote.

The statutes are intended to enforce honest and reputable living; they do not tend to luxury, nor compel anyone to earn more than his necessities require. In Georgia, the cases of *Jacobs v. State*, 1 Ga.

App. 519, 57 S. E. 1063, *Lewis v. State*, 3 Ga. App. 322, 59 S. E. 933, and *Miller v. State*, 4 Ga. App. 392, 61 S. E. 494, were all adopted into *Leonard v. State*, 5 Ga. App. 494, 63 S. E. 530. From that case we take that the circumstantial evidence introduced by the prosecution was purely negative in its character, and the inference of the defendant's guilt, which might have arisen from this negative testimony was so rebutted by positive proof, not inconsistent therewith, that the defendant had earned and had received a sufficient amount of money to maintain himself that the verdict finding him guilty of vagrancy was not authorized by law, and a new trial should have been granted. Though numerous witnesses, whose testimony was uncontradicted, testified that they had not seen the defendant work, that he had no visible means of support, and that he was always loafing in idleness when they saw him (and all saw him frequently), this evidence, though true, must yield, in a prosecution for vagrancy, to positive evidence, not necessarily in conflict therewith, and equally uncontradicted, that the defendant had earned and had been paid an amount of money sufficient to maintain him honestly, though only in a meager style, and even though the defendant were capable of earning much more. The case is valuable for setting at rest the point raised, but we should have taken it that "means of support" was a comparatively easy phrase to construe according to the plain meaning of the words. By no stretch of the imagination, by no twisting of signification, could they be construed to mean anything else than what they say—means of support, not means of luxurious support. Two other Georgia cases are of interest. In *Harris v. State*, 3 Ga. App. 447, 60 S. E. 207, there were considered the questions of what evidence was necessary to sustain the conviction and the substance of an instruction that a person may become a vagrant in a very short while—in fact, in a few days—provided he is able to work and does not work, and has no property to support himself, and that the law did not contemplate that under such circumstances a person might work one or two days in a week and then loaf around the remainder of it. Such instruction was erroneous, because the length of time in which a person might become a vagrant was immaterial, the real question being, not how long it took to make a vagrant, but whether in fact the defendant has become and is a vagrant. It was also erroneous, because the fact that one may work one or two days in a week and then remain idle the remainder of the week would not constitute one a vagrant, although he might be able to work and have no property to support himself, provided his earnings for the proportion of time he might labor were in fact sufficient to support him and furnish him an honest livelihood: *Lewis v. State*, 3 Ga. App. 322, 59 S. E. 933.

A defendant was convicted of vagrancy under the act of 1905, page 110, paragraph 8, she being alleged to be a minor over sixteen and under twenty-one years of age. In the face of evidence of her father's ability to support her the conviction could not be sustained: *Collins v. State*, 125 Ga. 15, 53 S. E. 809; *Turner v. State*, 2 Ga. App. 386, 58 S. E. 492.

The fact that a party is black and ragged, and asleep at night, and has not worked for four days, although he may have no money, will not of itself authorize a conviction for vagrancy, and where he has been arrested without a warrant, evidence obtained by un-

lawful search and seizure that such person has no money should have been rejected: *Gainer v. State*, 2 Ga. App. 126, 58 S. E. 295. In *Carter v. State*, 126 Ga. 570, 55 S. E. 477, it was held that one who wanders and strolls about in idleness, with no lawful purpose or object whatever, an habitual loafer, idler, and vagabond, who is able to work, has no property, no reasonably continuous employment, and no regular income, is a vagrant within the meaning of Penal Code of 1895, section 453, paragraph 3, notwithstanding such person may have a fixed place of abode, where he usually lodges. The fact that such person chose as his favorite haunts poolrooms, barrooms, dives, lewd houses and such like places would be an important element in estimating the nature of his loafing and loitering. This was followed in *Darby v. State*, 127 Ga. 46, 56 S. E. 91.

g. Trespassers.—Under Revised Ordinances of St. Louis, section 1062, anyone who shall be found trespassing on the private premises of others and not give a good account of themselves is a vagrant. In a prosecution under that section rather a novel turn was given to the case by the question whether the litigated ordinance required that the trespasser, in order to conviction, should not only commit the trespass, but in addition thereto fail to give a good account of himself. The court entertained no doubt on the point, nor do we see how they could when the language was almost too plain for construction. In the language of the court, "Under its plain and unmistakable terms, a person could no more be convicted of being a vagrant because he trespassed on private premises, and also gave a good account of himself, than he could be convicted of that offense if he gave a good account without the trespass. One is as much a constituent element of the offense as the other." It does not follow that because a trespasser is a wrongdoer that he is necessarily a vagrant, more especially if he give a good account of himself, and show himself as having visible means of support: *City of St. Louis v. Babcock*, 156 Mo. 148, 56 S. W. 732.

h. Confidence Operators.—That particular class of vagrants who play the confidence game have been dealt with in the monographic note, "The Confidence Game," on page 363 of volume 134 of the American State Reports. In California, under section 647, subdivision 4, of the Penal Code, every person known to be a confidence operator either by his own confession, or having been convicted of such offense, and having no visible means of support when found loitering around certain public places, shall be deemed to be a vagrant. In *Ex parte Hayden*, 12 Cal. App. 145, 106 Pac. 893, the term "confidence operator" is construed to mean that the person so designated is engaged in swindling operations in which advantage is taken of confidence reposed by the victim in the swindler. The same case is an authority that persons who are confidence operators are a menace to society; and the police power is broad enough to warrant legislation looking toward their suppression. It is certainly within the legislative power to provide that one having no visible means of support, and who admits that he is a swindler and is found lounging about places of public assemblage, thereby becomes a vagrant. The statute does not make confession of the calling an offense nor justify a conviction alone on that ground. It simply makes the admission of the truth of one of the elements of the offense sufficient to estab-

lish that element as to the status of the defendant. Where the defendant has entered a plea of guilty, such plea includes the admission of every element constituting the offense as defined in the Penal Code: *Ex parte Hayden*, 12 Cal. App. 145, 106 Pac. 893.

1. **Keeping a Disorderly House.**—The subject of disorderly houses was treated in the monographic note in volume 134, American State Reports, page 819, to which the reader is referred. In *Gavin v. State* (Mass.), 50 South. 498, the question was raised whether section 5055 of the Code of 1906, wherein it is provided that "Every keeper of a house of prostitution shall be punished as a vagrant," excludes the right to prosecute such person for keeping a bawdy-house, on the ground that since the adoption of that section the procedure thereunder was exclusive. The court held that the common law still prevailed in that state, unless abrogated by statute, and that one might be indicted for keeping a bawdy-house, which is one offense against the laws of the state, and also as a vagrant which is another substantial offense. The distinction between the two offenses is thus put: "The keeper of a bawdy-house offends the law in allowing, permitting and encouraging lewd, indecent, and immoral practices; and when charged with being the keeper of a bawdy-house, this is the thing for which the party is punished. In vagrancy, the offense consists in general worthlessness; that is to say, in being idle, and, though able to work, refusing to do so, and living without labor, or on the charity of others." The two offenses are as distinct as night and day.

V. The Indictment or Information.

a. **The Growth of the Modern Form.**—Lawyers and litigants alike have cause to be grateful that the day of the miscalled technical indictment is slowly but surely passing away, and that there is taking its place the rule that when a statute creates an offense, prescribing its constituents, it is sufficient in an indictment to pursue the language of the statute: *Grattan v. State*, 71 Ala. 344. As is well known, the common law called for great particularity, which has been recognized in most of the states. It is in every case that has been passed upon considered a constitutional requirement that in all criminal prosecutions the accused has a right to demand the nature and cause of his accusation and generally to have a copy thereof furnished to him. Lord Hale's definition of an indictment has been quoted time without number, especially in vagrancy cases—that it should be "a plain, brief and certain narrative of an offense committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature": 2 Hale's Pleas of the Crown, 169.

As a rule, the statutory requirements for an indictment are that it should state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment; and most of the statutes sanction the omission of such phrases as "by force and arms" and "contrary to the form of the statute," which served to embellish the legal rhodomoutade rather than serve any useful end. Modern legislation has turned itself to sweeping away the rigid and narrow rules of construction which the common law elaborated, and which

in reality prevented an indictment being rendered in the simple formula of Lord Hale. Through *Noles v. State*, 24 Ala. 672, *Burdine v. State*, 25 Ala. 60, *Smith v. State*, 63 Ala. 55, *Block v. State*, 66 Ala. 493, and *Grattan v. State*, 71 Ala. 344, a long line of Alabama cases, and all of useful support, can be traced the concession that the statute has, in many cases, dispensed with that particularity and certainty required at common law in the statement of the offense in the indictment, "and the liberal forms prescribed in our code have generally been held not to infringe upon the intent and spirit of the above constitutional provision": *Grattan v. State*, 71 Ala. 344. In *Smith v. State*, 63 Ala. 55, it was said that the only safe rule is to require that, when the indictment is not framed on any form given in the code, it should aver every material constituent of the offense, always excepting the statement of venue and time.

By the light of these judicial expressions we shall see how the indictments in vagrancy have fared at the hands of their judges in those states from which we have reported decisions upon them.

b. In Alabama.—*Traylor v. State*, 100 Ala. 142, 14 South. 634, is to be noted if only for its overruling *Boulo v. State*, 49 Ala. 22, the principle declared in which, if adopted, would have led to the proposition that it was necessary to aver affirmatively, not only the commission of the offense, but that the defendant was capable of committing it. In *Traylor v. State*, 100 Ala. 142, 14 South. 634, the complaint followed the statute that "within twelve months before making this affidavit in said county Jere Traylor, having no visible means of support, or being dependent on his labor, lives without employment, against the peace and dignity of the state of Alabama," etc. It was demurred to for failing to allege that the defendant was able-bodied or physically able to follow some employment for support. The court overruled the demurrer on the ground that the complaint conformed to the general rule of following the statute, and it was not necessary to aver in the complaint the facts suggested, which nevertheless might constitute good ground of defense. In *Vandiver v. State*, 145 Ala. 682, 40 South. 88, a similar demurrer was overruled. The offense as prohibited was "any person wandering or strolling about in idleness, who is able to work and has no property to support him." The indictment charged that the defendant, "being able to work and having no property to support her, did wander or stroll about in idleness," and was sufficient.

c. In California.—In *Ex parte McCarthy*, 72 Cal. 384, 14 Pac. 96, the defendant was charged for that she "willfully and unlawfully was, has been, and during said time [from April 26 to May 26, 1887] continued to be, and still is, an idle and dissolute person, who wanders and roams, and has during said time wandered and roamed, about the streets of said city and county, at late and unusual hours of the night." The Penal Code, section 647, which has been quoted ante, commences with the clause, "Every person (except a California Indian) without visible means of living," and the rest of the section contains other sentences enumerating the offenses. It was contended for the defendant that the words of the first clause applied to each of the succeeding ones, and that no matter which of the offenses was selected, in its construction, the words "without visible means of living" were to be included. The contention could not be upheld.

The code section enumerates in several groups certain acts which constitute vagrancy, and he who is guilty of the acts thus enumerated in any one of these groups is liable to the penalty of the statute: *People v. Frank*, 28 Cal. 507. Under the local statute every word which defines the class or makes a part of the description is material and important, but those words which go to define any other class of vagrants need not be inserted. There is an interesting divergence of reasoning between this decision and that in *State v. Custer*, 65 N. C. 339, for which the reader is referred to subdivision j of this chapter, post. In *Re McCue*, 7 Cal. App. 765, 96 Pac. 110, the defendant was charged under subsection 5 of section 647 of the Penal Code (the vagrancy section hereinbefore set out) with being an "idle, lewd and dissolute person," whereas the words of the subsection are, "Every idle or lewd or dissolute person." It was contended that the subdivision was void, in that the constituent elements entering into the crime were not defined, and by reason thereof the defendant was subject to the arbitrary meaning given by the court to the words employed. The court was of opinion that one who was so charged was sufficiently advised of the character of his offense as a vagrant, and that it was within the power of the court to determine whether one charged as a vagrant came within the class of lewd or dissolute persons.

d. In Georgia.—In *Allen v. State*, 51 Ga. 264, the defendant was charged with vagrancy. Section 4560 of the code recognizes five distinct classes of vagrants, the fifth being all professional gamblers living in idleness. Evidence that defendant was a professional gambler was improperly permitted to be given over the defendant's objection that if the state desired to convict him as a vagrant under the statute on that ground, that fact should have been alleged in the written accusation against him. The conviction was reversed. In *Morton v. Nelms*, 118 Ga. 786, 45 S. E. 616, under the act approved August 17, 1903, an accusation charging that the accused was able to work, and had no property, and had no visible or known means of a fair, honest and reputable livelihood, sufficiently set forth an offense against the penal laws of the state. The act cited makes the various acts of vagrancy therein cited penal.

e. In Idaho.—The decision in *Ex parte McCarthy*, 72 Cal. 384, 14 Pac. 96, was adopted by the Idaho court in *State v. Preston*, 4 Idaho, 215, 38 Pac. 694, and under subdivision 31, section 2230, Revised Statutes, and subdivision 25, section 69, page 116, Laws Second Session of 1893, an information for vagrancy is sufficient which alleges "that the defendant, Frank A. Preston, on the sixth day of May, 1894, and for three weeks prior thereto, at Pocatello, in the county of Bannock, and state of Idaho, unlawfully roamed and unlawfully has roamed about from place to place without any lawful business, willfully, and unlawfully was, has been, and continues to be, and still is an idle and dissolute person, who wanders and roams about the streets of said city at late and unusual hours of the night, has continued to be, and still is an idle and dissolute person, who lives and has lived in and about houses of ill-fame there situated." The ground of the demurrer was that the complaint did not state facts sufficient to constitute a public offense; and we agree with the court overruling it. There is enough stated and a considerable sur-

plusage to warrant the conviction of any such loafer as the defendant in the case referred to.

f. **In Indiana.**—In *State v. Cummins*, 78 Ind. 251, the affidavit charging the offense was drawn as inartistically as the indictment in Idaho above referred to. So much of the act as makes it an offense to idly loiter about tippling-houses and beer-houses is summarized in *State v. Cummins* as enacting that any person, male or female, who shall have arrived at years of discretion, and who may be found loitering or idling about tippling-houses or beer-houses, without being engaged in some useful employment there, and without visible means of support, shall be adjudged a vagrant. The charging part of the affidavit alleged that "on the twenty-fifth day of July, 1881, and from that day continuously until the eighth day of August, 1881, at and within the county of Jackson, and state of Indiana, John Cummins, an able-bodied male person, who has arrived at years of discretion, was then and there unlawfully found without any visible means of support, and then and there unlawfully found loitering and idling in and about the saloon of Frank Foulk, and the saloon of John Winscott, which said saloons were then and there tippling-houses and beer-houses, and the said John Cummins as aforesaid was then and there unlawfully found without any visible employment, lodging and idling in and around the sheds, stables and hacks of John Stout, the same being then and there unusual and improper places for orderly and industrious persons to be, without being there engaged in some useful employment." Notwithstanding the prolix cumbersomeness of the charge, the court rightly held it contained a substantially sufficient charge within the act defining vagrancy, and that such allegations as tended to make out another charge under the act were mere surplusage and on the authority of *State v. Wickey*, 54 Ind. 438, did not afford cause for quashing an affidavit or indictment.

g. **In Louisiana.**—Where, under an ordinance (and statute authorizing it) denouncing as vagrants all persons who live by gambling and imposing a penalty, the charge is made that "the defendant is a vagrant, being a person without visible means of support, who gambles, at the game of draw-poker, for a living," it is sufficient to warrant the court entertaining it and proceeding with the charge. There is no law in Louisiana which undertakes, by enumeration or otherwise, to define all the forms of gambling, and it would be a work of supererogation to do so, in so far as the game of draw-poker is concerned, since it is a matter of common knowledge that it is a gambling game, pure and simple, probably more widely recognized as such than any other game known to the American people. The concluding part of the opinion in *City of Shreveport v. Bowen*, 116 La. 522, 40 South. 859, the case which supports the propositions above set out, tersely points out that to gamble is "to play, or game, for money or other stakes," and the offense denounced by the statute and with which the defendant was charged was gambling for a living. It was immaterial, therefore, for the purposes of the charge, whether any game was specified, or, if specified, what game it was, since any game might be played for money or other stakes, thus making it gambling, and when gambling was carried on as a means of livelihood, it fell within the ban of the statute, and became the offense charged by it.

h. **In Massachusetts.**—The laying of a charge with a continuando formed the subject of a clear ruling in *Commonwealth v. Sullivan*.

and Daniels, 87 Mass. 511. The offense as expressed was "that the defendant, on the twenty-ninth day of November, 1861, on divers other days and times between that day and the twenty-ninth day of May, 1862, at said Boston, was and is an idle and disorderly person, and at said Boston on said days and times has neglected all lawful business, and habitually misspent his time by frequenting houses of ill-fame, gaming-houses and tippling-shops." The objection was that the time was not set forth with legal precision, that the words "and is" were without date. The point had been partially dealt with in *Commonwealth v. Elwell*, 1 Gray, 463. The offense charged was of that character which requires proving by a succession of acts and continuation of behavior not limited to any particular day, and it was sufficient to say it had been committed on a certain day named and on other days between that day and a certain subsequent day also named. Inasmuch as the complaint contained a charge of an offense as committed between two days expressly named, the words "and is" could be safely rejected as surplusage. "Thus it has been held that where an offense, which could be properly laid with a *continuando*, was charged as having been committed on a day named, and 'on divers days since,' the latter part of the averment was not sufficiently precise; but that the evidence of the commission of the offense on the day named was admissible: *Commonwealth v. Gardner*, 7 Gray, 494." The defendant asked the court to instruct the jury that the government must prove a habit of misspending his time indulged in by the defendant to a great extent; a constant continual practice and mode of living and passing his time, or the principal part of it. The judge refused, and the court in indorsing his refusal said that "if the defendant, being under a necessity to work for the support of himself or persons dependent upon him, being able and having opportunities to work, neglected all lawful business, and habitually frequented such places as those named in the complaint, he was certainly an idle and disorderly person within the meaning of the statute. If he 'frequented' such place, it implied numerous visits; and if his misconduct was 'habitual,' the word itself, without further explanation, was sufficiently intelligible."

In *Commonwealth v. Lord*, 147 Mass. 399, 18 N. E. 67, the complaint charged that the defendant "on the first day of January, 1886, and from thence continually to the sixth day of June, 1887, was an idle person," and the defendant claimed that the government must prove either that the defendant was guilty on January 1, 1886, or that continually, that is, all the time from that date to June 6, 1887, he was guilty of the offense charged. On the authority of *Commonwealth v. Kerrissey*, 141 Mass. 110, 4 N. E. 820, it was sufficient to prove that the offense charged was committed during a substantial part of the time named in the complaint. The court ruled the use of the word "continually" was unnecessary, and might be disregarded as surplusage.

1. In Michigan.—We have already referred to the case of *In re Jordan*, 90 Mich. 3, 50 N. W. 1087, as containing much valuable information. The common-law definition of vagrant used in that case was "a person who refuses to work and goes about begging," and the charge was that the defendant on a certain date slept in the complainant's barn, and during the preceding eight days went about from place to place in the township without any visible means of support.

Needless to say the charge could not be sustained. A person may be going from place to place without any visible means of support and yet be guilty of no offense. "This girl, for aught that is stated in this charge, might have been going about from place to place seeking work with an honest intent to gain thereby a livelihood. To make such going about vagrancy, it must further appear that the person is idle, and seeking to live upon the charity of others, unwilling, although able to do so, to work for his or her maintenance."

J. In North Carolina.—The case of *Ex parte McCarthy*, 72 Cal. 384, 14 Pac. 96, decided about sixteen years after *State v. Custer*, 65 N. C. 339, discloses almost converse reasoning with it. In the former case, as a reference to it, ante, subdivision c of this chapter, will show, it was held that the words of the first clause of the section which enumerated the various classes and kinds of vagrancy stood alone, and had no application to the succeeding ones. In North Carolina the statute defined vagrants under five descriptions: 1. Any person who may be able to labor and has no apparent means of subsistence and neglects to apply himself to some honest occupation for the support of himself and his family, if he have one; 2. Or shall be found spending his time in dissipation; 3. Or gaming; 4. Or sauntering about without employment; 5. Or endeavoring to maintain himself or his family by any undue or unlawful means. The defendant was charged that she "endeavored to maintain herself by gaming or other undue means," and a special verdict found that she "was frequently seen sauntering about and endeavoring to maintain herself by whoring." The court ruled the indictment deficient in certainty. "It is not allowable to charge that a defendant committed one offense, or some other offense. Nor would it be sufficient to say 'by other undue means'; the particular means must be alleged, in order that the court may see that they were 'undue.'" As to the construction of the class of vagrant in which it was sought to locate the defendant, the court said: "The description of persons expressed in the first of these paragraphs must be held to extend through the whole sentence, and that the word 'or' in the second paragraph must be read 'and.' Otherwise it would follow, among other things, that any person whatever, 'sauntering about without employment,' although he might have ample means of subsistence, or might generally be engaged in an honest occupation, would be a vagrant. Now, the indictment does not charge that the defendant was able to labor, or that she neglected to apply herself to some honest occupation. It fails, therefore, to bring the defendant within the description of the statute."

VI. The Evidence Necessary to Support the Charge.

Within the experience of the writer there is no class of criminal or semi-criminal cases in which so many rules of evidence are called into play as that which is colloquially called the elastic charge of vagrancy, and the reports of English-speaking countries teem with decisions on the various branches of the subject. In the first place, in the United States the various states have declared what acts shall be deemed acts of vagrancy, and these declarations are not uniform, so that there exists, and it will increase, a very large number of cases on lines sufficiently variant to call for individual attention. The difficulties of application of the ordinary rules of evidence manifest themselves on

the slightest investigation. Take, for illustration, the question of whether a defendant is able to work and the testimony offered is that he looked as if he were able; the case of the spasmodic worker who labors a couple of days in the month; the case of the alleged licensed preacher without a church; the cases of unfortunate as well as vicious women; the cases of fortune-tellers and reputed law-breakers. In such, there exists a necessity for evidence so near being not evidence, that it seems to be understood a large amount of latitude is necessary both in proof by the prosecution and disproof by the defense. The courts adjudicating have to be guided first of all by the statutory requirements, and must perforce bring to bear their common sense in the interpretation of the legislative directions. Where acts become offenses by reason of their repetition or their continuance, similar difficulties are presented in the reception of evidence and its limitation or otherwise to a specific date or dates. No general rule, therefore, can be laid down to guide the student as to the direction of evidence in vagrancy cases generally. Each class stands by itself, and the application of the canons of proof is, in each case, always respecting the primary rules of guidance, invariably a law unto itself. Each case on its merits calls for that class of evidence which experience of the working of the statutes has allotted to it: *Vandiver v. State*, 145 Ala. 682, 44 South. 88; *Welborn v. State*, 119 Ga. 429, 46 S. E. 645; *Commonwealth v. Carter*, 108 Mass. 17; *People v. Elmer*, 109 Mich. 493, 67 N. W. 550; *State v. McFarland*, 96 Minn. 482, 105 N. W. 187. We have cited these cases in that they have important bearing on the class of evidence to be produced, and we purpose briefly referring to them and other reported cases to point more directly to the difficulties which prosecutions for vagrancy present to the courts. In *Vandiver v. State*, 145 Ala. 682, 44 South. 88, where the indictment alleged that the defendant, being able to work and having no property, wandered about in idleness, the burden of proof was upon the state to establish by the evidence beyond a reasonable doubt not only that defendant was physically able to work and that she wandered or strolled about in idleness, but that she had no property to support her. In *Walters v. State*, 52 Ga. 574, defendant was charged with vagrancy. The state having proved the main charge of idleness and possession of no property, tendered evidence that the defendant "looked as though he was able to work." This was stated by nearly all the state witnesses. As against this the defendant introduced positive testimony of his inability in the shape of medical evidence. The court said the prosecution must go further than they had gone. If the defendant were able to work, witnesses for the state who knew him, or had been with him, could have given the result of their observation, and the conviction could not be sustained. In *Price v. State*, 67 Ga. 723, on the other hand, the evidence, uncontradicted even by defendant's statement, was, that he had no property, that he was able to work, that he had been watched for two years and had never done any work, though he had lived about Atlanta that length of time. It was of course sufficient to sustain the conviction. In *Hicks v. State*, 76 Ga. 326, on a similar charge, the proof was by two witnesses that defendant was a licensed preacher, but had no church and no pay except voluntary contributions; that neither knew of any property belonging to him and did not know of his working in the year 1884. One saw him several times in town, the other saw him at his church (both witnesses were preachers), and one stated that defendant had been of good standing

for years in the Baptist church. As Chief Justice Jackson put it, the evidence on which he was convicted was that in 1884 two men did not see him work, did not know of his assets, if any, and did not know of his getting money by preaching except by voluntary subscription. Such testimony was not adequate to sustain the conviction.

In *McLeod v. State*, 118 Ga. 82, 44 S. E. 816, there was positive evidence that the defendant had no property to support her, was able to work, and wandered and strolled about in idleness; and although it was met by a conflict, it was sufficient to hold the conviction under the Penal Code of 1895, section 453. In *Hartman v. State*, 119 Ga. 427, 46 S. E. 628, the evidence for the accused was consistent with that of the state, and as the former made out a good defense, the defendant was improperly convicted. The case is valuable for the comment of Candler, J., on what is known in Georgia as the Calvin Act (Acts 1903, p. 46), and which is an amendment to the vagrancy laws of that state, enlarging the definition of the term "vagrant." He pointed out that under both acts relating to vagrancy the gist of the offense was the failure or refusal to work, when work was necessary to support the defendant or his family. "It must appear," said the judge, "that, having no visible and known means of a fair, honest and reputable livelihood, and being able to support herself by means of her own labor, she failed to work, lived in idleness, and was, or threatened to become, a drone or a charge on the public. The evidence in this case fails to come within this rule. That introduced by the state was entirely consistent with that offered by the accused, which established the fact that the accused worked sufficiently to earn a support, however meager, for herself and her children. The conviction was therefore unwarranted by the evidence." In *Welborn v. State*, 119 Ga. 429, 46 S. E. 645, the court had to consider the suggestion that the defendant had earned money within the period covered by the charge. There was positive testimony that she, able to work, with no visible or known means of a fair, honorable, and reputable livelihood, was a street-walker, who loitered around saloons and did no work, as against which was only the fact that on two occasions she had earned small sums, wholly insufficient to support her, and which afforded no answer to the general state of idleness in which she was shown to live. The case of *Leonard v. State*, 5 Ga. App. 494, 63 S. E. 530, has already been referred to ante, and *Miller v. State*, 4 Ga. App. 392, 61 S. E. 494, which was controlled by the decision in *Jacobs v. State*, 1 Ga. App. 519, 57 S. E. 1063, affirms that a conviction for vagrancy is unauthorized where testimony that at certain times the defendant was seen not to work is opposed by positive and unimpeached testimony that he worked, especially where the evidence for the state wholly fails to show that he did not have visible means of support. The case of *Gainer v. State*, 2 Ga. App. 126, 58 S. E. 295, has already been referred to. In *Commonwealth v. Carter*, 108 Mass. 17, a proceeding under the Statutes of 1866, chapter 235, sections 1 and 3, it was necessary to prove continual idleness for forty days preceding the complaint. The evidence was that for a year at least preceding such date the defendant had dwelt at a bawdy-house and had been actually seen there, in a state of idleness during the statutory forty days; that she had been seen on the streets with other occupants of the house; that she said she had no relatives resident, and that her folks lived in Canada; that an officer of police who had known her for eighteen months did not know of any employment in

which she had been or what were her means of support, and that when he went to arrest her he found her concealed under the attic roof of the house called the "farm," thirty or forty feet from the light. The court were satisfied there was sufficient evidence to warrant the verdict of guilty. In *People v. Elmer*, 109 Mich. 493, 67 N. W. 550, the nature of the evidence sufficient to support the conviction of one who professed his ability to foretell future events was well considered. The complaint described the offense as a continuing one, and alleged it to have been committed on July 25, 1895, and for ten days next preceding. On July 23, 1895, the defendant had caused to be published in one of the papers of Ionia a long catchpenny advertisement to the effect that he, a modern-day seer, was then in the city, that he had been born with a marvelous power, and being conversant with occult science could truthfully foretell future events and permit "a peep through the keyhole of the mysterious future"; that he was possessed of all the usual powers of insight into the emotions and affections, and generally under the disguise of the advertisement, that his powers were practically divine. He further advertised himself as a "magnetic healer" and "clairvoyant physician," and published the usual number of "testimonials." He made practically no answer to the charge except that he told his victims he could not tell fortunes. The court was guided mainly by the case of *Penny v. Hansen*, 16 Cox C. C. 173, 56 L. J. U. C. 41, 81 Q. B. D. 478, 56 L. J. 235, 35 W. R. 379, 51 J. P. 167. The English statute under which that conviction was had provided that "every person pretending or professing to tell fortunes . . . shall be deemed a rogue and a vagabond": 5 George IV, c. 83, sec. 4. The court in deciding that case said: "No person who was not a lunatic could believe he [the respondent] possessed such power. . . . The advertisement and circular amounted to pretending and professing to tell fortunes." The Michigan court added: "This language is especially applicable to this case. No sane, intelligent juror could come to any other conclusion than that reached by the circuit judge. No intent was involved. The offense was a misdemeanor. In such cases, where the facts are admitted or are undisputed, it is the duty of courts to instruct jurors that the facts proven constitute the offense. . . . Witnesses for the people had testified to specific acts of pretending to tell fortunes, for which some of them had paid. The defense requested the court to compel the prosecution to elect upon which one of these conviction was asked. The court refused. The ruling was correct. The offense was a continuing one, and any acts to sustain the general charge were admissible. But, if this were not so, the respondent was not prejudiced, because, aside from these specific acts, the advertisement itself constituted the offense." In *State v. McFarland*, 96 Minn. 482, 105 N. W. 187, the defendant was convicted of vagrancy under the ordinance of the city. Over the objection and exception of the defendant the testimony of two policemen, who did not know the defendant prior to his arrest, was received that the reputation of the defendant was that of a pick-pocket, the interpretation put on that term being a thief who steals from the pockets or person of another without putting him in fear. The court said: "It was perfectly obvious that this evidence was incompetent and prejudicial, for it does not fall within any of the exceptions to the general rule that evidence of the bad reputation of the defendant in a criminal case is incompetent."

VII. Jurisdiction.

In vagrancy cases the jurisdiction is practically confined to justices of the peace and in some jurisdictions police magistrates who have power to convict and punish the offense as a misdemeanor under the statute authorizing it. The subject was elaborately discussed in *Wolcott v. Bachman*, 3 Wyo. 335, 23 Pac. 72, 673, on which last-named page the dissenting opinion of Saufley, J., will well repay perusal. An instruction had been given on the trial which assumed that a justice of the peace did not have jurisdiction to commit to the county jail for vagrancy, and in so doing it "palpably misstates the law. Our statute (section 3647) specially confers jurisdiction of the offense of vagrancy on justices of the peace, and authorizes the commitment of the offender." Therefore, having jurisdiction of the offense, which is the subject matter, if he obtains jurisdiction over the person of the offender, he may then lawfully impose the imprisonment. Such was undoubtedly the law, but to a large extent it begged the question which the dissenting justice did not hesitate to answer. The facts were that a justice of the peace in the county of Albany sentenced a man to imprisonment in the county jail for vagrancy without any criminal complaint being made, such man being then before the justice on another charge. The man brought an action against the justice and obtained a verdict for three thousand five hundred dollars. The justice moved for a new trial and his motion was overruled, and on the appeal the judgment was reversed and a new trial ordered.

Saufley, J., in the dissenting opinion referred to, pointed out that to have given the justice jurisdiction of the person of the plaintiff, there should have been, in the absence of a voluntary submission, an information or complaint under oath lodged with him, charging the plaintiff as a vagrant. Section 1025 of the Revised Statutes provides for this complaint on oath. Section 3620, chapter 3, title "Jurisdiction and Procedure in Criminal Cases," provides for the punishment of offenders on information or complaint on oath. Section 3621 provides also for the beginning of criminal actions by information subscribed and sworn to, and other sections provide for the contents of informations. The point of difference is clearly the submission of the man imprisoned to the jurisdiction of the justice, and it seems hardly capable of discussion at this stage that if he had submitted himself, he might have had no cause of action, but that on the evidence presented by the record there is not only no proof that he did but a strong presumption that he did not. These statutes conferring a great jurisdiction are in derogation of the common law, and the rule for their strict construction is inflexible. While they are constitutional, they must be construed strictly and executed carefully in favor of the liberty of the citizen: *People v. Forbes*, 4 Park. C. C. (N. Y.) 611. In *People v. Phillips*, 1 Edmond's Select Cases, 386, a most concise digest of the opinion of the circuit judge is presented, and serves as a valuable guide, both to magistrate and attorney. From it we have gathered such as serve the purpose of this note. It lays down that a record must be made up in every case as a prerequisite to commitment or trespass will lie against the magistrate. The reasons for this record are for the protection of the accused that he may not again be charged with the same offense, for the better protection of the magistrate, and for the purposes of appeal. Although there may be no jury trial, the proceedings must be according to the course of the common law in trials by jury. There must first be an information,

then the defendant summoned and given an opportunity for defense, then the evidence taken, to be followed by the conviction if the defendant is convicted, the judgment and the execution all according to the course of the common law, changing these terms to the statute law, where the statute has supplied the procedure.

VIII. Trial.

The subject of vagrancy, so far as it forms the subject of judicial investigation, receives more consideration in the jurisdiction over the offense and the offender and the sufficiency of the charge and the evidence in support than in the actual trial itself for the offenses, but there are cases, nevertheless, which throw light upon it by reason of the interpretation of the verdict. In *Morton v. Nelms*, 118 Ga. 786, 45 S. E. 616, it was decided that under the act approved August 17, 1903, an accusation charging that the accused was able to work, and had no property nor visible or known means of a fair, honest and reputable livelihood, set forth an offense against the penal laws of the state, and in such case a verdict of guilty meant that the accused was guilty of the acts specified in the accusation. In *State v. Preston*, 4 Idaho, 215, 38 Pac. 694, it was held that the following verdict was sufficient to sustain the judgment: "We the jury in the above-entitled cause, find the defendant guilty of being a vagrant at the time charged in the complaint." The intention of the jury could not be misunderstood from the language used. "Whether the jury found the appellant 'guilty' or 'not guilty' requires no construction of the wording of the verdict to determine. The verdict is not in the usual form prescribed by the Penal Code, but section 8236 of the Revised Statutes provides as follows: 'Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor any error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice in respect to a substantial right.' See, also, *Kellum v. State*, 64 Miss. 226, 1 South. 174; *State v. Wilson*, 40 La. Ann. 751, 5 South. 52, 1 L. R. A. 795. . . . The verdict is sufficient to sustain the judgment: *State v. Reed*, 3 Idaho, 754, 35 Pac. 706; *State v. Clark*, 4 Idaho, 7, 35 Pac. 710." In *Commonwealth v. Sullivan*, 5 Allen, 511, to which we have before referred, it was held correct that the court refused to instruct the jury that the government must prove a habit of mispending his time indulged in by the defendant to a great extent; a constant, continual practice and mode of living and passing his time, or the principal part of it, and also refused, in answer to the express request of the defendant's counsel, to define to the jury what constitutes habitually mispending time by frequenting tippling-shops. In *People v. Phillips*, 1 Edmond's Select Cases, 386, also hereinbefore referred to, the procedure was well discussed by the New York court; and in *Re Waters*, 66 How. Pr. 173, the filing of the record of conviction of a prisoner on a charge of being a vagrant by a police justice in the office of the clerk of the general sessions of the peace in lieu of with the county clerk was held to be regular. Under the Code of Criminal Procedure, section 892, the filing in the latter office was the law, but that section was repealed or abrogated by the provisions of the consolidation act, Laws of 1882, chapter 410. The failure so to file the record would not have entitled the defendant to discharge, as that contingency was expressly provided for by section 1601 of the

consolidation act: *In re Dorfmann*, 21 Abb. N. C. 296. In *People v. Warden of Workhouse*, 37 Misc. Rep. 639, 75 N. Y. Supp. 1111, it was held that the Code of Criminal Procedure, section 515, which abolishes certiorari in criminal cases, applies to prosecutions for vagrancy, notwithstanding that section is in part 4 of the code, relating to prosecutions by indictment, and it is in part 5 the provisions as to vagrancy are contained. The same view was previously expressed by the court in *People v. Cullen*, 151 N. Y. 54, 45 N. E. 401. In *Simmons v. State*, 126 Ga. 632, 55 S. E. 479, upon the trial of one for the offense of vagrancy, it was charged in one count of the accusation that the defendant was a "professional gambler living in idleness"; the court did not err in refusing a request to charge the following: "Under the law of vagrancy, the gist of the offense is the failure or the refusal of the offender to work, when work is necessary to support himself."

IX. Constitutionality of Statutes Dealing With Vagrancy.

There is a strong consensus of opinion that statutes regulating the treatment of vagrancy are constitutional: *In re Fife*, 110 Cal. 8, 42 Pac. 299; *State v. Noble*, 20 La. Ann. 325; *Matter of Glenn*, 54 Md. 572; *St. Louis v. Lee*, 8 Mo. App. 599; *State v. Kenilworth*, 69 N. J. L. 114, 54 Atl. 244; *Morris v. People*, 1 Park. C. C. (N. Y.) 441; *People v. Forbes*, 4 Park C. C. (N. Y.) 611; *People v. Fox*, 77 App. Div. 245, 79 N. Y. Supp. 56; *State v. Hogan*, 63 Ohio St. 202, 81 Am. St. Rep. 626, 58 N. E. 572, 52 L. R. A. 863; *State v. Maxcy*, 1 McMull. 501. The Wisconsin "Tramp Law," chapter 342, Laws of 1883, was three times questioned as to its constitutionality. In *Johnson v. Waukesha County*, 64 Wis. 281, 25 N. W. 7, it was considered but not determined, and in *Murphy v. State*, 86 Wis. 626, 57 N. W. 361, a conviction was had under it. In *Ryan v. Outagamie County*, 80 Wis. 336, 50 N. W. 340, it was also adopted in that the authority of county boards to fix fees under the act was upheld, without any attack upon its general constitutionality.

While it is not competent for the legislature to punish mere idleness alone, without qualification, as constituting a vagrant, yet it is a competent exercise of its police power under the constitution to enact in subdivision 5 of section 537 (now in section 647) of the Penal Code that every lewd or dissolute person shall be punished as a vagrant, and that subdivision is not invalid because failing to define the constituent elements of the crime: *In re McCue*, 7 Cal. App. 765, 96 Pac. 110. Whatever may have been the views of those who doubted the power to enact such laws, there is indeed little room for doubt after reading *Ex parte Strittmatter*, 58 Tex. Cr. 156, ante, p. 937, 124 S. W. 906. A reference to it will show that Ramsey, J., entered into the spirit of the contention that the thirteenth amendment to the federal constitution, that neither slavery nor involuntary servitude shall exist in the United States except as a punishment for crime whereof the party shall have been duly convicted, prevented such legislation as was aimed at the punishment for vagrancy, and that the local act was contrary to the spirit, if not the tenor, of the Bill of Rights of Texas. We have not the space for lengthy excerpts from the case, nor do we feel that more information could be given by any attempt to further condense it. In a remarkably small space the learned judge has admirably given a succinct statement of the foundation on which the constitutionality of the statute rests. In the first place, the constitution of Texas, article 3, section 46, declares that the legislature

at its first session shall enact effective vagrant laws, and as put by the court, if they had not, there could be no question of the power. After paying a compliment to the learning of the contending counsel, the court suggested that the attention bestowed on the common-law definition of vagrancy, though interesting, was not applicable by reason of the holding that the statutes both of England and America have dealt so exhaustively with the subject of vagrancy that the common law has become unimportant: *People v. Forbes*, 4 Park. C. C. (N. Y.) 611. The power of the legislature, says the court, admits "of no sort of doubt," and confining his adjudication to the particular subsection before the court, the judge clearly and beyond answer lays it down that General Laws 31st Legislature, chapter 59, section 1, paragraph "d," which classes as vagrants all able-bodied persons who habitually loaf, loiter and idle in any city, town, village, railroad station, or other public place within the state for the larger portion of their time, without any regular employment, and without any visible means of support, is constitutional. With the remainder of the excellent opinion we have nothing to do here, but the court of criminal appeals of Texas is to be complimented and thanked for an authoritative decision which may be hereafter cited without hesitation and without fear that the line of its cogent reasoning can be diverted. In *People v. Fox*, 77 App. Div. 245, 79 N. Y. Supp. 56, an attack was made upon the constitutionality of the Greater New York charter of 1901. Under sections 707-710 thereof persons convicted of vagrancy shall be sentenced to the workhouse for six months; the superintendent of such workhouse is to transmit to the commissioner of correction within twenty-four hours a description of the person committed with all particulars of the offense and previous convictions within two years; these documents are to be recorded; after such recording, the case made by the documents is to be examined, and an order made discharging the offender five days after the date of commitment for a first offense; twenty days for a second; and if more than two, "at the expiration of a period equal to twice the term of his detention under the last previous commitment, but not in any event exceeding the period fixed by the warrant of commitment"; and providing that in all cases the warrant for discharge should be signed by the committing magistrate, and that in all cases the defendant should have an opportunity of disputing any alleged previous conviction. The constitutionality of the statute was properly upheld, as the sections referred to did not make the sentence uncertain, nor in any way disproportionate to the offense.

X. The Punishment for the Offense.

With each step in the proceedings, the importance of the subject to the lawyer decreases, although naturally the measure of punishment is of the greater proportion to the offender. We shall give, therefore, but brief attention to the decisions on sentences, merely supplying them so that the whole of the subject, which might well fill many times the number of pages to which we are constrained to limit it, may have been covered. In *Baker v. State*, 118 Ga. 787, 45 S. E. 617, it was decided that the act approved August 17, 1903 (Acts 1903, p. 46), was not applicable to a case made by an indictment charging acts of vagrancy on August 1, 1903, and that upon conviction of a person under such an indictment, the record failing to show the date of the return of the bill by the grand jury, a judgment sentencing the ac-

cused in accordance with the law as it was prior to the amendatory act was legal. In *Re Ryan*, 45 Mich. 173, 7 N. W. 819, the defendant was committed under chapter 53, Compiled Laws, as a disorderly person to the state house of correction at Ionia, in default of finding sureties, which statute points out the way in which a defendant may be discharged. The command by the justice was to detain Ryan until he should find sureties or be then discharged by due course of law. The proceedings were to be taken in the county in which the person was tried and contemplated his continued presence there. The act No. 110 of the Session Laws of 1879, section 12, provides that persons convicted under said section 53 of the Compiled Laws may be sentenced to the reformatory at Ionia, and the effect of carrying that out was to prevent the defendant obtaining his liberty as intended. As the one statute did not expressly repeal the other, and repeals by implication are not favored, the court ordered the prisoner's release.

In *People v. Fox*, 39 Misc. Rep. 591, 80 N. Y. Supp. 605, the defendant was convicted of vagrancy, by reason of having committed prostitution in a tenement house in the city. The magistrate had jurisdiction of the case and authority to impose the sentence. In the commitment, however, he stated that it was "pursuant to title 3, section 141, of the Greater New York charter," whereas in reality it was pursuant to title 3, section 141, of the tenement house law, supplemented, as to the form of punishment, by section 707 of the charter. The court did not think the misquotation was of sufficient importance to invalidate the commitment, since the magistrate was undoubtedly armed with the power to commit the defendant to the workhouse upon finding her guilty of the charge: Laws 1901, c. 334, sec. 141; Laws 1901, c. 466, sec. 707; *People v. Flynn*, 37 Misc. Rep. 90, 74 N. Y. Supp. 740. In *People v. Coggey*, 131 App. Div. 20, 115 N. Y. Supp. 836, it was held that a vagrant was not entitled to her discharge before the expiration of her commitment on the order of the commissioner of corrections without the order of the committing magistrate. The express provisions of the Greater New York charter (Laws 1897, p. 249, c. 378, as amended by Laws 1901, p. 298, c. 466, and Laws 1905, p. 1568, c. 638), section 710, provide for the correct method of her discharge. We have already referred to *People v. Fox*, 39 Misc. Rep. 591, 80 N. Y. Supp. 605, ante, division IX, "Constitutionality of Statutes Dealing With Vagrancy."

In *State v. Custer*, 65 N. C. 339, it was ruled that as the Revised Code required that the prisoner should be fined and imprisoned for twenty days, and also be required to find security for good behavior, and under the act of 1866 the court might fine or imprison or both, or sentence him to the workhouse, the two punishments were inconsistent, and that the two statutes could not stand together, and the second repealed the first. The verdict of not guilty was affirmed.

XI. Summary.

As stated throughout this note, we have endeavored to present in as small compass as possible the large topic of vagrancy, and have selected such cases as may be regarded as the leading ones for guidance. The subject was treated in a monographic note to *In re Thompson*, 38 Am. St. Rep. 643. We have made no mention of juvenile vagrancy, regarding it as rather for discussion at a time when juvenile offenders generally may be considered.

HAWKINS v. STATE.

[58 Tex. Cr. 407, 126 S. W. 268.]

THEFT—False Pretexts.—Under an Ordinary Indictment for theft, charging a fraudulent taking without the consent of the owner, it is competent to prove that the taking was with the owner's consent but obtained by false pretexts. (p. 971.)

THEFT—False Pretexts.—Where an Information contains three counts, first, swindling by false pretexts, second, ordinary theft, and third, theft by conversion as bailee, and the case is submitted to the jury on the second count, with evidence that the accused took money from the owner with his consent but by false pretexts, a conviction will be sustained. (pp. 970, 972.)

THEFT—False Pretexts.—One Who Obtains Money from another under the false pretext that he will obtain alcohol with it for the latter and return in a moment with it, but never returns, may be convicted of theft. (pp. 971, 972.)

THEFT—Instruction Singling Out Fact.—A court is not required in a trial for theft to single out a particular fact and eliminate it from the consideration of the jury. (p. 972.)

THEFT—False Pretexts—Demand for Return.—In a prosecution for theft by obtaining money by false pretexts, it is not necessary to prove that demand by the prosecuting witness has been made for the return of the money. (p. 972.)

THEFT—False Pretext—Evidence.—In a Prosecution for theft in obtaining money by false pretexts, evidence is admissible that after procuring the money the defendant, on meeting the prosecuting witness in the street, ran. (p. 972.)

B. F. Amonette, for the appellant.

John A. Mobley, assistant attorney general, for the state.

⁴⁰⁸ McCORD, J. The appellant in this case has appealed from a conviction for theft wherein his punishment was assessed at a fine of forty dollars and thirty days' imprisonment in the county jail.

The information contains three counts: First, swindling by false and fraudulent pretexts and representations; second, theft of property under article 858 of White's Penal Code; and, third, theft by conversion as bailee. The case was submitted to the jury on the second count in the information, resulting in the appellant's conviction. A motion was made in the court below to quash the second count, and was also renewed in a motion in arrest of judgment. We are inclined ⁴⁰⁹ to think that the court below did not err in refusing to quash the second count as the same was drawn in the usual form as provided for ordinary theft. The facts in the case are about as follows:

One W. H. Terna, on the twenty-sixth day of December, 1908, was in the town of Nacogdoches. The appellant in this case, Jean Hawkins, approached the witness and asked him if he wanted some "red eye." The witness replied to him

that he would like to get a quart of alcohol, but that he did not wish any "red eye." Appellant replied, "We keep all kinds." The witness asked him what would a quart of alcohol cost. Appellant said one dollar; witness asked him how long it would take to get it; appellant replied within five or ten minutes; witness gave appellant one dollar and appellant told him to wait right where he was and he would bring it to him; that he, witness, gave appellant one United States silver dollar of the value of one dollar, and the appellant went on off and he never saw him any more until he was arrested some time thereafter. The question here presented is whether this is a case of theft. It has been held in this state that under an ordinary indictment for theft charging a fraudulent taking without the consent of the owner, it is competent to prove the taking was with the owner's consent but obtained by false pretenses: *Dow v. State*, 12 Tex. App. 343; *Morrison v. State*, 17 Tex. App. 34, 50 Am. Rep. 120; and *Atterberry v. State*, 19 Tex. App. 401. On the second count in the indictment the court charged the jury, after defining theft: "To constitute theft by false pretense, it is necessary at the time of taking that the person taking obtained the corporeal personal property by means of some false pretext, and with the intent at the time of taking to defraud the owner of the value thereof, and to appropriate to the use and benefit of the person taking and the offense of theft by false pretense, when taken and so appropriated, is complete provided said wrongful intent to take and appropriate to the use and benefit of the person taking and to deprive the owner of the value thereof existed at the time the property was so taken and appropriated and this is the case, notwithstanding the property so acquired with such wrongful intent may have been obtained with the consent of the person from whom it was taken." At the instance of the state the court further charged: "In this cause the county attorney has elected to prosecute upon that paragraph alone of the information which charges that Jean Hawkins unlawfully and fraudulently took from the possession of W. H. Terna, without his consent, one dollar, with the intent of him, the said Jean Hawkins, to deprive the said W. H. Terna of the value of the same and to appropriate the same to his own use and benefit. He has abandoned those portions of the information and complaint which allege that the defendant agreed to get one quart of whisky for the said W. H. Terna. Now, if you believe from the evidence beyond a reasonable doubt, that the defendant, Jean Hawkins, in Nacogdoches county, Texas, on or about the date alleged, falsely pretended to the said W. H. Terna that he could and would procure for ⁴¹⁰ and deliver to the said W. H. Terna one quart of alcohol, that said pretense was false and known to be false by the defendant, and that the same was made

for the purpose of acquiring one dollar from the said W. H. Terna, and that he did in this manner acquire said money and did appropriate the same to his own use and benefit; then you will convict him. But if you have a reasonable doubt about the aforesaid matters you should acquit him. You are further charged that notwithstanding the indictment herein charges that said money was taken without the consent of W. H. Terna, and the facts show that it was taken with his consent, that if his consent was fraudulently procured, then you will find that his consent was not in law obtained. If you have a reasonable doubt as to whether his consent was fraudulently obtained as charged, then you will acquit him."

The appellant requested a charge that if the false pretense was a promise to do something in the future it would not constitute swindling. This had passed out of the case by the court refusing to submit the question of swindling to the jury.

The second charge that appellant asked was that they would not consider defendant's guilt because he had not returned the said dollar, nor consider whether he had promised to repay same. This the court properly refused. We do not think the court was called upon to single out a particular fact and eliminate it from the consideration of the jury.

The third charge requested was that they would acquit the defendant if the prosecuting witness Terna never made any request or demand of the defendant for either the alcohol or the dollar before the defendant was arrested.

Appellant's fourth requested charge was to the same effect as the third. We have not been cited to any authority in support of this proposition, and the fact that no demand was made upon the defendant for the return of the dollar, or for the property, on the part of the prosecuting witness, would not make the defendant any the less guilty, and we know of no authority that holds that a demand would have to be made by the prosecuting witness for the return of the money that had been obtained by false pretext.

We find a bill of exceptions in the record to the action of the court in allowing the state to prove by the witness Porter that on the day after the defendant procured the dollar from the prosecuting witness, as Porter and the prosecuting witness were going down the street they came upon the defendant and the defendant ran. We think this testimony was clearly admissible as a circumstance in the case and the state was entitled to prove same. We think there is no merit in the appeal in this case and that no errors were committed in the trial court and the judgment is in all things affirmed.

Affirmed.

Larceny by Trick, Fraud or False Pretext is discussed in the note to *People v. Miller*, 88 Am. St. Rep. 569; and in the recent cases of

State v. Donaldson, 35 Utah, 96, 136 Am. St. Rep. 1041; **Towns v. State**, 167 Ind. 315, 119 Am. St. Rep. 501; **Aldrich v. People**, 224 Ill. 622, 115 Am. St. Rep. 166. If a person takes a piece of money from another to change and places it in his own pocket with the unlawful intent to convert it, or any part of it, to his own use, and refuses to deliver the money given him, or the change therefor, on demand, he is guilty of larceny, and the fact that the taking was open and from the owner is of no consequence, if the intent to steal existed: **Verberg v. State**, 137 Ala. 73, 97 Am. St. Rep. 17.

RICHMOND v. STATE.

[58 Tex. Cr. 435, 126 S. W. 596.]

SLANDER OF WOMAN—Inquiry into Reputation.—In a prosecution for slander in charging a woman with being unchaste, any inquiry into her reputation for chastity should be limited to the time of uttering the words, or at least to a time reasonably approximating thereto. (pp. 974, 975.)

SLANDER OF WOMAN—Evidence of Reputation.—In a prosecution for slander in charging a woman with being unchaste and with going to a certain place to be delivered of a child, it is error to permit a witness to testify that while the prosecutrix stayed at her house at that place she saw nothing in the conduct of the prosecutrix indicating that she was not a virtuous woman. (p. 975.)

SLANDER OF WOMAN—Privileged Communication.—Where one, in conversing with a father about matters not at all relating to his daughter, makes statements imputing to her a want of chastity, the communication is not privileged. (pp. 975, 976.)

McMurray & Gettys, for the appellant.

John A. Mobley, assistant attorney general, for the state.

⁴³⁶ **RAMSEY, J.** On the ninth day of March, 1909, an information was filed in the county court of Wise county, charging appellant with falsely and wantonly imputing to Pearl Teague a want of chastity, in that he said, in substance, that she was ruined, meaning thereby that she was guilty of illicit carnal intercourse with a man; and in another count charging her with being pregnant; and in a still further count charging that the said Pearl Teague had gone to Keene to get rid of a child, meaning thereby that the said Pearl Teague, being an unmarried woman, was pregnant with a child as the result of illicit carnal intercourse with a man.

The testimony in the case took a very wide range, the appellant seeking to establish the truth of the statements made, and especially undertaking to make a strong showing to the effect, in substance, that at and before the time of the uttering of the words alleged that the general reputation of the said Pearl Teague in the community where she lived for chastity was bad. On the other hand, all the charges against Miss

Teague were strenuously denied by her, and many witnesses were introduced by the state tending to show that her reputation was good, and that such reputation was good at the time of the trial. The trial occurred, it should be stated, and the conviction had on the thirteenth day of October, 1909. The language ascribed to appellant is charged to have been uttered on the ninth day of December, 1908. Among other things, the state was permitted to prove that just a short time before the trial Miss Teague had been elected organist in the singing class in the community where she lived.

1. In this state of the record the court, among other things, charged the jury as follows: "If, on inquiry as to the general reputation of the female, the evidence satisfies you that her reputation for chastity is bad in the community in which she lives, then you should acquit the defendant." This charge was at the time excepted to, because same limits the evidence and finding of the jury to the general reputation of the prosecutrix at the time of the trial. In this connection, and to cure the error believed to exist in the court's charge, counsel for appellant requested the court to give the following special instruction: "That if they find from the evidence in this case that the defendant Tom Richmond used the language about Pearl Teague charged against him in the complaint, and that said language imputed to her a want of chastity, but that at the time said language was so uttered, ⁴³⁷ or before, the general reputation of said Pearl Teague in the community where she lived for chastity and virtue was bad, or if they find from the evidence of specific acts by said Pearl Teague with other men, she was unchaste, the jury will find the defendant not guilty."

Article 751 of our Penal Code provides that, "In any proceeding under this chapter it shall not be necessary for the state to show that such imputation was false, but the defendant may in justification show the truth of the imputation, and the general reputation for chastity of the female alleged to have been slandered may be inquired into." It has been quite uniformly held by this court that where, in a prosecution for slander, an inquiry into the reputation of the female for chastity establishes that such reputation is bad, the defendant is entitled to an acquittal: *Crane v. State*, 30 Tex. App. 464, 17 S. W. 939; *Shaw v. State*, 28 Tex. App. 236, 12 S. W. 741; *Van Dusen v. State*, 34 Tex. Cr. 456, 30 S. W. 1073. We think it must be evident that it was the purpose of this statute to limit the inquiry to the time of the uttering of the words, or at least to a time reasonably approximating the date of such uttering. If it were otherwise, a man who would wantonly put in circulation false charges against an innocent woman, and had by cunning and industry at the time of the trial, months or years thereafter, brought her good name into

disrepute, he might justify his act of slander in respect to a woman in fact chaste, and at the time so regarded by showing a bad reputation months thereafter. While if the charge of the court had stood alone and had not been excepted to at the time it might have been sufficient. We think, in view of the character of the testimony introduced, and in view of the request of appellant for a correct instruction, that the court should have modified the charge given so that it would clearly relate to the reputation of Miss Teague at the time of the alleged slanderous words, and that in view of the entire record, for this error, we would not be justified in treating same as immaterial.

2. Again, we think also there was error in the ruling of the court in permitting Mrs. Moore to testify, in answer to a question by counsel for the state, that while Miss Teague stayed at her house at Keene, that she saw nothing in her action or conduct indicating that she was not a virtuous woman. It would, of course, have been competent for the state to have introduced any amount of testimony to the effect that Miss Teague had not while at Keene been delivered of a child or submitted to an abortion, but we think this testimony goes beyond the scope within which the evidence should have been limited, and calls for a conclusion of the witness based upon facts not stated, and is subject to the objection urged by counsel for appellant.

3. Again, serious complaint is made of the argument of counsel for the state, claiming that in the course of the argument more than one reference was made to the failure of appellant to testify. In respect to one of these bills, the court states that he did not hear the language complained of, and it is not wholly clear in respect to the ⁴³⁸ other bill that the language should be held, in the light of the issues made, to constitute a reference to the failure of appellant to testify. These, of course, are matters not likely to occur on another trial and need not therefore be further considered.

4. An important issue raised in the case was that the language of appellant, being in reply to a question or questions of Miss Teague's father, was privileged, and that in no event could a prosecution be predicated thereon. We think this position, under the facts here, is not maintainable. This case is wholly different from that of *Hix v. State* (Tex. App.), 20 S. W. 550. The court there held that statements by a defendant, which would otherwise be slanderous, are privileged, where they were made to the father of the person alleged to have been slandered, at a meeting by appointment for the purpose of investigating the alleged slander. The decision in that case is rested somewhat upon the holding of the court in *Ormsby v. Douglass*, 37 N. Y. 477, where the rule is thus stated: "A communication, which would otherwise be slanderous and

actionable, is privileged if made in good faith upon a matter involving an interest or duty to the party making it, though such duty be not strictly legal, but of doubtful obligation, to a person having a corresponding interest or duty." In this case it appears from the evidence, however, that J. W. Teague, father of Miss Teague, and appellant were talking about a wholly different matter not at all relating to Teague's daughter, and that during this conversation appellant began the conversation touching Miss Teague, and uttered the words alleged to be libelous: See 2 McClain on Criminal Law, p. 1052.

5. The other matters raised on the appeal, which are quite numerous, relate to matters in respect to which, we think, there was no error committed by the court, or such as will not likely arise on another trial, and need not, therefore, be discussed.

For the errors pointed out, the judgment is reversed and the cause is remanded.

As to Whether Words Imputing Want of Chastity to a woman are libelous per se, see the note to Nichols v. Daily Reporter Co., 116 Am. St. Rep. 809. It has been held that to call a woman a "damned old bitch" does not impute want of chastity, and is not actionable per se: Warren v. Ray, 155 Mich. 91, 130 Am. St. Rep. 566. But the following words spoken of a married woman: "I suppose that you have heard the slander that's going about the Coopers; that little girl was born within four or five months after they were married; now, what do you think of them?" fairly mean the woman's child was begotten out of lawful wedlock and that she had been guilty of a breach of chastity: Cooper v. Seaverns, 81 Kan. 267, 135 Am. St. Rep. 359.

As to What Communications are Privileged in the law of libel and slander, see the note to Holmes v. Clisby, 104 Am. St. Rep. 110.

Justification in Libel and Slander is the subject of a note to Rutherford v. Paddock, 91 Am. St. Rep. 285.

TOWNSER v. STATE.

[58 Tex. Cr. 453, 126 S. W. 572.]

FORNICATION.—An Information in the Usual Form, which charges the defendant with being an unmarried male and the prosecuting witness as being an unmarried female, is not open to the objection that it does not allege that the defendant is a man and the prosecuting witness a woman. (p. 977.)

FORNICATION—Accomplice—Corroboration.—A man cannot be convicted of fornication on the testimony of the alleged female, if the state offers no other evidence to show intercourse between them, or that he has ever been seen with her, or that they ever have lived together. (p. 977.)

King & King, for the appellant.

John A. Mobley, assistant attorney general, for the state.

⁴⁵³ McCORD, J. This is an appeal from a conviction under a complaint charging appellant with fornication. The information is in the usual form and sufficiently charges the offense. The objection that it does not allege that appellant was a man and that Mattye Townser was a woman is without force, because the information charges appellant with being an unmarried male and Mattye Townser as being an unmarried female. On the trial of the case Mattye Townser was sworn by the state and testified that she had known the appellant for the past seven or eight years; that she had been raised in Nacogdoches county; that she and the appellant had been living together as man and wife in Nacogdoches county for the past four or five years; that they lived in a house in the town of Nacogdoches to the rear of and near Mrs. N. G. Wade's place; that they had never been married, but had lived together as man and wife, and that she had four children born to her by the appellant, and that they engaged in sexual intercourse with each other as often as they desired; that the appellant told her he was an unmarried man, but had been married prior thereto and had been divorced from his wife; that her name was Jones prior to the time she took the name of appellant; that she and the appellant joined the church together, he as John Townser and she as Mattye Townser, and that they joined as man and wife. The state also offered Jeff Smith, who testified that he at one time belonged to the same church as John Townser and Mattye Townser, and saw their names on the church book; that Mattye Townser had lived at three different ⁴⁵⁴ places in the town of Nacogdoches; that he had never been at her house but once, and did not see appellant there at that time.

Complaint is made in the motion for new trial and before this court that the testimony is wholly insufficient to support the verdict, in that Mattye Townser is not corroborated sufficiently to justify the conviction. We are inclined to think that this point is well taken. There is no testimony offered whatever on the part of the state by any witness to show either intercourse or that appellant was ever seen in the presence of the prosecuting witness, Mattye Townser, or that they ever lived together: See *Zollicoffer v. State*, 16 Tex. Cr. 312; *Dunn v. State*, 15 Tex. Cr. 560, and *Powell v. State*, 15 Tex. Cr. 441.

The judgment is reversed and the cause is remanded.

Accomplices—Fornication and Adultery.—As to whether the parties in fornication or adultery are accomplices within the rule of accomplice testimony, see the note to *Stone v. State*, 98 Am. St. Rep. 179.

PETTUS v. STATE.

[58 Tex. Cr. 546, 126 S. W. 868.]

RAPE.—Testimony of the Statement of the Prosecutrix that the defendant assaulted her is admissible in a rape case; although it was not made by her until ten days after the alleged offense, it appearing that she is the wife of the stepson of the defendant, that he threatened to kill her if she complained, and that she is not permitted to state any of the details of the occurrence, but only the substantial fact of the assault. (p. 979.)

RAPE—Consent.—In Instructing the Jury in a rape case, the court should not assume to decide what is the main issue and state that it is consent. (p. 981.)

RAPE—Instructions—Use of Word "Crime."—In defining the offense in instructions in a rape case, the court should not use the word "crime," in a connection that may convey an impression that the court believes an offense has been committed. (p. 981.)

RAPE—Consent—Instructions.—Where There is Evidence in a rape case that the intercourse was consented to, an instruction is erroneous which does not affirmatively submit the issue of consent and advise an acquittal if the prosecutrix consented. (p. 981.)

Norman & Shook, for the appellant.

John A. Mobley, assistant attorney general, for the state.

⁵⁴⁷ **RAMSEY, J.** The appellant suffered a conviction on charge of rape in the district court of Cherokee county on June 8, 1909, wherein his punishment was assessed at confinement in the penitentiary for a period of twenty-five years. The alleged injured party, Mrs. Aubrey Nelson, was the wife of a stepson of appellant and was a young woman about twenty-five years of age, living something like a mile from where appellant and his wife resided. The rape was alleged to have been accomplished on a certain Tuesday, the first day of June, 1909. Appellant admits the intercourse, but claims it was by the consent of Mrs. Nelson, and that they had intercourse repeatedly for some two or three years before the occasion in question. Mrs. Nelson testifies ⁵⁴⁸ that after the accomplishment of his purpose, appellant said to her that if she told of his conduct toward her that he would kill both her and her husband, and that this statement was repeated to her some days thereafter by appellant. She made no mention of the transaction to anyone until about ten days thereafter, when she told her mother and her husband. She was shown to be a woman of good reputation, both for virtue and chastity and for truth and veracity. Appellant's reputation for truth and veracity was shown to be bad, and there was some suggestion that his relations with women had not been what they should have been. There are a great many questions raised in the case, only one or two of which we deem it necessary to notice. Some of the matters are not likely to arise on another

trial, at least in the manner here presented, and as to most of them we feel and think there was no error committed by the trial court.

1. Complaint is made that testimony of the statement of Mrs. Nelson to the effect, in substance, that appellant had assaulted her was not admissible on account of the delay in making the same. It should be stated in this connection that she, prosecuting witness, was not permitted to give or state any of the details of the transaction, but her testimony was confined solely and only to the substantial fact of the assault made upon her. We think, in view of the threats testified to by her, considered in connection with her relations to appellant, that this testimony was admissible: *Warren v. State*, 54 Tex. Cr. 443, 114 S. W. 380, and *Railsback v. State*, 53 Tex. Cr. 542, 110 S. W. 916. We think the manner of producing this testimony, and the circumstances under which it was introduced, is probably subject to the complaint that it was in advance of any assault upon the witness on account of her failure to make outcry, except that such objection is answered in the fact that later this was made the matter of serious contention by appellant. It should be further stated that the testimony of prosecutrix on the subject of resistance is quite vaguely stated. While she testifies that she resisted and that the intercourse was accomplished without her consent, her account of the circumstance is not very clear. This may be due in part to the shock and fright of such assault for the time being measurably overpowering her reason, and to some extent by the natural reluctance of a modest woman to go into details in respect to such transaction. However this may be, her testimony in respect to the matter of resistance and touching the issue of force on the part of appellant, while perhaps sufficient, is, it must be confessed, rather vaguely and indefinitely stated by her.

2. In this condition of the record the court gave to the jury the following charge: "To constitute rape something more must be shown than the mere want of the female's consent and the use of force by the accused; there must have been resistance upon her part, dependent, in amount, on the circumstances surrounding her at the time, and on the relative strength of herself and the accused; in other words, every exertion in her power, under the circumstances of the occasion, must ⁵⁴⁹ be made by her to prevent the crime, or her consent will be presumed. Now, the question of consent is the main issue in this case, and you are instructed that unless you believe from the evidence beyond a reasonable doubt, not only that defendant had and obtained carnal knowledge of Aubrey Nelson, a woman, at the time and place alleged in the indictment, but also further that same was obtained without the consent of the woman and by the use of force such as might

reasonably be supposed sufficient to overcome resistance on her part, taking into consideration the relative strength of the parties, and the other circumstances of the case, and that she resisted by every exertion in her power, under the circumstances surrounding her at the time, to prevent the crime, you will acquit the defendant. If you have a reasonable doubt as to whether or not the carnal knowledge (if had) was had with her consent, or was obtained by the use of the degree of force, on defendant's part, above explained, or whether or not she resisted, to the extent above mentioned, you will in case of either such doubt find the defendant not guilty." Serious complaint is made of so much of the charge as in substance instructed the jury that the question of consent was the main issue in the case and to the following clause of the charge: "And that she resisted by every exertion in her power, under the circumstances surrounding her at the time, to prevent the crime." In this connection complaint is also made that the court did not, except as implied in the foregoing instruction, charge the jury affirmatively that if the intercourse was by the consent of the prosecutrix, that appellant was entitled to an acquittal. This charge is objected to substantially for the following reasons: (a) Because in defining the degree of force necessary the jury are only required to find such force as might be reasonably supposed to be sufficient to overcome resistance on the woman's part; whereas, the law requires in order to constitute the offense of rape that the defendant must use that degree of force necessary to overcome the utmost resistance of which the female is capable. (b) Because the court assumes that the crime had been committed, and that it was necessary only for the jury to determine whether or not Mrs. Nelson had consented and whether she had used that resistance to avoid the commission of the crime required of her. That the use of the word "crime" in this connection was calculated to and did cause the jury to believe, and that the court believed, that the appellant had committed the crime. That the court should, in defining said offense, have used some other word which would not have implied that appellant was guilty of such intercourse or obtaining carnal knowledge. (c) Because there was affirmative error in said paragraph in assuming that the only issue, or the main issue, in the case arose upon the testimony of the prosecutrix in determining the amount of force, particularly since the evidence of the appellant was clear and positive that the intercourse was with the consent of prosecutrix, and that this was particularly hurtful, since nowhere did the court affirmatively present this defense of consent to ⁵⁵⁰ the jury and advise them that if they believed that prosecutrix had consented, that they should acquit. (d) That the charge is erroneous since it was error for the court to undertake to assume and decide what was the main issue in the

case, and that under the evidence the question of force was important, and was equally a main, or the main, issue in the case, as the issue of consent, and it was the province of the jury to determine if this issue should have been determined by anyone, what the main issue or issues were, and that the jury should have been permitted to determine these things wholly independent of and unencumbered and unhampered by any charge as to what was the main issue in the case. We think the charge of the court erroneous in these respects: First, it was clearly error, and, in the light of the entire evidence, probably injurious for the court to undertake to instruct the jury that consent was the main issue in the case. Second, we think the use of the word "crime" was unfortunate and probably prejudicial, and might have the effect, and probably did have the effect, to convey to the jury the impression that the court believed that an offense had been committed. Third, the charge of the court was clearly erroneous in that there was no distinct and affirmative submission of the issue of consent and instruction to the effect that if Mrs. Nelson consented that appellant was entitled to an acquittal: See *Logan v. State*, 40 Tex. Cr. 85, 48 S. W. 575; *Moore v. State*, 44 Tex. Cr. 45, 68 S. W. 279; *Owens v. State*, 39 Tex. Cr. 391, 46 S. W. 240; *White v. State*, 17 Tex. App. 188; *Lee v. State*, 27 Tex. App. 475, 11 S. W. 483; *Barton v. State*, 49 Tex. Cr. 121, 90 S. W. 877; *Beaver v. State* (Tex. App.), 86 S. W. 1020; *Green v. State*, 49 Tex. Cr. 645, 98 S. W. 1059; *King v. State*, 51 Tex. Cr. 208, 123 Am. St. Rep. 881, 101 S. W. 237.

For the errors pointed out the judgment is reversed and the cause is remanded.

The Crime of Rape is discussed in the note to *Smith v. State*, 80 Am. Dec. 361. Absence of complaint by the prosecutrix in a rape case is not conclusive against conviction: *Garvik v. Burlington etc. Ry. Co.*, 131 Iowa, 415, 117 Am. St. Rep. 432. As to the admissibility of evidence of the complaint of the prosecutrix, made perhaps a considerable length of time after the commission of the offense, see *People v. Gage*, 62 Mich. 271, 4 Am. St. Rep. 854; *Barnes v. State*, 88 Ala. 204, 16 Am. St. Rep. 48; *State v. Langford*, 45 La. Ann. 1177, 40 Am. St. Rep. 277; *Reddick v. State*, 35 Tex. Cr. 463, 60 Am. St. Rep. 56; *Thomas v. State*, 47 Tex. Cr. 534, 122 Am. St. Rep. 712.

TILMYER v. STATE.

[58 Tex. Cr. 562, 126 S. W. 870.]

HOMICIDE—Justification—Threats—Instructions.—While it is better always in a homicide case, in submitting a charge upon threats to take life, to include also serious bodily injury, it is not necessarily error in all cases to fail to do so. If the positions of the parties and conditions surrounding them are such that it could not possibly be anticipated that the preparation of one of them could be other than to take life, then the omission to say he would be justified if the threat was made to seriously inflict bodily injury would not be reversible error. (p. 983.)

HOMICIDE—Self-defense—Threats.—One Who Arms Himself with the intention of killing another when he meets him has a perfect right of self-defense, if the latter has previously threatened his life, and when they meet makes an attack or demonstration manifesting a purpose to put his threats into execution before the other has made any effort to carry out his intention. (p. 983.)

HOMICIDE—Submitting Issue to Jury.—An issue presented in a homicide case must be submitted with proper instructions to the jury, although the court may think it false. (p. 983.)

M. O. Flowers, for the appellant.

John A. Mobley, assistant attorney general, for the state.

⁵⁶³ McCORD, J. This is an appeal from a conviction for murder in the second degree with a penalty of twenty years' confinement in the penitentiary.

On the trial of the case several witnesses testified that the deceased had made threats against the life of the defendant. On the evening of the killing, the defendant testified, that being alarmed and frightened at the frequent threats made against his life by the deceased, he procured a gun for the purpose of protecting himself and started toward his shop. While walking down the street he saw the deceased standing in the door, and when the deceased saw him he turned and looked at him and threw his hand to his hip, and that believing that deceased was going to carry his threats into execution he shot and killed the deceased. On the trial of the case the court charged the jury on the subject of threats as follows: "Where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense unless it be shown at the time of the homicide the person killed by some act then done manifested an intention to execute the threats so made. If you believe from the evidence that the deceased did make threats against the life of defendant, and it reasonably appeared to the defendant at the time of the killing the deceased made such an act or demonstration as reasonably to produce in the mind of the defend-

ant that the deceased then and there intended to take the life of the defendant, you will acquit." In connection with this charge the court further charged the jury as follows: "If you believe that the defendant prepared himself with a gun for the purpose of seeking the deceased with the intent to kill him, and did shoot and kill the deceased, then such threats would not justify the defendant in shooting and killing the deceased." The whole charge on the subject of threats is complained of in the appellant's motion for a new trial in that it omitted to charge the jury on the subject of apparent danger growing out of the threat and the doing of the act; and, further, that the charge is more restrictive than the statute; and, third, that it omitted to state to the jury that the appellant had the right to defend not only against threats to take life, but to inflict serious ⁵⁶⁴ bodily injury. In view of the facts surrounding the killing, we do not think that the charge is subject to the criticism leveled against it. It was in the language of the statute and did authorize the jury to consider apparent danger, and while it is better always in submitting a charge upon threats to take life to include also serious bodily injury, yet we are not prepared to say that in every case it would be error to omit to so instruct the jury. If the positions of the parties and conditions surrounding them are such that it could not possibly be anticipated that the preparation of the party could be other than to take life, then the omission to say he would be justified if the threat was made to seriously inflict bodily injury would not be such error as would authorize a reversal. We are, however, inclined to think that the second paragraph of the charge as above quoted should not have been given to the jury. It may be true that appellant prepared himself with a gun for the purpose of seeking the deceased with the intent to kill him, and did shoot and kill him, yet, though the intention may have been in the mind of the deceased to shoot and kill, when he meets his assailant, if the assailant commences an attack on him before he has made any effort to carry out his intention, in such case his right of self-defense would be perfect; and if the deceased, before the defendant did anything, did some act or made some demonstration that manifested an intention to carry his threat into execution, he would certainly have a right to defend, and could justify the killing on the ground of threats made and an effort to carry them into execution. This charge should not have been given, and for this error the case must be reversed. It is true no one testified to this state of facts surrounding the killing other than the appellant, yet he was entitled to have his view of the case presented to the jury, and though the jury may not believe what he said about it, they, and not the court, are the judges. When an issue is presented, though the court may think it false, yet

the law has lodged it with the jury to pass upon the facts of a case under proper instructions, and where the instructions are not proper and legal and calculated to do injury to the appellant, it is the duty of this court to reverse the case.

There are other questions raised in the record, but as they are not likely to occur upon another trial, they will not be considered.

For the error indicated, the judgment is reversed and the cause is remanded.

The Law of Self-defense is discussed in the notes to *State v. Sumner*, 74 Am. St. Rep. 717; *State v. Gordon*, 109 Am. St. Rep. 804.

The Admissibility of Threats in prosecutions for homicide is considered in the notes to *State v. Nelson*, 89 Am. St. Rep. 691; *Campbell v. People*, 61 Am. Dec. 53.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

COREVO v. HOLMAN.

[82 Vt. 34, 71 Atl. 718.]

WATERS—Prescriptive Right to Use from Spring.—One may acquire a prescriptive right to take water for use on his premises from a spring located on another's land, by taking water in pails from a roadside watering-trough fed by the spring. (p. 986.)

WATERS—Right to Take, Whether Passes as Appurtenance.—A prescriptive right to take water from a roadside watering-trough fed by a neighboring spring passes as an appurtenance in a deed conveying the premises with which the right is connected. And it is not necessary that the water should be running in or on such premises; it is enough if it is carried in pails thereon. (pp. 986, 987.)

N. L. Boyden and R. M. Harvey, for the plaintiff.

Cowles & Moulton and David S. Conant, for the defendant.

35 WATSON, J. This action was brought to recover for the alleged trespass of defendants in laying a pipe into a certain spring claimed by the plaintiff, which was situated on land adjoining that of defendant, but belonging to a third person. As to defendant Trask the verdict was guilty, and on his exceptions the case is here. The plaintiff produced a deed from one Sault and wife to him, conveying the farm on which he resided and containing the clause: "With the right to a spring on the J. Seymour place, meaning the spring where the water is now taken." It was conceded by both sides that this is the spring here in question.

Defendant introduced evidence tending to show that for upward of sixty years the occupants of the premises owned by his father, under whose authority he acted when he did the acts complained of, had taken all their water for household purposes from a watering-trough on the roadside, situated eight or ten rods from the house. This watering-trough was supplied with water from the spring in question by means of "pump-logs." The deed of the house and land

to the defendant's father included the appurtenances. This conveyance was before the deed ³⁶ from Sault to the plaintiff. Evidence was introduced by both parties in respect to which party repaired the spring, pipe-line and trough. But defendant's evidence tended to show that his father had used the water ever since he purchased the premises, and so under a claim of right, and that the defendant had kept the spring in repair, replaced the logs by a pipe, and, in 1906, laid a pipe from the trough to his house.

A prescriptive right to take water from this spring for the necessary use and benefit of the defendant's house and premises could be acquired by taking water from the watering-trough for that purpose in pails uninterruptedly under a claim of right for the requisite period, as well as by taking water therefrom by pipe running to the house and premises—the only difference being in the method of conveying the water from the watering-trough—or by both taken together in succession, and pass as an appurtenance in a deed conveying the property with which it is thus connected. The plaintiff does not controvert this proposition in argument, but, on the contrary, says there is nothing in the charge indicating that an appurtenance must be connected with the house or buildings; that there was no claim on the part of defendant Trask that at the time he took his deed water from this spring was running to his house or land, but only that he had a right to go to the spring to get water or to the watering-trough on a third person's land; and that the charge of the court rightly understood means that the right to go to the spring or trough for water may be an appurtenance. The charge in this respect to which exception was taken was as follows: "Water running in a house or other building may be an appurtenance; running water in premises so situated and under such circumstances that it belongs there, belongs to the building or premises conveyed, passes with the building or premises in the deed, under the head of appurtenances, but it must be so used in connection with the buildings or premises, and under such circumstances that it constitutes a part of such property so conveyed, for the purpose for which it is used, that it belongs there, is appurtenant thereto." Then continuing the charge, the court said: "The water was not in fact running in the old logs when these deeds were made, according to the situation as I remember it. When it did run it did not run across or upon the land conveyed, which was the Trask place, and was in no way directly connected with the premises. Take the testimony ³⁷ in view of what I have said, and say whether the water or line of logs or the spring, or any right therein, was appurtenant to the premises conveyed. If it was not, then it did not pass as an appurtenant to those deeds."

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We think that portion of the charge excepted to was well calculated to mislead the jury into believing that in order to be an appurtenance passing under the deeds the water must have been running in the buildings or on the premises in such circumstances as to belong to the building or premises deeded, and must have been used in connection with them so as to constitute a part of the property, thereby excluding the idea that the right to take water from the spring could be an appurtenance if the water was carried from the watering-trough to defendant's buildings and premises in pails, and the tendency of what the court said to the jury immediately thereafter was to strengthen such belief. This was error.

It is unnecessary to consider the other exceptions argued, as they are not likely to arise on another trial.

Judgment reversed and cause remanded.

Prescriptive Title to Waters is the subject of a note to Oregon etc. Co. v. Allen Ditch Co., 93 Am. St. Rep. 711. To acquire ownership of a water right by adverse user the use must be open, notorious, continuous, adverse and exclusive under a claim of right for the statutory period; the words "open" and "notorious," as thus used, are practically synonymous: Smith v. Duff, 39 Mont. 374, 133 Am. St. Rep. 582, and see cases cited in the cross-reference note thereto.

As to What Appurtenances in the Way of Water Rights will pass with a conveyance of land, see the note to Scott v. Moore, 81 Am. St. Rep. 769. Whether a water right passes as an appurtenance to the land, granted by deed silent as to water rights, depends upon the intention of the grantor, to be ascertained from the circumstances, and whether such right is or is not incident and necessary to the beneficial enjoyment of the land: Bessemer Irr. Ditch Co. v. Woolley, 32 Colo. 437, 105 Am. St. Rep. 91.

As to the Creation and Conveyance of Easements Appurtenant, see the note to Smith v. Garbe, 136 Am. St. Rep. 680.

WELLS v. BOSTON AND MAINE RAILROAD.

[82 Vt. 108, 71 Atl. 1103.]

CARRIER—Action for Assault in Ejecting Passenger.—In trespass against a carrier for assault and battery in ejecting a passenger from a train, it is necessary for the plaintiff, in making his opening, to prove not only the assault and battery, but also such facts as in law make the defendant responsible therefor. (p. 989.)

CARRIER—Action for Assault in Ejecting Passenger.—In trespass against a carrier for assault and battery in ejecting a passenger from a train, it is not essential that the declaration state the injury with any inducement of the defendant's motive or intent, or of the circumstances under which the injury was committed. (p. 989.)

CARRIER—Action for Assault in Ejecting Passenger.—The order in which the plaintiff introduces his evidence in trespass

against a carrier for ejecting him from the train is within the discretion of the court. (p. 990.)

JUDGMENT—Res Judicata—Matters Concluded.—A verdict and judgment is conclusive evidence, between the same parties in a subsequent suit, of whatever it was necessary for the jury to find in order to warrant the verdict. It is not necessary that the issue should have been taken in the former action upon the precise point controverted in the subsequent suit. But every point that was expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment, is concluded. (p. 990.)

JUDGMENT—Res Judicata—Matters Concluded.—A judgment is not evidence in a subsequent suit of any matter which came collaterally in question merely, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument upon the judgment. (p. 991.)

CARRIER—Ejection of Passenger—Res Judicata.—Where a passenger is ejected from a train because he fails to produce a ticket or pay fare, but re-enters the train and continues his journey after a friend, whom he subsequently reimburses, pays the fare, a judgment in his favor, in an action to recover from the carrier the amount so paid, is not, in his subsequent action in trespass for being ejected from the train, conclusive that he was rightly on the train and is entitled to recover damages. (p. 991.)

JUDGMENT—Estoppel—Right of Defendant.—Where the plaintiffs have introduced a former judgment in evidence, the defendant cannot take advantage of it by way of estoppel if he has not pleaded it as such. (p. 991.)

CARRIER—Ejection of Passenger—Evidence.—In an action against a carrier for wrongfully ejecting a passenger on his failure to produce a ticket, evidence that one not called as a witness was in the car and told the conductor that he saw the former conductor take up the ticket, is not admissible either as part of the *res gestae* or as bearing on the question of exemplary damages. (p. 992.)

CARRIER—Damages for Ejecting Passenger.—In an action against a carrier for wrongfully ejecting a passenger, such special damages may be shown as are the natural and proximate, not the necessary, consequences of the act complained of. (p. 992.)

CARRIER—Damages for Ejecting Passenger.—In an action against a carrier for damages in wrongfully ejecting a passenger from a train, his loss of profits which he might have made in carrying out a lumber contract that he abandoned because partly disabled by his injuries, but which is not the natural and proximate result of the ejection, does not constitute an element of recoverable damages. (p. 993.)

CARRIER—Ejection of Passenger—Exemplary Damages.—In an action against a carrier for wrongfully ejecting a passenger, an instruction that if the jury find the plaintiff is entitled to recover and that the act of putting him off the car was willful and malicious, they may add exemplary damages, is erroneous in permitting such damages without regard to whether the carrier was guilty of the wrong committed by its servant, by directing, participating in, or subsequently approving it. (p. 993.)

Howe & Hovey, for the plaintiff.

Young & Young and Harry Blodgett, for the defendant.

115 WATSON, J. The first count of the declaration alleges in detail an assault and battery at Barton, including

“and also, then and there, with great force and violence shook and pulled about the plaintiff, and threw and cast the plaintiff out of and from a certain railroad passenger car, and cast and threw [him] down to and upon a certain wooden platform then and there situated,” and special damages. Pleas, the general issue, and special in justification that at the time when, etc., the plaintiff, riding in a certain car of defendant’s train through the towns of Newport and Barton to Lyndonville, on proper request by the conductor in charge of the train, refused to pay his fare or to produce a ticket as evidence of payment thereof, whereupon by reason thereof, the defendant by its said conductor, using no more force than was necessary, ejected the plaintiff from the car. The plaintiff replied *de injuria*.

Subject to objection and exception on the ground that the evidence was not admissible under the declaration, the plaintiff was permitted to show that on the morning of September, 1905, he purchased a ticket at Lyndonville, having three coupons, the first entitling him to ride over defendant’s railroad from there to Sherbrooke, the second, to attend the fair at Sherbrooke, and the third to a ride over defendant’s railroad from Sherbrooke back to Lyndonville on the same day; that the plaintiff rode to Sherbrooke, surrendering the first coupon, attended the fair, surrendering the second coupon, and took the train at Sherbrooke late in the afternoon to ride back to ¹¹⁶ Lyndonville; that between Sherbrooke and Newport the conductor of the train took up the third coupon, returning nothing to the plaintiff to show that he had paid his fare from Newport to Lyndonville; that at Newport some changes were made in the train, and also a change of conductors; that when the conductor south of Newport called upon the plaintiff for his fare the plaintiff told him he had a ticket from Sherbrooke to Lyndonville and that the conductor north of Newport took it up and retained it, whereupon the conductor told plaintiff he must pay his fare, which he refused to do, or be put off; and when the train stopped at Barton station, the plaintiff again refusing to pay his fare, the conductor ordered him to leave the train, and as the plaintiff refused to do so, he was forcibly ejected.

The admission of this evidence was not error. To make out his opening case it was necessary for the plaintiff to prove not only the assault and battery, but also such facts as in law make the defendant responsible therefor. And it is not essential that the declaration state the injury with any inducement of the defendant’s motive or intent, or of the circumstances under which the injury was committed: 1 Chitty’s Pleadings, 14th Am. ed., 387. Whether the evidence went beyond what was necessary to the opening case

we need not inquire; since under the special pleadings it was all admissible at some stage of the trial, and even though somewhat varied from the regular order, the variance was within the discretion of the court, and it is not manifest that the defendant was put to any disadvantage thereby: *State v. Magoon*, 50 Vt. 333.

That the plaintiff purchased and had such a ticket was not denied by the defendant. Its evidence, however, tended to show that the conductor north of Newport did not retain the ticket, but punched it, and returned it to the plaintiff; that when the train reached Barton the plaintiff refusing to produce a ticket, pay his fare, or get off the train, the conductor and a brakeman ejected him from the train, using no more force than was necessary to accomplish that purpose; and that the plaintiff had the same ticket in his possession several days afterward.

It appeared that immediately after the plaintiff had been ejected, his fare from Newport to Lyndonville was paid to the conductor by a friend of the plaintiff, and that the plaintiff then returned to the same car and rode therein to Lyndonville, on the way paying the friend the amount of the fare so paid by him. ¹¹⁷ It further appeared that subsequently thereto and before the commencement of this suit, the plaintiff brought his action of assumpsit against the defendant, before a justice of the peace, to recover the money thus paid at Barton, and such proceedings were had therein that a judgment was rendered for the plaintiff to recover the amount so paid and costs of suit. No appeal therefrom was allowable by law. Subject to defendant's objection and exception the plaintiff was allowed to introduce a certified copy of this judgment as conclusive evidence that the plaintiff was rightfully on the train at the time he was ejected, and also as conclusive of the plaintiff's right of recovery in this case. The latter question was also raised by exception to the charge.

The judgment in question falls within the purview of the statute which reads: "No judgment of a justice where an appeal is not allowed shall be an estoppel upon a question or matters not therein expressly adjudicated, and no right of recovery shall thereby be established upon a collateral matter": Pub. Stats. 1656. The general rule is that a verdict and judgment is conclusive evidence between the same parties in a subsequent suit, of whatever it was necessary for the jury to find in order to warrant the verdict in the former action, and no further: *Town v. Lamphere*, 34 Vt. 365. It is not necessary to the conclusiveness that the issue should have been taken in the former action upon the precise point which it is proposed to controvert in the subsequent suit. It is enough if that point was essential to

the former judgment: 1 Greenleaf's Evidence, sec. 534. In other words, every point that was expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment, is concluded: Board of Supervisors v. Mineral Point R. R. Co., 24 Wis. 93. In the former suit the question directly and distinctly put in issue was the plaintiff's right to recover of the defendant the money paid to it at Barton for his passage from Newport to Lyndonville. The result depended upon whether the plaintiff had previously paid for the same passage, within the meaning of the law—that is, whether his ticket to Lyndonville was taken up by the conductor north of Newport without giving him anything as evidence in lieu of the ticket of his right to a passage through. If he had, then the money paid at Barton was a second payment for the same thing, and it was held by the defendant to the plaintiff's use. On the other ¹¹⁸ hand, if the plaintiff had not made such previous payment, then the money paid at Barton was for a valuable consideration and not recoverable: See Jerome v. Smith, 48 Vt. 230, 21 Am. Rep. 125. The plaintiff's right to be upon the train when ejected, without producing a ticket or something equivalent thereto, or paying his fare, likewise depended on whether such previous payment had been made. Yet this right was not a question expressly adjudicated. It was a collateral matter which can only be inferred by arguing from the judgment. And aside from the statute a judgment is not evidence of any matter which came collaterally in question merely, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment: The Duchess of Kingston's Case, 20 St. Tr. 361, 2 Smith Lead. Cas. *573; Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218; Lawrence v. Hunt, 10 Wend. 81, 25 Am. Dec. 539; Campbell v. Consalus, 25 N. Y. 613; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Kitson v. Farwell, 132 Ill. 327, 23 N. E. 1024; McCravey v. Remson, 19 Ala. 430, 54 Am. Dec. 194. It follows that both under the statute and at common law the admission of the former recovery as conclusive evidence that the plaintiff was rightfully on the train at the time of his ejection, and of his right of recovery in this action, was error, as was also the charge giving it such conclusive effect.

The defendant contends that the former recovery is a bar to this action, and that since the plaintiff introduced it in evidence, the defendant is entitled to the full benefit thereof. It is a sufficient answer to this position that the defendant cannot take advantage of the judgment by way of estoppel, he not having pleaded it as such; and the fact that it is in the case as evidence does not change the rule in this re-

spect: *Briggs v. Mason*, 31 Vt. 433; *Poole v. Massachusetts Mt. Acc. Assn.*, 75 Vt. 85, 53 Atl. 331.

The plaintiff was permitted to introduce testimony that one Ben Taylor, a person not called as a witness, was in the same car as was the plaintiff between Newport and Barton, and that Taylor told the conductor that he saw the conductor above Newport take up plaintiff's ticket. It is urged by the plaintiff that the evidence was properly received, first, as part of the *res gestae*, and, secondly, as bearing on the question of exemplary damages. The evidence, however, was not admissible on either ground. Not on the first, since it was but the narration of a past occurrence ¹¹⁹ (1 Greenleaf's Evidence, sec. 110); nor on the second, for the disregard of a third person's statement in such circumstances does not tend to show the act of the conductor in ejecting the plaintiff to have been maliciously, wantonly or recklessly committed. If the evidence had any tendency, it was that the conductor was performing his duty as required by rule 579, furnished by the defendant to all conductors of its passenger trains, and introduced in evidence by the plaintiff, which provides: "The conductor will not permit any person . . . to ride on his train without a ticket or pass, except those provided for by rule."

As bearing on the question of special damages and subject to defendant's exception, the plaintiff was permitted to introduce evidence tending to show that at the time of the assault he had a parol contract with the Moose River Lumber Company whereby he purchased of that company at eight dollars per thousand feet stumpage the standing timber on a certain lot, and that the amount of timber was estimated by the company at seven hundred thousand feet; that the first winter after the assault, and because of the injury resulting therefrom, he could not be around with his men cutting and hauling the logs more than probably half the time, and could do but little of all kinds of work connected therewith; that because of this injury he was not well enough to go on with the cutting and manufacturing of this lumber, and had to abandon his contract of purchase and give it up to the Moose River Lumber Company; that at the time of such abandonment he had cut, manufactured and sold lumber to the amount of one hundred and sixty-five thousand feet, and the completion of the work would have occupied another year; that he then had a contract with the Northern Lumber Company whereby it was to have the manufactured lumber subject to the prices as they should range in the market; that in doing the work he employed choppers in the woods, some teams besides his own with teamsters in hauling the logs, and help at his mill in sawing, etc.; that the plaintiff never kept any exact account, but as near as he

could tell he made five dollars profit per thousand feet on the lumber manufactured and sold, and estimated that he could have made the same profit on the rest of the lumber had he not been obliged to abandon his contract of purchase.

Without considering the sufficiency of the declaration in this respect, when properly alleged only such special damages may be shown as are the natural and proximate (not the necessary) ¹²⁰ consequences of the act complained of: *Roberts v. Graham*, 6 Wall. 578, 18 L. ed. 791; *Brown v. Cummings*, 7 Allen, 507. In the case at bar the wrongful act at most but partly disabled the plaintiff from personally performing work in cutting, hauling, manufacturing, etc., the lumber, which he otherwise would have done in connection with the carrying out of the timber contract of purchase, the manufacturing and sale of the lumber. Yet the work he was thus rendered unable to do would be but a small part of the whole in the prosecution of a business of such nature and magnitude, and there would seem to be no reason why that also might not have been performed by a competent employé. It cannot be said that his loss of profits, whatever they might have been in connection with his lumber contract, was the natural and proximate result of the act complained of. Such loss was more particularly the natural and proximate consequence of the plaintiff's subsequent voluntary act of giving up or abandoning the contract. For this reason—not considering others suggested in argument—the loss of such profits does not constitute an element of recoverable damages, and the rulings otherwise in the admission of evidence and in submitting the case to the jury were error.

The jury were instructed that if they found the plaintiff was entitled to recover and that the act of putting him off the cars "was a willful and malicious act," then they had the right to add to the damages sustained, "such damages as you think ought to be imposed as a punishment, as an example, called here sometimes exemplary damages and sometimes punitive damages," to which exception was taken. Under this charge the jury were at liberty to add exemplary damages without regard to whether the defendant corporation was or was not guilty of the wrong committed by its servant, by directing, participating in, or subsequently approving it. This is contrary to the rule laid down upon careful consideration of the question in *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72, following the case of *Lake Shore etc. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. Rep. 261, 37 L. ed. 97, and was error.

Judgment reversed and cause remanded.

As to the Liability of a Carrier for Ejecting a Passenger who asserts that he has lost his ticket, see the note to St. Louis etc. Ry. Co. v. White, 122 Am. St. Rep. 642. Also consult, in this connection, the note to Arnold v. Rhode Island Co., 125 Am. St. Rep. 727. Ordinarily, the expulsion from a railroad train by a conductor of a passenger who neither pays his fare nor tenders a ticket that evidences his right to carriage is, in the absence of unnecessary force, not actionable: Shelton v. Erie R. R. Co., 73 N. J. L. 558, 118 Am. St. Rep. 704. And when a conductor has given a passenger a reasonable opportunity to pay his fare, which he persistently refuses to do, and has begun to expel him, the expulsion may be completed, although he thereafter tenders his fare: Garrison v. United Railways etc. Co., 97 Md. 347, 99 Am. St. Rep. 452. To the same effect, see Mullins v. Illinois Cent. R. R. Co., 93 Miss. 184, 136 Am. St. Rep. 542.

FRENCH v. RAYMOND.

[82 Vt. 156, 72 Atl. 324.]

ARBITRATION—Setting Aside for Perjury.—Equity will not set aside an award by arbitrators on the ground of perjury in procuring it. (p. 995.)

JUDGMENT—Relief in Equity for Fraud Extrinsic.—The acts for which courts of equity will, for fraud, set aside a judgment have relation to fraud extrinsic or collateral to the matter on which the judgment was rendered, not intrinsic or direct fraud. (p. 995.)

Chase & Daley and Gibson & Waterman, for the orator.

Herbert G. Barber and Frank E. Barber, for the defendant.

157 ROWELL, C. J. This is a bill in chancery to set aside an award between the parties, for that the defendant purposely and designedly testified falsely before the arbitrators concerning divers matters and things in issue and on trial before them, whereby and by means whereof the arbitrators were cheated and deceived into awarding for the defendant and against the orator. This is the sum and substance of the bill, which is demurred to for want of equity, and the objection is well taken.

The orator says that fraud vitiates everything. But this maxim applies only when proof of fraud is admissible, and here proof of the fraud alleged is not admissible, for it is intrinsic and not extrinsic, direct and not collateral. Thus, in *Camp v. Ward*, 69 Vt. 286, 60 Am. St. Rep. 929, 37 Atl. 747, we held that the acts for which courts of equity will, for fraud, set aside or annul a judgment or a decree between the same parties rendered by a court of competent jurisdiction, have relation to fraud extrinsic or collateral to the matter on which the judgment or decree was rendered. In

support of this holding we referred to some of our own cases, and to *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, where it is said that when by reason of something done by the successful party there was in fact no adversary trial nor decision of the issue in the case, equity will grant relief; but that it is well settled that the court will not set aside a judgment because it is founded on a fraudulent instrument or perjured testimony, nor for any other matter that was actually presented and considered in the judgment assailed. The judgment there sought to be set aside was based upon a land grant that the successful party had himself falsely and fraudulently antedated, and thereby imposed upon the court the belief that it was made when the signer thereof had power to make it.

It makes no difference whether the perjury is suborned by the successful party or not, unless you call the subornation the fraud and not the introduction of the perjury testimony, nor whether the successful party himself commits it, in which case it is clearly ¹⁵⁸ intrinsic and direct; for when a matter has been actually tried and determined by a tribunal of competent jurisdiction, both parties having been fully heard, as here, a court of equity will not, according to most of the cases, reopen the controversy because of perjury, and throw the whole matter at large again, for that would be sowing dragons' teeth, and disregarding the maxims that it is for the public good that litigation should end, and that a man shall not be twice vexed for the same thing, which maxims are the foundation of the law of this subject.

Decree reversed, demurrer sustained, bill adjudged insufficient, and cause remanded.

Relief from Judgments on the Ground of Perjury is discussed in the notes to *Pico v. Cohn*, 25 Am. St. Rep. 165-171; *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 232, 233. For subsequent cases on this question, see *Secord v. Powers*, 61 Neb. 615, 87 Am. St. Rep. 474; *Barr v. Post*, 59 Neb. 361, 80 Am. St. Rep. 680; *McDougall v. Walling*, 21 Wash. 478, 75 Am. St. Rep. 849; *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366.

An Award by Arbitrators is in the Nature of a Judgment, and ordinarily conclusive upon the parties: *Hynes v. Wright*, 62 Conn. 323, 36 Am. St. Rep. 344. Awards are favored in law, and reluctantly set aside; every presumption is in favor of their fairness, and the burden of proof is on the party seeking to set them aside to do so by clear and strong proof: *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510; *Roberts v. Consumers' Can Co.*, 102 Md. 362, 111 Am. St. Rep. 377. That a statutory award may be impeached upon a showing of fraud and mistake, though honestly made, which would work a fraud on either party, see *Waisner v. Waisner*, 15 Wyo. 420, 123 Am. St. Rep. 1081.

PROUTY v. NICHOLS.

[82 Vt. 181, 72 Atl. 988.]

LEASE—Construction by Parties—License to Sell.—Where the terms of a lease of personalty do not authorize the lessee to sell the property, evidence is admissible that, after conferring with the draftsman, the parties adopted his view and construed the lease otherwise, in an action of trover by the lessor against one who subsequently purchased the chattels from the lessee, as tending to show a license to sell. (p. 996.)

LEASE—Varying Terms by Showing License to Sell.—Where a lessee of chattels sells them under a verbal license from the lessor, when the lease, which is under seal, does not permit the sale, the lessor cannot maintain trover against the purchaser. (p. 997.)

LICENSE—Declarations of Licensee to Establish.—A license or agency cannot be proved by the declarations of the licensee or agent. (p. 997.)

LEASE—License to Lessee to Exchange Property.—A license to a lessee of personal property, to make an exchange does not authorize him to sell it. (p. 997.)

Chase & Daley, for the plaintiff.

Herbert G. Barber and Frank E. Barber, for the defendant.

¹⁸³ **HASELTON, J.** This was an action of trover for the alleged conversion of a yoke of oxen. Trial by jury was had. A verdict for the plaintiff was returned and judgment was rendered thereon.

The plaintiff leased a farm with the farming implements and the livestock thereon to one Platt for a term of five years. Included in the livestock was a certain yoke of oxen. The lease, which was in writing, and which was duly signed, sealed, delivered and recorded, contained the following clause: "At the expiration of this lease the party of the second part does agree with the party of the first part to return to said party of the first part the above personal property or its equivalent in as good condition as it is received, loss by fire and accident excepted."

Counsel agree that by the terms of the lease Platt did not have the right to sell the livestock referred to. Nevertheless, he sold the oxen to the defendant and received pay therefor.

On trial the defendant offered to show, in substance, that after the execution and delivery of the lease, the question as to the right of Platt to sell any of the stock, including the oxen, came up between the plaintiff and Platt, that they conferred with the draftsman of the lease, who advised that Platt had such right to sell, and that the plaintiff and Platt thereupon agreed so to construe the lease, and that Platt had the right to sell the oxen, and that both the plaintiff

and Platt acted upon their mutual agreement as to the construction of the lease until a time later than the sale of the oxen by Platt to the defendant Nichols. The offered evidence was excluded and the defendant excepted. As, however, the evidence offered tended to show a license to sell the oxen, its exclusion was error. If Platt sold the oxen under a license from the plaintiff, although such license was verbal merely, the plaintiff could not recover of the defendant: *Colston v. Bean*, 77 Vt. 40, 58 Atl. 795; *Hunt v. Allen*, 73 Vt. 322, 50 Atl. 1103; *Lawrence v. Dole*, 11 Vt. 549.

That part of the offer which related to the advice of the draftsman tended merely to show how it was that the parties came to treat the lease as they did, and how it came about that ¹⁸⁴ the license offered to be shown was granted. The offer was not vitiated by anything contained in it.

The fact that the lease was a sealed instrument has no bearing upon the question of a license to sell: *Hunt v. Allen*, 73 Vt. 322, 50 Atl. 1103; *Lawrence v. Dole*, 11 Vt. 549.

During the examination of Platt he was asked this question: "At the time you sold the oxen to Mr. Nichols did you inform Mr. Nichols that you had had any conversation with Mr. Prouty, the plaintiff, in regard to selling the oxen?" The question was excluded and an exception was taken. In excluding this question there was no error. There was no offer, but in view of other evidence in the case this question appears to have been an attempt to prove license or agency by the declarations of the licensee or agent. This could not be done: *Sias v. Consolidated Lighting Co.*, 73 Vt. 35, 50 Atl. 544.

The court instructed the jury that if the plaintiff had given Platt leave to exchange the oxen, that would not give Platt a right to sell them. The defendant excepted to this instruction; but in the circumstances of this case we think the instruction was correct. The lessor might well consent to an exchange but refuse to consent to a sale proper, for in case of an exchange the stock would quite likely be kept good, whereas a sale without a corresponding purchase would deplete it.

For error in excluding evidence under the offer to show a license to sell, the judgment is reversed and the cause remanded.

What Constitutes a Conversion of Chattels Which will Support an action of trover is the subject of a note to Bolling v. Kirby, 24 Am. St. Rep. 795.

Subsequent Parol Agreements to Vary a Writing are discussed in the note to Harris v. Murphy, 56 Am. St. Rep. 659.

LINCOLN v. CENTRAL VERMONT RAILWAY COMPANY.

[82 Vt. 187, 72 Atl. 821.]

RAILROAD—Condition of Track—Opinion Evidence.—In an action by a brakeman for injuries received through his car leaving the track while rounding a curve, a nonexpert, after the jury has viewed the track, may testify as to the comparative height of the outer rail shortly before the accident and at the time of the trial. (p. 999.)

EVIDENCE—Qualification of Expert—Review.—The finding of the trial court that a witness qualified as an expert is not revisable, if it is not arbitrary but is based on evidence and involves no erroneous conception of the law. (p. 1000.)

RAILROAD—Fellow-servants—Trackmen and Brakemen.—A section foreman may be a fellow-servant with the sectionmen under him, while as to brakemen he represents the railroad company. (p. 1001.)

RAILROAD—Duty to Employés to Maintain Safe Track.—The duty of a railroad corporation to properly inspect and maintain its track is only a continuance of the duty of proper construction; and the agent, whatever he may be called, to whom that duty is assigned, represents the principal, and his negligence in the discharge of the duty is the negligence of the principal, for the duty cannot be delegated so as to relieve the principal from liability. (p. 1001.)

MASTER AND SERVANT—Concurring Negligence of Fellow-servant.—Where an employé is injured through the concurring negligence of the master and a fellow-servant, the negligence of the latter does not defeat a recovery. (p. 1002.)

RAILROAD—Condition of Track at Curve.—In an Action by a brakeman for injuries received through his car leaving the track while rounding a curve, evidence that the outer rail was lower than the inner one and had been in that condition for considerable time, tends to show that the track was unsuitable and the railroad company negligent. (p. 1003.)

TRIAL.—Claims That a Verdict is Against the Evidence and against the weight of evidence are one and the same. (p. 1004.)

TRIAL.—A Motion to Set Aside a Verdict on the ground that it is against the weight of evidence and excessive is addressed to the sound judicial discretion of the court, and the decision thereon is not reviewable unless the court failed or refused to exercise its discretion or abused it. (p. 1004.)

TRIAL.—A Verdict may be Set Aside by the Trial Court if it appears to have resulted from passion, prejudice, corruption or disregard of the evidence. (p. 1005.)

DAMAGES.—Loss of Ability to Earn is a factor that enters into an employé's damages for personal injuries. (p. 1006.)

Gibson & Waterman and Clarke C. Fitts, for the plaintiff.

C. W. Witters, J. K. Bachelder and C. H. Darling, for the defendant.

¹⁹⁰ HASELTON, J. This was an action of case. The plaintiff was a brakeman in the employ of the defendant

company, and on January 1, 1907, while acting as such on the West river division of the defendant's road, he received injuries which he claims were the result solely of the defendant's negligence. Trial by jury was had. The verdict was for the plaintiff.

The plaintiff's evidence tended to show that on the day named a freight-car, upon which he was in the line of his duty, left the track while rounding a curve, carrying him with it, and that so the injuries complained of were received. The plaintiff claimed that at the time of the accident, at the point of the curve where the car left the track, the outer rail of the track was lower than the inner, instead of being higher, as the evidence tended to show it should have been. Before any witness was called there was a jury-view of the place of the accident. Thereafter the plaintiff called as a witness one Chamberlain, who testified that December 29, 1906, three days before the accident, he noticed that the outer rail of the curve was slightly lower than the inner rail, that it looked about the same on the day of the accident, and that he had observed the elevation of the outside rail on the very ¹⁹¹ day of the giving of his evidence. He was then asked: "How does it now compare in elevation to its elevation on the 29th of December, 1906, when you were there or thereabouts?" Subject to objection and exception the witness answered: "The outer rail seems a good deal higher comparatively." This question and answer were entirely proper. The jury had just been shown how the track looked at the time of the trial, and to prevent misapprehension it was proper that they should be told by way of comparison how it differed as to the elevation of the outer rail at the time of the accident and shortly before. The jury-view went upon the theory that men of ordinary experience could tell something about such a matter as this, and it was not necessary that the witness should qualify as an expert. It appeared that the witness, though a farmer, had been a carpenter and builder and an amateur surveyor, but if these things had not appeared the evidence would have been proper. A man of ordinary intelligence may testify upon such matters as the settling or heaving of the ground, or a floor, of the inclination of a post, or the variation in diameter of a growing tree. Height and depth, length and breadth, size, shape, quantity, weight, odor, flavor and color, darkness and light and shade, cold and heat, opacity and transparency, dampness and dryness, roughness and smoothness, brightness and dullness, soundness and decay, speed, force, time, noise, direction and distance, are among the things which, in most circumstances, men in general may testify about, and about which they may make comparisons, although their ideas, tastes and

standards may differ and their comparisons be crude, if not odious. The value of such testimony can fairly be gauged by cross-examination.

The plaintiff claimed that the defendant was negligent in respect to the condition of the track, and that it did not make adequate provision for the repair of the same. On this question the plaintiff called one Kidder as a witness. He testified that he was for eighteen years a bridgeman on the West river division in question, but that he ceased such employment about nine years before the trial; that while bridgeman he was foreman or second foreman; that in the line of his employment he saw to the laying and altering of the tracks on the bridges and their approaches; that he was familiar with the whole division of the road, and in his work dealt somewhat with tracks and curves, and the fastening together and spiking down of rails, and that ¹⁹² his work acquainted him in a general way with the duties and work of the sectionmen. His testimony tended further to show a present acquaintance with the road, and with the section, about six miles in length, on which the accident happened. The witness was then asked the following question: "What do you say, from your experience as a railroad-man, your knowledge of railroad work, as you have testified, as to whether one section foreman and two men under him is sufficient help to care for that section?" To this question the defendant objected on the ground that the witness had not shown such knowledge as qualified him to testify as an expert in relation to the matter of the question. The court found him qualified and permitted him to answer. The defendant excepted. However, the evidence had a tendency to qualify the witness and warranted the finding of the court. Since the finding was not arbitrary, but was based on evidence and involved no erroneous conception of the law, it is not revisable, and the exception thereto avails nothing: *Drouin v. Wilson*, 80 Vt. 335, 344, 67 Atl. 825, 13 Ann. Cas. 93; *Morrisette v. Canadian Pacific Ry. Co.*, 76 Vt. 267, 56 Atl. 1102; *McGovern v. Hays*, 75 Vt. 104, 53 Atl. 326; *Watriss v. Trendall*, 74 Vt. 54, 57, 52 Atl. 118; *Maughan v. Burns' Estate*, 64 Vt. 316, 23 Atl. 583; *Bemis v. Central Vt. R. R. Co.*, 58 Vt. 636, 3 Atl. 531; *Lamoille V. R. R. Co. v. Bixby*, 57 Vt. 548; *Wright v. Williams' Estate*, 47 Vt. 222.

The defendant requested that various instructions be given to the jury. Some of these requests the court did not give and the defendant took exceptions. It is claimed in argument that the court should have complied with the fourth request and with the eighth. These requests were as follows: "(4) The trackmen were colaborers with the plaintiff, and he cannot recover if his injury was the result

solely of their negligence in caring for the track. . . .

(8) If the railroad and its bed were properly constructed at the place of accident, and the accident occurred through no fault of construction, but solely by reason of the trackmen or sectionmen neglecting to make such ordinary repairs as they were accustomed to, and as it was their duty to make, the plaintiff cannot recover." These requests make no distinction between the section foreman and the sectionmen under him. As between themselves in working together there may have been no distinction; all may well have been fellow-servants: *Garrow v. Miller*, 72 Vt. 284, 47 Atl. 1087; *Lambert* ¹⁹³ v. *Missisquoi Pulp Co.*, 72 Vt. 278, 47 Atl. 1085; *Brown v. People's Gas Light Co.*, 81 Vt. 477, 71 Atl. 204, 22 L. R. A., N. S., 738. But as to others the evidence tended to show that this section foreman represented the company. An agent or servant often acts in a dual capacity: *Note to Fogarty v. St. Louis Transfer Co.*, 1 Ann. Cas. 143. The duty of properly inspecting, preserving, and maintaining a track is but a continuance of the duty of proper construction, and, since a corporation can act only by agents, the agent, whatever he may be called, to whom that or a like duty is assigned represents the principal, and his negligence in the discharge of that duty is the negligence of the principal, for it is a duty which cannot be so delegated as to relieve the principal from liability: *Davis v. Central Vt. R. R. Co.*, 55 Vt. 84, 45 Am. Rep. 590; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Hayes v. Colchester Mills*, 69 Vt. 1, 60 Am. St. Rep. 915, 37 Atl. 269; *Morrisette v. Canadian Pacific Ry. Co.*, 74 Vt. 232, 52 Atl. 520; *Dunbar v. Central Vt. Ry. Co.*, 79 Vt. 474, 65 Atl. 528; *Sias v. Consolidated Lighting Co.*, 79 Vt. 224, 64 Atl. 1104; *Kiley v. Rutland R. R. Co.*, 80 Vt. 536, 68 Atl. 713, 13 Ann. Cas. 269; *Drown v. New England Telephone & Telegraph Co.*, 80 Vt. 1, 66 Atl. 801; *Williams v. Norton Brothers*, 81 Vt. 1, 69 Atl. 146; *Hough v. Texas & P. Ry. Co.*, 100 U. S. 213, 25 L. ed. 612; *Northern Pacific R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29 L. ed. 755; *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. Rep. 905, 36 L. ed. 829; *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, 37 L. ed. 772; *Union Pacific Ry. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. Rep. 756, 38 L. ed. 597; *Northern Pacific R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. Rep. 978, 38 L. ed. 598; *Baltimore & Potomac R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. Rep. 491, 39 L. ed. 624; *Union Pacific Ry. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. Rep. 618, 40 L. ed. 766; *Texas & Pacific Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. Rep. 707, 41 L. ed. 1136; *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. Rep. 777, 42 L. ed. 1188; *Choctaw etc. R. Co. v. McDade*, 191 U.

S. 64, 24 Sup. Ct. Rep. 24, 48 L. ed. 96; *El Paso R. Co. v. Vizard*, 211 U. S. 608, 29 Sup. Ct. Rep. 210, 53 L. ed. 348.

The testimony tended to show that at a curve the proper elevation of the outside rail above the level of the inner is a guard against derailment, and such a guard as is necessary to the provision of a reasonably safe place.

¹⁹⁴ At the close of the evidence the defendant moved the court to direct a verdict in its favor. The motion was overruled and the defendant excepted. The defendant now claims that the motion should have been complied with on the ground: "That the testimony shows that the derailment was caused by the failure of the sectionmen to make the repairs upon the track and that these sectionmen and the plaintiff were fellow-servants." The claim made is equivalent to a claim that there was not evidence tending to show proximate negligence on the part of the defendant, for if there was proximate negligence on the part of a fellow-servant with which proximate negligence on the part of the defendant concurred, the negligence of the fellow-servant would not defeat recovery: *Mahoney's Admr. v. Rutland R. Co.*, 78 Vt. 244, 62 Atl. 722; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493, 27 L. ed. 266.

As to the elevation of the outer rail of the curve at the point where the car in question left the track, the testimony of the witness Chamberlain, already referred to, did not by any means stand alone. One Howard testified that he lived about a quarter of a mile from the scene of the accident, that after the accident, but on the same day, he noticed the place and thought the outside rail was the lower, and that a few days thereafter, when the track appeared unchanged, he and the witness Kidder, by the use of a straight edge and a level, found that at the point in question the outside rail was half an inch lower than the other. The witness Kidder who, as has been seen, was a railroad-man, testified to the measurements referred to by the witness Howard, and his testimony was to the same effect as that of Howard.

One Lowe testified that he went to the scene of the accident the morning after it happened and that there appeared to be little or no elevation of the outside rail.

One Burwell testified that he was at the place of the accident the day on which it happened, that his attention was called to the fact, which he observed, that the outer rail was the lower.

One Sparks testified that he got to the scene of the accident the day of its occurrence and that he noticed that the outer rail was the lower of the two.

One Taft testified that he was at the place in question while Sparks was there, that he could see that the outside

rail was lower than the inside along where the car left the track, and that he made his observations by getting down on the ground. ¹⁹⁵ Sparks, it should be said, also testified that he ascertained the relative level of the rails by getting down and looking across the track. This evidence, except that of Chamberlain already treated of, was received without objection, and it certainly had a tendency to show that the track at the time of the accident was not a suitable one.

To say nothing of other testimony on this point, the road-master of another road, of long experience as such, a witness called by the defendant, testified, with reference to the time and place of the accident, that if the outer rail was as low as the inside rail, "it would not be right." On the question of whether or not the track was in an improper and unsafe condition as the result of some heaving or washing or sinking so recent and sudden that the duty of the defendant to know about it and to make repairs had not arisen, the evidence of some witnesses called by the defendant is material.

One Anderson, the conductor of the train on which the plaintiff was brakeman, testified that almost immediately after the accident he went over the place where the car went off, that he did not find anything, that there was no apparent change in the track at that point, and that the track was to all appearance in ordinary condition. This witness had been running over the line in question for a long time.

One Abbott, who was the engineer of the train on which the plaintiff was, testified that after caring for the plaintiff he looked over the track on the curve and the place of the derailment, that he found no cause of the accident and saw no defect in the track, and saw nothing wrong with the track, that as he walked back and forth he could discover no difficulty with the track. He had been an engineer on this line for some time.

One Rouse, who had been a conductor about twenty-one years on the division in question, testified that on the day of the accident he was on a mixed train going in an opposite direction from that in which the plaintiff was going, that his train was flagged as it approached the place of the accident, and that he went and looked over the track and didn't see that anything was the matter with it, or that any change had been made in the track by reason of the derailment.

There was other testimony tending to show that the track was substantially as it had been for a very considerable time, and the testimony recited and referred to tended to show ¹⁹⁶ negligence on the part of the defendant itself in not ascertaining and remedying a defect which, as there was

evidence tending to show, was the proximate cause of the plaintiff's injuries.

Besides, as has been noted, there was evidence from the witness Kidder, an experienced railroad-man, to the effect that the defendant did not furnish, on the section of road which covered the place of the accident, enough sectionmen properly to care for the track. The section foreman, two roadmasters, and an experienced roadmaster from another road were all witnesses in the case, and none of them disputed this evidence of Kidder. In the state of the evidence Kidder's testimony was more than a mere scintilla, and in any view of the fellow-servant doctrine, the motion of the defendant to have a verdict directed in its favor was rightly overruled: *Scofield's Admx. v. Metropolitan Life Ins. Co.*, 79 Vt. 161, 64 Atl. 1107, 8 Ann. Cas. 1152; *Coolidge v. Ayres*, 77 Vt. 448, 61 Atl. 40; *Tracy v. Grand Trunk Ry. Co.*, 76 Vt. 313, 57 Atl. 104; *Fletcher v. Wakefield*, 75 Vt. 257, 54 Atl. 1012; *German v. Bennington R. R. Co.*, 71 Vt. 70, 42 Atl. 972; *Lindsay v. Canadian R. R. Co.*, 68 Vt. 556, 35 Atl. 513.

The defendant moved to set aside the verdict on the ground that it was against the evidence, that it was against the weight of evidence, and that it was excessive. The court overruled the motion and the defendant excepted. The claims that the verdict was against the evidence and against the weight of the evidence are one and the same: *German v. Bennington R. R. Co.*, 71 Vt. 70, 42 Atl. 972; *Coolidge v. Ayers*, 77 Vt. 448, 61 Atl. 40.

But if we assume that "against the evidence" was intended to mean "without any supporting evidence," enough has been said in discussing the motion for a verdict to show that a verdict for the plaintiff was supported by evidence and so cannot be disturbed for lack thereof: *Tracy v. Grand Trunk Ry. Co.*, 76 Vt. 313, 57 Atl. 104; *Jangraw v. Mee*, 75 Vt. 211, 98 Am. St. Rep. 816, 54 Atl. 189; *State v. Peach*, 70 Vt. 283, 40 Atl. 732.

The motion to set aside the verdict on the ground that it was against the weight of evidence and on the ground that it was excessive was addressed to the sound judicial discretion of the court, and is not reviewable unless it appears that the court failed or refused to exercise its discretion or abused it: *Ward's Admr. v. Preferred Accident Ins. Co.*, 80 Vt. 321, 67 Atl. 821; *Massucco v. Tomassi*, 80 Vt. 186, 67 Atl. 551; *Marcy v. Parker*, 78 Vt. 73, 62 Atl. 19; *Coolidge v. Ayres*, 77 Vt. 448, 61 Atl. 40; ¹⁹⁷ *Jangraw v. Mee*, 75 Vt. 211, 98 Am. St. Rep. 816, 54 Atl. 189; *German v. Bennington R. R. Co.*, 71 Vt. 70, 42 Atl. 972; *State v. Peach*, 70 Vt. 283, 40 Atl. 732; *Sowles v. Carr*, 69 Vt. 414, 38 Atl. 77; *Ranney v. St. Johnsbury R. R. Co.*, 67 Vt. 594, 32 Atl. 810; *Stearn*

v. Clifford, 62 Vt. 92, 18 Atl. 1045; Newton v. Brown, 49 Vt. 16; Wheatley v. Waldo, 36 Vt. 237.

The cases are referred to, although the principle is familiar, for the purpose of showing its varied application. Of the cases above cited those dealing with motions to set aside a verdict for an allowance of damages claimed to be excessive are as follows: Massucco v. Tomassi, 80 Vt. 168, 67 Atl. 551; Marcy v. Parker, 78 Vt. 73, 62 Atl. 19; Ranney v. St. Johnsbury R. R. Co., 67 Vt. 594, 32 Atl. 810.

A verdict may be set aside by the trial court if it appears to have resulted from passion or prejudice or corruption, or from a disregard of the evidence: Barrette v. Carr, 75 Vt. 425, 56 Atl. 93; Averill v. Robinson, 70 Vt. 161, 40 Atl. 49.

And since a motion to set aside a verdict is addressed to the discretion of the trial court, that court must exercise its discretion: Massucco v. Tomassi, 80 Vt. 186, 67 Atl. 551; State v. Newell, 71 Vt. 476, 45 Atl. 1045; Ranney v. St. Johnsbury R. R. Co., 67 Vt. 594, 32 Atl. 810; Johnson v. Shumway, 65 Vt. 389, 26 Atl. 590.

The court below gave its reasons for overruling the motion, and nothing can be more plain than that it exercised its discretion and did it in a way that could leave no room for the suggestion that judicial discretion was in any way abused. As to the first ground for the motion the court said: "If it was left for us to say, we should be obliged to say, just as the jury has said, that the evidence was for the plaintiff. . . . It seems pretty plain to us that it [the car] left the rail on account of a defect in that track, a defect that was plainly chargeable to the neglect of the defendant."

The claimed excess of damages is the ground of the motion chiefly argued, and in argument stress is laid upon the fact that the court in commenting upon the plaintiff's injuries and their consequences on the one hand and the amount of damages awarded by the jury on the other, said of the verdict: "We are agreed that it isn't in a legal sense excessive." But the context shows clearly that the court meant no more than that the verdict did not appear to have been influenced by passion or prejudice or anything else than such consideration of the evidence as the ¹⁹⁰⁸ jury had a right to give it, and so the court said with fair reference to the testimony: "In this case the evidence tends to show that this young man was put to pretty heavy expenses, having had two amputations, and must have suffered a good deal more pain from the injury than he would from an ordinary broken leg or from a leg so broken as to require one amputation. That is an element that the jury were called upon to exercise their judgment in. Then there was an injury to the shoulder which is of more or less perma-

nency. How much, of course, is a matter, as counsel have suggested, of more or less conjecture, a matter of judgment. In addition to that, there is a curvature of the spine, which testimony tended to show was caused by this accident. . . . Here is a young man, twenty-six years old, who, if he lives out his allotted time, is going to be deprived of an earning power that he would otherwise have had, which, as argued to the jury, in dollars and cents, if you apply that test to it, amounts up into the thousands." That loss of ability to earn was a factor that entered into the plaintiff's damages is, of course, beyond dispute.

The question before this court is not how we should have exercised our discretion if we had been in place of the trial court, but it is for us to say whether or not it appears that the trial court withheld or abused its discretion. It does not appear that it did either, and the exception to the overruling of the motion to set aside the verdict avails nothing.

All the exceptions relied on in argument having been considered, the judgment is affirmed.

As to Who is a Fellow-servant and Who a Vice-principal, see the note to Mast v. Kern, 75 Am. St. Rep. 584. A railroad section foreman is not a fellow-servant with the crew running a mixed freight and passenger train: Mobile etc. R. R. Co. v. Hicks, 91 Miss. 273, 124 Am. St. Rep. 679.

Where the Negligence of a Master and That of a Fellow-servant together produces injury to an employé, the master is liable therefor: Fuller v. Tremont Lumber Co., 114 La. 266, 108 Am. St. Rep. 348; Siegel-Cooper & Co. v. Treka, 218 Ill. 559, 109 Am. St. Rep. 302; Merrill v. Oregon Short Line R. R. Co., 29 Utah, 264, 110 Am. St. Rep. 695; Haskell & Barker Car Co. v. Przewdziankowski, 170 Ind. 1, 127 Am. St. Rep. 352.

A Railroad Company Owes the Duty to Employés operating its trains to use reasonable care and diligence to provide and maintain a safe track. This duty is nonassignable: Vickers v. Kanawha etc. R. R. Co., 64 W. Va. 474, 131 Am. St. Rep. 929; Fuller v. Tremont Lumber Co., 114 La. 266, 108 Am. St. Rep. 348; Rogers v. Cleveland etc. Ry. Co., 211 Ill. 126, 103 Am. St. Rep. 185.

MORGAN v. MORGAN.

[82 Vt. 243, 73 Atl. 24.]

EQUITY.—The Findings of a Chancellor Stand, as regards their effect, the same as those of a special master, and cannot be set aside if there is evidence tending to support them. (p. 1007.)

DEEDS—Delivery.—The Fact That a Deed is on Record is prima facie evidence of delivery. (p. 1007.)

DEEDS—Delivery.—The Mere Fact That a Deed has been Recorded, even if done by the grantor's direction, does not of itself constitute a delivery. (p. 1007.)

DEEDS—Delivery by Recorder to Grantee.—Where a town clerk receives a deed from the grantor with instructions to file it but to

delay the recording, the subsequent recording of the deed and its delivery by the clerk to the grantee at her direction do not constitute a delivery. (p. 1008.)

O. M. Barber and Batchelder & Bates, for the orator.

C. H. Mason and W. B. Sheldon, for the defendant.

²⁴⁴ MUNSON, J. On the nineteenth day of October, 1900, the orator executed to his sister Harriet a deed of real estate in Bennington, and three days later he handed it to the town clerk with instructions to file it but delay the recording. This was the only instruction given the town clerk by the orator. Sometime after this the grantee directed the town clerk to record the deed, and he thereupon recorded it and delivered it to the grantee. The orator afterward called for the deed, and then learned what had been done regarding it. The chancellor does not say in terms that Harriet acted without the orator's authority, but his language fairly implies that she did, and we think it should be so construed.

The defendant moved to have the findings set aside as not warranted or supported by the evidence. The findings of a chancellor stand the same as those of a special master, as regards their effect; and they cannot be set aside if there was evidence tending to support them. The only question that can possibly be made under this motion regarding the findings above stated is with reference to the instructions. The town clerk was called by the defendant, and testified on direct examination that the orator's instructions were that the deed be filed for record, but that the actual work of recording be delayed; and on cross-examination he testified that he had a place where he put papers that were not to be recorded until further directions were given, which he called the "slow record" file; that he might just minute the filing of these papers in lead pencil, or perhaps not file them; that papers in this file were sometimes taken away without anything further being done with them; and that he put the orator's deed in this file. This was clearly evidence tending to support the finding regarding the instructions.

The fact that a deed is on record is prima facie evidence of delivery: *Walsh's Admx. v. Vermont Mut. Ins. Co.*, 54 Vt. 351. But the ²⁴⁵ mere fact that the deed has been recorded, even if done by the grantor's direction, does not of itself constitute a delivery: *Fair Haven Marble Co. v. Owens*, 69 Vt. 246, 37 Atl. 749. There was no delivery here unless a delivery was effected by means of the recording and the delivery of the recorded deed to the grantee by the town clerk. But the delivery of the deed by the town clerk could have no effect unless he was authorized to record it.

The town clerk received the deed from the grantor with instructions to file it but delay the recording. This must be construed as a direction to postpone the recording until further instructions from the grantor. It cannot have meant that the town clerk was to delay the recording for an indefinite period, that was to be ended, if at all, on some impulse of his own. So the deed was held by the town clerk to be filed but not recorded, and the placing it upon record without further instructions from the grantor was of no effect: *Blair v. Ritchie*, 72 Vt. 311, 47 Atl. 1074. It follows that the grantee's possession of the deed was unauthorized.

It is not necessary to inquire whether the filing of exceptions to the chancellor's findings was necessary to entitle the defendant to stand on his objections to the evidence, nor whether Mr. O'Brien was a competent witness to what the orator and his sister said in Mr. Baker's office in connection with the preparation and execution of the deed; for it is clear that Mr. O'Brien's testimony had no bearing upon the transaction between the orator and the town clerk, but only upon issues made immaterial by our holding that that transaction did not constitute a delivery.

Decree affirmed and cause remanded.

What Constitutes a Delivery of a Deed is the subject of a note to *Brown v. Westerfield*, 53 Am. St. Rep. 537. The delivery of a deed to a recorder for registry is not a delivery to the grantee: *Cravens v. Rossiter*, 116 Mo. 338, 38 Am. St. Rep. 606. See, however, *Prignon v. Daussat*, 4 Wash. 199, 31 Am. St. Rep. 914. But recording a deed with intent and for the purpose of passing title to the grantee may constitute a sufficient delivery: *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430; *Fryer v. Fryer*, 77 Neb. 298, 124 Am. St. Rep. 850.

STATE v. ANDREWS.

[82 Vt. 314, 73 Atl. 586.]

WITNESS—Privilege—Incriminating Testimony.—The privilege of a witness to decline to answer a question because the answer will tend to incriminate him is strictly personal; and although the court may properly instruct him as to his privilege, it cannot exclude material evidence for his protection unless he claims his privilege. (p. 1009.)

Information for unlawfully furnishing intoxicating liquor. Verdict of guilty, and judgment thereon. Respondent excepted.

Benjamin Gates, state's attorney, for the state.

M. M. Gordon, for the respondent.

³¹⁴ MUNSON, J. Mahoney, the state's witness, testified that the respondent took a bottle of whisky from his pocket and ³¹⁵ gave him a drink. It was the theory of the defense, and the testimony of the respondent when he took the stand, that the respondent had no liquor with him, and that Mahoney was the one who produced the whisky and did the giving. Respondent's counsel undertook in his cross-examination of Mahoney to get some admissions in line with this theory, but the state's attorney objected to his inquiries on the ground that the witness was entitled to protection, and the court excluded the testimony as evidence that would tend to incriminate the witness. The witness made no claim of privilege.

It is not necessary to inquire what the situation would have been if the witness had claimed the privilege of silence on the ground that his answers would tend to criminate him. The respondent was entitled to the benefit of the proposed examination if the witness was willing to answer, even if there were legal grounds on which the witness might have refused to answer. The privilege, if it existed, was strictly personal, and could be asserted by no one but the witness. The court might properly have instructed the witness as to his privilege, but could not exclude evidence material to the defense for the protection of the witness unless the witness claimed protection. No claim of privilege having been made by the witness, the exclusion of the testimony was error.

Exceptions sustained, judgment and sentence reversed and cause remanded.

The Privilege of a Witness as to Incriminating Testimony is the subject of a note to *Evans v. O'Connor*, 75 Am. St. Rep. 318-347. The right of a witness in a criminal trial to refuse to answer incriminating questions is a personal privilege which he may exercise or waive; if he chooses to answer them, neither he nor his counsel can legally object: *State v. Shockley*, 29 Utah, 25, 110 Am. St. Rep. 639; *State v. Duncan*, 78 Vt. 264, 112 Am. St. Rep. 922. According to *Ex parte Gauss*, 223 Mo. 277, 135 Am. St. Rep. 517, if a question is of such a description that an answer to it may or may not incriminate the witness, it rests with him to determine whether an answer will have that tendency; and if he says on oath that his answer will incriminate himself, the court can demand no other testimony of that fact nor compel him to answer.

SOWLES v. MINOT.

[82 Vt. 344, 73 Atl. 1025.]

ESTOPPEL—Common Source of Title.—Parties claiming title from the same source cannot question the title of the common grantor. (p. 1018.)

VENDOR AND VENDEE—Taking Possession by Grantee.—Grantees will be treated as having received possession with their deed, although there is no evidence that they ever went upon the land. (p. 1018.)

MORTGAGE—Presumption of Payment.—There is no presumption that a mortgage note was paid at maturity. (p. 1018.)

MORTGAGEE—Rights After Condition Broken.—The legal title to land passes to the mortgagee on condition broken, but he holds the title only for the purpose of security, and the burden is on him and those claiming in his right to show anything done in enlargement of the title. (p. 1018.)

MORTGAGE—Presumption of Relinquishment by Mortgagor.—It is only in support of an actual possession by a mortgagee that the law will presume a conveyance or other relinquishment of the mortgagor's interest to him. (p. 1018.)

MORTGAGE.—The Lapse of Fifteen Years without payment or other recognition, and without an enforcement of the security in any manner, will defeat a mortgagee's right. (p. 1018.)

ABANDONMENT.—A Failure to Occupy Land for an indefinite time does not constitute abandonment of title or possession. (p. 1018.)

WATER-POWER—Loss by Nonuser.—The right to a water-power is not lost by nonuser. (p. 1018.)

WATER-POWER—Nonuser and Abandonment.—There cannot be an abandonment of the right to a water-power without an intention to abandon. And an intention to abandon will not be inferred from mere nonuser or nonpayment of taxes. (p. 1018.)

WATER-POWER—Grant of Privilege.—In a deed of land the words "with the privilege of taking and using from the flume now occupied by said Crane, or any other flume which may be there erected, sufficient water to carry two tub bellowses for a blast furnace," should be construed to be a measure of the power granted and not a restriction of its use. (p. 1019.)

ADVERSE POSSESSION—Claim of Right.—The use of land with nothing to indicate that it is under a claim of right will not ripen into title by adverse possession. (p. 1019.)

ADVERSE POSSESSION—Possession of Part of Tract.—The doctrine that the possession of any part of a tract of land will be considered a possession of the whole applies to possession under a deed which gives definite and certain boundaries. A description by a general reference to the lands of others does not meet this requirement. (pp. 1019, 1020.)

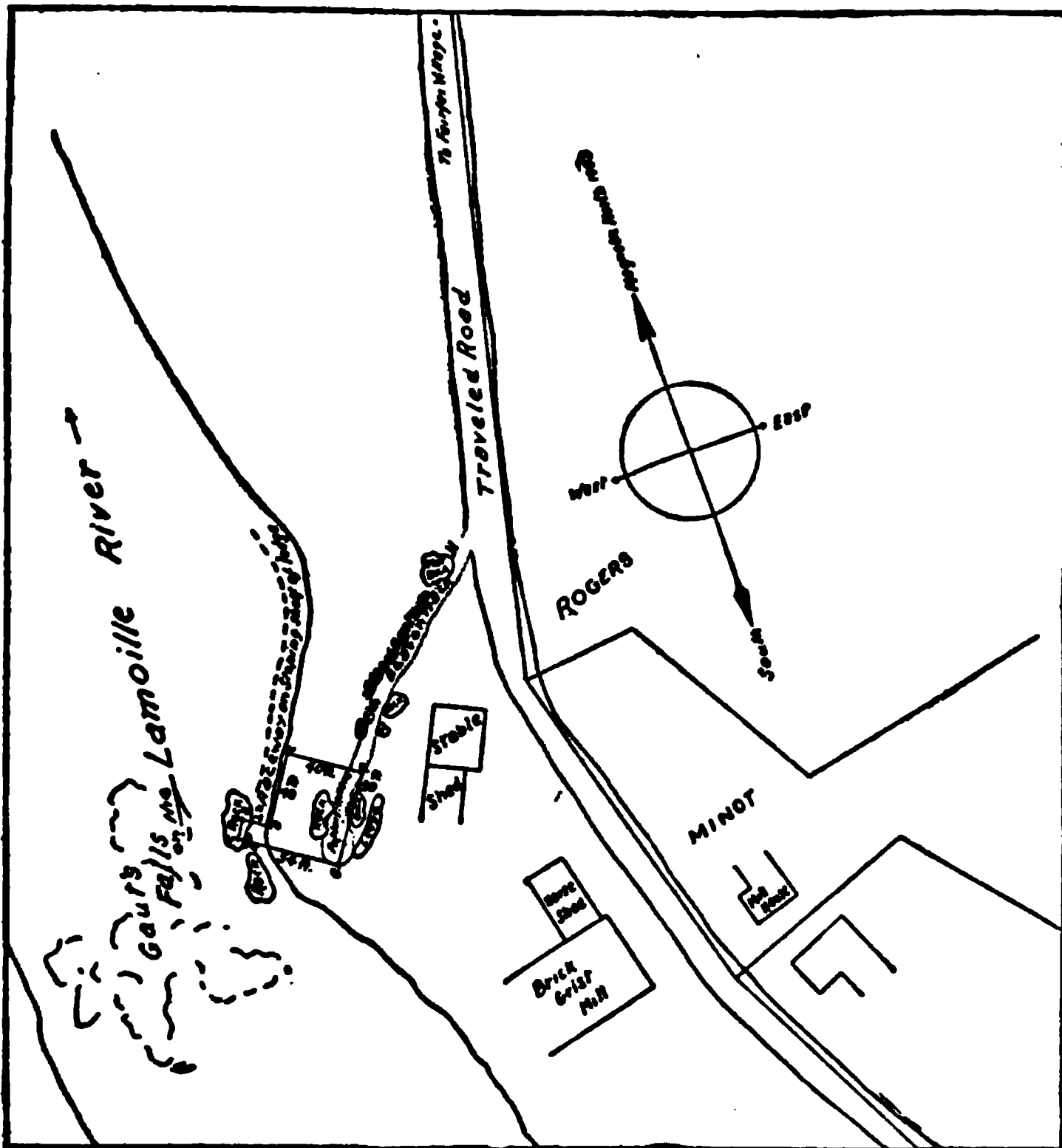
BOUNDARIES.—Variations in the Description in a subsequent deed from the original description, such as a change from "northeasterly to northwesterly," may be immaterial. (p. 1020.)

BOUNDARIES.—The Expression "Southerly or South," used in fixing a definite course so many degrees west, must be read south, unless the course is controlled by an ascertained monument. (p. 1020.)

BOUNDARIES.—A Line Called in a Grant Fifty Feet More or Less must be taken to be of the length stated, unless the distance is controlled by other calls. (p. 1021.)

BOUNDARIES.—A Court is not Justified in Disregarding the direction of the starting point as given in a deed without some definite information concerning the location. (p. 1021.)

The following is the map referred to in the opinion:



E. A. Sowles and Farrington & Post, for the orators.

C. G. Austin & Sons and Fuller C. Smith, for the defendants.

347 **MUNSON, J.** This case was fully heard by the late Henry E. Rustedt as special master. His death occurred soon after the hearing was completed, and without a report having been filed. The testimony having been stenographically reported, the parties agreed that the case might be heard by the late Chancellor Start on the depositions, exhibits and evidence taken, and joined in a request that the chancellor inspect the premises. It was also agreed that if either party considered further testimony necessary, such party might apply to the chancellor for permission to introduce it,

and that the chancellor, in his discretion, might order it to be taken and prescribe the form of taking. Nothing was done under this provision; and the case was finally disposed of by Chancellor Start, then in failing health, strictly pro forma and without hearing. So the case is before us for the determination of both fact and law; and the proposition for a view of the premises, made by one party since the hearing, not being acceded to by all the parties, it becomes necessary for us to settle the facts without the benefit of the inspection contemplated by the original agreement.

The bill alleges ownership of a water privilege on Fairfax Falls under deeds from Daniel Wilkins and successive grantors, concerning which it is stated that the defendants claim inaccuracies of description; and alleges that the defendants are about to destroy the power by a removal of rocks that will change the channel; and prays for an injunction in that behalf and a quieting ³⁴⁸ of the orators' title. The answer denies that the title remained in Wilkin's grantees until they made conveyances, and alleges that if the title did remain in them and pass by their conveyance, it has since been lost by adverse possession; denies that there is any inaccuracy of description in the Wilkin's deed, but alleges that it is now impossible to locate the grant; denies that the defendants have made or contemplate making any change in the channel, and alleges that natural alterations in the bed of the stream have destroyed the power in question.

Before taking up the orator's chain of title it will be well to refer to some earlier conveyances. Prior to May 25, 1803, Asa Wilkins became the owner of a large tract of land which included Fairfax Falls. On that day he conveyed to Louis Sherrill a privilege on or adjoining the falls, a little above the old sawmill, for the purpose of a carding-machine, with the privilege of a road to and from said machine, and the privilege of drawing what water might be necessary for carrying on the business of said machine. December 1, 1803, Asa Wilkins executed to Daniel Wilkins a warranty deed of one-third of the farm and mills. October 6, 1809, said Asa conveyed to William Crane one-half of certain carding-machines, carding-machine house and road thereto, with the privilege of drawing water to carry said machines or to carry on any business that could be done in said house, the water privilege to revert if the carding-machines should be removed or not kept in repair; which deed recited that the machines and house were the same built by Louis Sherrill and sold by Sherrill to the grantor. April 2, 1816, Asa Wilkins quitclaimed to Daniel Wilkins the entire tract and falls, with mills and other buildings thereon. April 10, 1816, Daniel Wilkins conveyed to William Crane a piece "begin-

ning at a notch in the rocks at the southwest corner of the carding-machine house, thence north thirty-three degrees east forty-four feet; thence west thirty-three degrees north forty feet; thence south forty-four feet; thence east thirty-three degrees south thirty-two feet to the first-mentioned bounds''; with the privilege of drawing water to carry on the business of carding wool and the clothiers' works, or water to carry on any other business, drawing the same quantity as the carding and cloth dressing business. January 22, 1822, Daniel Wilkins conveyed to W. B. Parker and I. A. Webster a site for a grist-mill, describing ³⁴⁹ it as beginning about two rods and one-half southeast from the southeast corner of the Crane mill, with the privilege of taking water from the dam.

We come now to a statement of the orators' title. January 14, 1828, Daniel Wilkins conveyed by warranty deed to David Nichols and Allen L. Nichols, for an expressed consideration of seventy-five dollars, property described as follows: "Beginning northeasterly of Crane's carding works, at a rock notched N, thence southerly, or south, thirty degrees west forty feet to a cross in a rock, thence making a right angle and running westerly fourteen feet, thence making a right angle and running southerly ten feet, thence making another right angle and running easterly fifty feet, be the same more or less, to the road leading to Crane's carding works, thence on said road fifty feet to a stake and stones, from thence making a right angle and running westerly to the first-mentioned bounds, with the privilege of taking and using from the flume now occupied by said Crane, or any other flume which may be there erected, sufficient water to carry two tub bellowses for a blast furnace, reserving to said Crane the right of water sufficient for his carding and clothing works." On the same day the grantees of the premises mortgaged them to the grantor to secure a promissory note for seventy-five dollars, to be paid in hollow ware or iron castings on or before October 1, 1829, with interest. The mortgage was recorded before the maturity of the note and has not been discharged of record. Nothing appears regarding the payment or possession of the note. November 10, 1848, David Nichols and Allen L. Nichols quitclaimed the premises to Andrew J. Soule, the signature of David having but one witness. August 22, 1865, Soule executed to Hiram Bellows a quitclaim that was evidently intended to convey the same property. In the last two deeds the course of the first line was given as thirty-nine degrees west instead of thirty degrees, and in the last deed the place of beginning was put northwesterly from Crane's mill instead of northeasterly, and the call for a right angle in running the third line was omitted. Bellows died in

1876, without having conveyed the title, and the oratrix Margaret claims the property under his will and the will of his wife, Susan B., who died in 1880.

Privileges upon the falls other than the ones above described were subsequently granted by those who took the remainder of David Wilkins' right; and there have been many conveyances of ³⁵⁰ the different interests, as shown by the eighty-four deeds introduced by the defendants. For the purposes of this inquiry it may be assumed that all the rights, except the one claimed by the orators, are now united in the defendants by written evidences of title. It will be necessary to trace the main line of these conveyances.

January 8, 1833, Daniel Wilkins conveyed to Erastus Cross by warranty deed "one equal undivided half of 28 acres of land of the original right of Frances Panton or Fanton, which 28 acres covers the grant in Fairfax on the river Lamoille, together with the water privileges and mills thereon standing"; in which deed exceptions were made of the grist-mill privilege deeded to Parker and Webster, the carding and cloth dyeing privileges deeded to William Crane, and certain parcels not connected with water rights. March 12, 1833, Wilkins quitclaimed to Erastus Cross as follows: "All my right in the whole of the lot of land on which I now reside, and one equal undivided half of which I conveyed to said Cross by deed dated January 6, 1833, meaning hereby to convey the other equal undivided half of said lot," referring to the record of said deed for further particulars. Erastus Cross had previously become the owner of the grist-mill property by deed from Isaac N. Soule dated December 8, 1832; and on the 23d of December, 1833, he quitclaimed certain land to Joseph Cross by the following description: "Being the same deeded to me by Isaac N. Soule and Daniel Wilkins A. D. 1832, also all right and title I have in a grist mill, saw mill, and shingle mill, all deeded me by said Soule and Wilkins, for a more particular description of which reference being had to said deeds." April 3, 1834, Joseph Cross quitclaimed to Erastus Cross as follows: "Being the same land mills and machinery and the whole of the estate that the said Erastus deeded to me December 23, 1833," referring to the record of said deed for a more particular description and excepting the grist-mill property and the shingle machine. On the same day Erastus Cross quitclaimed to John Warner and Silas W. Brush, describing the property as all the estate deeded him by Daniel Wilkins by his deeds of January 8 and March 12, 1833, and referring to the records. May 24, 1834, Brush quitclaimed to Warner as follows: "All the right, title and interest I have in and to the Fairfax Falls, meaning hereby to convey all the land I ever owned

in the town of Fairfax." October 27, 1836, William Crane quitclaimed ³⁵¹ to Warner and Brush the following: "All my right in the water privilege at Wilkins Falls so-called with my other privilege appertaining to said water privilege." February 3, 1840, Warner conveyed to Silas Smith property described substantially as follows: All the real estate deeded me by Erastus Cross, April 3, 1834, and a certain other piece deeded me by William Crane, being the same land deeded him by Daniel Wilkins, April 10, 1816, referring for further description to the records of all the deeds mentioned; with the privilege of erecting a grist-mill or other machinery on the last-described premises, with the right to use the quantity of water specified in Wilkins' deed to Crane. March 22, 1845, Smith quitclaimed to Warner, describing the property as the same deeded to him by Warner, with reference to the record. In the meantime Solomon Bradley had become the owner of the grist-mill property by deed from Joseph Cross. January 10, 1846, Warner deeded to Blinn and Barstow a piece extending from the bridge above the dam northerly to the grist-mill property. April 6, 1852, Warner conveyed to Samuel N. Gaut, by metes and bounds, a tract on both sides of the river, which is further described as follows: "Meaning to convey all the lands and water privileges in and about the great falls whether described in the above description or not; excepting all I have heretofore deeded to Blinn and Barstow, also the old grist-mill privilege, also the privilege deeded to Daniel (?) Nichols and Allen L. Nichols by Daniel Wilkins the 14th day of Jan., 1828." January 31, 1881, Gaut quitclaimed the property to Harriet G. Minot, bounding it by adjoining owners, and describing it further as all the land he owned at or about Fairfax Falls and the water privileges connected therewith; and on the same day Mrs. Minot quitclaimed an undivided half of this to Susan E. Gaut. June 3, 1902, Mrs. Minot, and the heirs of Mrs. Gaut quitclaimed the entire tract to certain of these defendants.

The general course of the Lamoille river through the section involved in our inquiry is about north. The fall consists of an irregular descent, covering about thirty rods, and amounting to nearly ninety feet. All the mills and mill-sites mentioned in the exhibits and testimony are on the easterly bank. The mills now existing are located at the head of the falls, and are supplied from the dam. Prior to 1873 there were mills just below the falls, which took their power from a lower point hereinafter ³⁵² described. The questions of location to be determined are confined to the section between these upper and lower mill-sites. The highway runs a few rods from the river in the same general direction, but makes the first part of the descent from the upper level

with a slight bend toward the stream, after which it runs in a straight line a little east of north. Irregular ledges corresponding with the upper section of the falls run diagonally across the space between the river and the road in a northeasterly direction, striking the road at the lower part of the bend. Running beneath these upper ledges, from a point in the highway at the lower end of the bend to a small level space near the edge of the falls, in a line nearly straight, is a natural path, much used in later times by parties visiting the falls. A few feet from the highway, on the northerly edge of this path, is a large flat rock, which is of importance in our inquiry. From this path beneath the upper ledges, and from the westerly line of the straight road north of the bend, there is a steep and rocky descent toward the stream. The narrowest place between the road and the river is an east and west line crossing the flat rock, and south of this line the rocky descent extends to the edge of the stream.

The marks upon the rocks called for by the orators' deeds have not been found. The other objects mentioned in the description are Crane's carding-mill, the road leading to it, and the flume supplying it. So the first point of inquiry is the location of Crane's carding-mill. This building was carried off by a flood in the early thirties. It was without artificial stone foundation, and no vestige of it remains. But the parties are agreed that some part of the building stood on the flat rock above mentioned, marked H on the orators' plan; and all the evidence indicates that the rear of the building stood on timbers resting on the rocky slope before described. There is no satisfactory evidence of the size and shape of the building. Without presenting in detail the evidence upon which our conclusion is based, we locate the northeasterly corner of the Crane mill on the westerly part of the flat rock, with the easterly face of the building, extending upon and along the edge of the path as it is indicated on the orators' plan.

The power which supplied Crane's mill, as well as the mills below, came from a point more than half way down the falls, ³⁵³ where a large rock, standing a few feet from the edge of the river, separated some of the water from the main body of the stream, and caused it to flow for a short distance in a separate channel, divided from the main channel by a ledge of rocks. The rock first referred to in connection with rocks in the bank opposite to it, formed a natural frame, in which a structure was placed to control the flow, and from which a flume conducted water to the mill. This gorge in the rocks, where the Crane bulkhead was located, is nearly opposite the spot above described as the lower terminus of the path now used by parties visiting

the falls. The orators claim that this path marks the location of the old road referred to in their deed. The defendants insist that there never was a road here, and that if there was it could not be called a road leading to Crane's mill. The distance from the flat rock to the end of the path is about nine or ten rods. We conclude from the evidence that neither the grade nor the adjacent rocks were such as to make the location impracticable for teams. The defendants introduced some testimony as to indications of an old road that left the highway at a point a little distance north of the flat rock and came down toward the river in the rear of the Crane millsite, but we do not find that there was such a road. It is true that the road claimed by the orators must have ended at the spot described as the end of the path. The evidence precludes the possibility of its being a section of a road coming down from the south. But the terminus described is at the top of a steep slope that goes down to the gorge where the bulkhead was located. There is no suggestion that the vicinity of the bulkhead was accessible to teams coming up the bank of the stream from the flat below. The testimony of witnesses who in their youth worked in the lower mills, and assisted in the work of maintaining the bulkhead at this point, gives us a general understanding of the timbers required in its construction, and the frequency with which they were carried out by floodwood and ice; and we can judge from this what was going on in the earlier period, concerning which no testimony can be had. The Crane carding-mill had been in operation twenty-five years when the deed to the Nicholises was given, and it may easily be conceived that this line of approach to the bulkhead had then become known as a road used in connection with the carding-mill and that a surveyor running a line from the ³⁵⁴ bulkhead to the end of it might describe it as the road leading to Crane's mill.

The description in the orators' deeds, taken as it reads, requires that the lot be located northerly from the Crane millsite. The orators read the direction governing the starting point "southwesterly" instead of "northeasterly" as given in the first deed or "northwesterly" as given in the deed to Bellows, and so bring the lot southerly from the Crane millsite. This enables them to locate the westerly lines of the lot on the stream, with the easterly line resting on the lower part of the path or road above described. This location lacks the confirmation of the artificial marks used to designate the main westerly line; but the defendants claim, and their evidence tends to show, that rocks from the bank of the stream in this vicinity have been carried out by floods. We have seen that the lot as plotted has at its southwesterly corner a projection fourteen feet long by ten

wide. The length of this projection is such that when the main westerly line of the lot is brought upon the margin of the stream the projection spans the gorge before described, bringing the end line of the projection on the outer rock. The witnesses are agreed that the lower line of the projection as surveyed crosses the gorge about where Crane's dam and gate were located. It may be that the lot can be located substantially as claimed by the orators, if the court is justified in rejecting the starting point as given—a question which is left for further consideration.

The Nicholsons must be treated as obtaining a good title to the premises covered by their deed, for the parties claim from a common source: *Ames v. Beckley*, 48 Vt. 395. There is no evidence that they ever went upon the land, but they are to be treated as having received the possession with their deed: *Davenport v. Newton*, 71 Vt. 11, 42 Atl. 1087. There is no presumption that the mortgage note was paid at maturity, and under our holdings the legal title passes to the mortgagee on condition broken. But a mortgagee holds the title thus received only for the purpose of security, and the burden is on him and those claiming in his right to show anything done in enlargement of the title. There is no evidence that Wilkins or his grantees took possession under the mortgage within the statutory period, and it is only in support of an actual possession that the law will presume a conveyance or other relinquishment of the mortgagor's³⁵⁵ interest to the mortgagee: *Appleton v. Edson*, 8 Vt. 239; *Brown v. Edson*, 23 Vt. 435. The lapse of fifteen years without payment or other recognition, and without an enforcement of the security in any manner will defeat the mortgagee's right: *Whitney v. French*, 25 Vt. 663. Nor will the law of abandonment avail the defendants. A failure to occupy land for an indefinite time does not constitute an abandonment of title or possession: 2 Washburn on Real Property, 453, 457; *Perkins v. Blood*, 36 Vt. 273; *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866; *Davenport v. Newton*, 71 Vt. 11, 42 Atl. 1087. The water power covered by the deeds has not been lost by nonuser: *Adams v. Barney*, 25 Vt. 225. It is generally said that real property, corporeal or incorporeal, held by grant, cannot be lost by abandonment: 1 Cyc. 6; 40 Am. Dec. 466, note. But if the law is otherwise, there can be no abandonment without an intention to abandon: *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *Dyer v. Sanford*, 9 Met. 395, 43 Am. Dec. 399; and most authorities hold that this intention cannot be inferred from nonuser alone: 1 Cyc. 5. But if not precluded by legal rule, we should not draw the inference from an omission to use property of this character. Nor will an abandonment be inferred from the nonpayment of taxes: *Mayor etc. v. Riddle*, 25

Pa. 259; Keene v. Connovan, 21 Cal. 291, 82 Am. Dec. 738; Davis v. Perley, 30 Cal. 630. We cannot find the fact of abandonment from the few indefinite statements regarding the business and personal history of the Nicholsons. It is not necessary at this time to consider the effect of a deed having but one witness. The deed to Soule was properly executed on the part of Allen L. Nichols, and so conveyed an undivided half of the property. Defendants also claim from the evidence that the changes in the process of manufacturing iron ware have been such that tub bellows are no longer used, and contend that the power can be applied to nothing else. It is not necessary to inquire as to the fact, for we construe the words of the deed to be a measure of the power granted and not a restriction of its use. So the orators have at least an undivided half of whatever land and power were conveyed by the Wilkins deed, if the property can be located with sufficient certainty and has not been lost by adverse possession.

If the lot lies where the orators have located it, it has not been lost by adverse possession, actual or constructive. The man ³⁵⁶ who had charge of the adjacent property under Gaut put up two lengths of fence where they were sufficient in connection with a ledge to keep hogs on a small tract which included this parcel, and occupied the parcel in this manner from 1852 to 1862. The evidence does not carry the occupancy further, but if it did the continuance would be of no avail to the defendants, for the grant to the Nicholsons was excepted from the conveyance to Gaut, and there is nothing in the evidence to indicate that this use was under a claim of right. There is no evidence of any other actual occupancy of the piece surveyed, except in connection with the water rights pertaining to the mills below. Nor can the occupancy of other parts of the grant avail here. The doctrine that the possession of any part will be considered a possession of the whole applies to possession under a deed which gives definite and certain boundaries: Spaulding v. Warren, 25 Vt. 316. The defendants' title has already been stated. It originated in a deed of an undivided half of twenty-eight acres of a certain original right. This language affords no certain indication that the twenty-eight acres was all of the allotment, and if it was not all the description leaves the part conveyed undesignated. Nothing appears to show what the proprietors' records would have disclosed in this regard. The further statement that the twenty-eight acres covers the grant on the river together with the water privileges and mills is no more definite as regards boundaries. The only further element introduced by the deed of the remaining half is the fact that it was the whole of the lot on which the grantor resided. The grantee

in the above deeds conveyed property deeded him by the grantor in 1832—a reference which would lead the inquirer to nothing if his inquiry was confined to that year. The next grantor used the same description by reference. The next returned by reference to the original description. The succeeding deed was of all the grantor's interest in the falls and land, without reference. The two subsequent conveyances were by references which led back to the first description. This brings us to Warner's deed to Gaut in 1852, and thus far no boundaries have been found sufficiently definite to support a claim of constructive possession. Warner's deed to Gaut was by metes and bounds, but the grant in question was excepted. Gaut's deed to Mrs. Minot in 1881 bounded the premises conveyed by the lands of certain persons named, and ³⁵⁷ described them further as all the lands and privileges he owned at the falls, but without referring to his deed. A description by a general reference to the lands of others cannot meet the requirement of definite and certain boundaries.

In reaching our conclusions of fact we consider all the evidence introduced by the defendants, and exclude from consideration the testimony of the orator E. A. Sowles, the objection to which is insisted upon.

We return to a further consideration of the description in the orators' deeds. The description as a whole is such that the change from "northeasterly" to "northwesterly" in the language which determines the starting point in the final deed of the series, is immaterial. The other variations from the first description may be treated as errors. So the courses are to be taken as found in the first deed. The expression "southerly or south," used in fixing a definite course so many degrees west, must be read "south," unless the course is controlled by an ascertained monument. If the direction governing the starting point is correct, the lot is located north of the Crane millsite. There is no patent obstacle in the way of this location. The reservation in favor of the Crane privilege does not necessarily require that the lot be located above the Crane mill. If a location north of the Crane property is accepted, several things follow with certainty. The road described as leading to Crane's mill is the highway running past it. The lot lies wholly on the westerly side of the road. The entire length of its easterly line rests on the road. The northerly line of the lot is at a right angle with the road. The first and main line of the westerly side of the lot is south thirty degrees west, and the lines forming the projection and southerly side of the lot are run by right angles from the end of that line. So the course of the southerly line of the lot is definitely determined by the course above given. This line, called

fifty feet more or less, must be taken to be of the length stated, unless the distance is controlled by other calls: *Johnson v. Pannel*, 2 Wheat. 206, 4 L. ed. 221; *Cutts v. King*, 5 Me. 482. See *Blaney v. Rice*, 20 Pick. 62, 32 Am. Dec. 204. For present purposes this line may be assumed to strike the highway one rod north of the point represented on the orators' plan as the junction of the beaten path with the highway. Then if the southerly and westerly lines of the survey are run in reverse ³⁵⁸ order, the surveyor will be brought to the near vicinity of the points where the description locates the cross in the rock and the distinctive mark designated as the place of beginning—the letter N. An examination extending along narrow strips running through the places thus located in a direction parallel with the highway, will adapt the test to any north or south variation of the assumed starting point. It is to be presumed that a description of this character represents an actual survey. The case affords some indications that the rocks in this locality have remained undisturbed. The court would not be justified in disregarding the direction of the starting point as given in the deeds without some definite information concerning this location; and the case will be remanded for the taking of testimony covering a plotting of the survey on the highway north of the Crane millsite, a search for the designated marks on the lines above indicated, and distances, levels and other facts bearing upon the feasibility of the location for the use of power to be taken from the flume which supplied Crane's mill. There need be no inquiry upon the issue of adverse possession as applied to the territory described until the case upon the question of location is completed.

NOTE.—This opinion was read at the January term, 1909, and the case has since been held at the request of counsel, who now file a stipulation which provides for an affirmance of the decree, and a mandate in accordance therewith is sent down.

The Gain or Loss of Title by Abandonment is the subject of a recent note to *Phy v. Hatfield*, 135 Am. St. Rep. 889. This question is discussed with reference to water rights on pages 905–907 of the above note.

The General Rules for the Location of Boundaries are discussed in the note to *Matheny v. Allen*, 129 Am. St. Rep. 990.

STATE v. HILDRETH.

[82 Vt. 382, 74 Atl. 71.]

CONTEMPT—Statute Changing Common Law.—A statutory provision that a person who defames a court of justice, or a sentence or proceeding thereof, or defames the magistrate, judge, or justice of such court as to an act or sentence therein passed, shall be fined not more than so much, does not change the common law of the subject. (p. 1023.)

STATUTE.—In Construing Statutes the Rules of the Common Law are not to be changed by doubtful implication nor overturned except by clear and unambiguous language. (p. 1023.)

CRIMINAL LAW—Common Law.—If a Statute Fixing a Penalty for an offense does not expressly nor by implication cut off the common-law prosecution or punishment for the same offense, it is taken to intend a cumulative remedy only. (p. 1023.)

CONTEMPT—Newspaper Publication Scandalizing Court.—It is a contempt at common law to scandalize a court of record by a newspaper publication in respect of its decision in a case no longer pending. (p. 1028.)

John G. Sargent, attorney general, for the state.

Young & Young, for the respondent.

³⁸³ ROWELL, C. J. This is an information presented to this court by the attorney general ex mero motu, asking that the respondent be cited to show cause why he should not be punished for contempt for defaming the court in an article that he wrote and published in his own newspaper of and concerning a certain decision that the court had recently announced that finally determined the case in which it was rendered. The respondent was cited and appeared.

The article entirely misconceived and misstated the ground and reason of the decision, and the respondent did not claim that it was not defamatory, as it most clearly was, and highly so, for it impugned the motives of the court and charged it with corruption. But he objected by demurrer that as the case was not pending when the article was published, but had been finally determined, the court had no jurisdiction to proceed against him for contempt, but that he could be proceeded against only by indictment or information. This objection was not sustained, the demurrer was overruled, the respondent adjudged guilty of contempt and fined.

There are, undoubtedly, many cases in this country that support the respondent's contention. But it will be found, we think, that though a few of them rest upon constitutional provisions, that the more part rest upon statutory provisions that ³⁸⁴ expressly or impliedly undertake to limit the jurisdiction of courts to punish for contempt, and to confine it to pending cases; and although it is very generally held that legislatures cannot thus limit and confine the power of the

courts, yet many courts, it would seem, have been content to follow those provisions without questioning the power of the legislature to make them.

But whatever may be true of those cases, the common law governs here, for we have no constitutional provision on the subject, and no statutory provision save that which enacts that a person who defames a court of justice, or a sentence or proceeding thereof, or defames the magistrate, judge, or justice of such court as to an act or sentence therein passed, shall be fined not more than so much: Pub. Stats. 5898. But this statute does not change the common law of the subject, for as said in *Dewey v. St. Albans Trust Co.*, 57 Vt. 332, speaking of the construction of statutes, "the rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language," and here is no certain implication of change, nor clear and unambiguous language of overturn. And besides, it is a general rule that if a statute fixing a penalty for an offense does not expressly nor by implication cut off the common-law prosecution or punishment for the same offense, it shall be taken to intend a cumulative remedy only: *Black on Interpretation of Laws*, 234; *People v. Bristol etc. Turnpike Co.*, 23 Wend. 222. The precise question is, therefore, whether it is a contempt at common law to scandalize a court of record by a newspaper publication in respect of its decision in a case no longer pending.

Lord Hardwick says there are three different sorts of contempt. One, scandalizing the court itself; one, abusing parties who are concerned in cases in court; and one, prejudicing mankind against persons before the case is heard: 2 Atk. 471. Blackstone says that contempts that are punishable by attachment are either direct, which openly insult or resist the powers of the court or the persons of the judges who preside there, or else are consequential, which plainly tend to create universal disregard of their authority. In giving the principal instances of each kind, he says that a contempt arises by speaking or writing contemptuously of the court or of the judges acting in their judicial capacity, and, in short, by anything that demonstrates ³⁸⁵ a gross want of that regard and respect which, when once courts of justice are deprived of, their authority, so necessary for the good order of the kingdom, is entirely lost among the people: 4 Blackstone's Commentaries, *283 et seq. The reason that prompted the passage of our statute for the punishment of defamation is to the same effect, as shown by the preamble of the original act, passed in 1787, which recites that "whereas defaming the civil authority of the state greatly tends to bring the same into contempt and

enervate the government, for the prevention whereof" the act was passed: Stats. 1787, p. 46.

There is a collection of cases of commitments for contempts by courts of justice in 8 State Trials, 49 and 50, all of which are more or less in point here, but we state only two of them. In Easter term, 6 George II, one Wilkins having confessed himself guilty of publishing a libel upon the court of king's bench, the court made a rule committing him to the marshal. The next term, having made an affidavit charging another with being the author of the libel, he was sentenced to pay a fine and to give security for his good behavior for a year. In Trinity term, 7 George II, an attachment was granted against John Barber for contemptuous words of the court of king's bench uttered in a speech to the common council of London. This case is also to be found in 1 Strange, 444.

It has often been said by English judges that the history, purpose, and extent of this jurisdiction are competently treated by Wilmot, C. J., in an undelivered opinion in *The King v. Almon*, 8 St. Tr. 54. The occasion of it was a motion in the king's bench for an attachment against Almon for contempt in publishing a libel on the court and the chief justice. "Indeed it is admitted," says the chief justice, "that attachments are very properly granted for resistance of process or a contumelious treatment of it, or for any violence or abuse of the ministers or others employed to execute it; but it is said that the courts of justice in those cases are obstructed, and that the obstruction must be instantly removed, but that there is no such necessity in the case of libels upon courts or judges, which may wait for the ordinary method of prosecution without any inconvenience whatever. But when the nature of the offense of libeling judges for what they do in their judicial capacities, either in court or out of court, comes to be considered, it does, in my opinion, ³⁸⁶ become more proper for an attachment than any other case whatsoever. . . . In the moral estimation of the offense, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal that fancy can suggest upon the judges themselves. It seems to be material, to fix the ideas of the words 'authority' and 'contempt of court,' to speak with precision upon the question. The trial by jury is one part of that system, the punishing of contempts of courts by attachment is another part. We must not confound the modes of proceeding, and try contempts by juries and murders by attachment. We must give that energy to each

which the constitution prescribes. In many cases we may not see the correspondence and dependence that one part of the system has and bears to another part, but we must pay such deference to the wisdom of many ages as to presume it. And I am sure it wants no great intuition to see that trials by jury will be buried in the same grave with the authority of courts that are to preside over them."

In *McLeod v. St. Aubyn*, [1899] App. Cas. 549, the privy council held that contempts of court could be committed by publishing scandalous matter respecting the court after adjudication as well as pending a case before it; but said that in England, committals for contempt for scandalizing the court itself had become obsolete, though in small colonies, consisting mostly of colored populations, like the island of St. Vincent whence that case came, such committals might still be necessary in proper cases. But the very next year there arose in England itself the case of *The Queen v. Gray*, [1900] 2 Q. B. 36, in which the queen's bench division held that the publication in a newspaper of an article containing scurrilous personal abuse of a judge with reference to his conduct as a judge in a judicial proceeding that had terminated, was a contempt of court, punishable by the court on summary process. The opinion was delivered by Lord Chief Justice Russell of Killowen, who said that it could not be doubted, and indeed had not been argued to the contrary, that the article constituted a contempt of court; but as those applications were, happily, of an unusual character, they thought it right to explain a little more fully than perhaps was necessary, ³⁸⁷ what constitutes a contempt of court, and what means the law had put into the hands of the judiciary for checking and punishing such contempts. He then goes on to say that any act done or writing published calculated to bring the court or a judge of the court into contempt or to lower his authority is a contempt of court; that that is one class of contempt; that any act done or writing published calculated to obstruct or to interfere with the due course of justice or the lawful process of the courts, is also a contempt of court; that the former class belongs to the category that Lord Hardwick characterizes as "scandalizing the court itself"; but that the description of that class of contempts is to be taken subject to an important qualification, namely, that courts and judges are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or to the public good, no court could nor would treat that as contempt of court; that the law ought not to be astute in such cases to criticise adversely what is published in such circumstances and with such an object; but that it is to be remembered that in this matter the lib-

erty of the press is no greater than the liberty of every subject of the queen. His lordship goes on still further to say: "Now, as I have said, no one has suggested that this is not a contempt of court, and nobody has suggested nor could suggest that it falls within the right of public criticism in the sense I have described. It is not criticism; it is personal and scurrilous abuse of a judge as a judge. We have, therefore, to deal with it as a case of contempt, and we have to deal with it *brevi manu*. This is not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms a part; it is a jurisdiction, however, to be exercised with scrupulous care; to be exercised only when the case is clear and beyond reasonable doubt, because if it is not a case beyond reasonable doubt, the courts will, and ought, to leave the attorney general to proceed by criminal information."

A note to that case says that it is reported as showing that in England the court will still, when the circumstances demand its action, exercise its jurisdiction to punish on summary process the contempt of "scandalizing the court," though no contempt has been committed *ex facie* of the court, nor in respect of a case pending.

³⁸⁸ The common law of this subject has also been pretty fully considered in this country. Among the earlier cases is *Commonwealth v. Dandridge*, 2 Va. Cas. 408, decided in 1824. That was an attachment for contempt in insulting a judge as he was entering the courthouse to take his seat upon the bench. The insult related to what the judge had done the term before in a case then tried and still pending. The respondent claimed that while the attaching power might be exercised for contempts touching the prospective conduct of a judge, it could not be exercised for contempts touching his past conduct. But the court said that as the authority and independence of the court might be equally assailed either way, the distinction was merely ideal. That case is referred to approvingly in *Burdett v. Commonwealth*, 103 Va. 838, 106 Am. St. Rep. 916, 48 S. E. 878, 68 L. R. A. 251, decided in 1904. There twelve indictments had been found against the respondent, to all of which he pleaded guilty and was fined and paid, which ended the cases. Directly after that, he caused to be published in a newspaper an article signed by him, in which he charged the judge not only with having acted toward him in respect of those cases in a harsh and an arbitrary manner, but also with having been actuated therein by vicious and corrupt motives. This was held a contempt at common law, and as being of that kind that consists of "scandalizing and defaming the court itself."

State v. Morrill, 16 Ark. 384, was an attachment for contempt in publishing an article intimating by implication that the court was induced by bribery to admit to bail on habeas corpus a prisoner charged with murder, but who, failing to furnish the bail required, was remanded, with the privilege of being brought again before the court if he could furnish the bail, which he failed to do. It was submitted by counsel for the defense, among other things, that the publication of a libel upon the official conduct of a court being an out-door affair, was not, by the common law, the subject of contempt; but if it was, that it was so only when the publication was made in reference to a cause pending in court, and that inasmuch as the publication there in question was made after the case had been determined and therefore was not pending, it did not fall within the definition of common-law contempts. But the court said that the cases abundantly show that by the common law courts have power to punish, as for contempt, libelous publications upon ³⁸⁹ their proceedings, present or past, on the ground that they tend to degrade the tribunals, destroy public confidence in them and respect for their judgments and decrees, and most effectually to obstruct the free course of justice.

In re Chadwick, 109 Mich. 588, 67 N. W. 1071, was certiorari to review the proceedings of a circuit court in which the respondent was adjudged guilty of contempt for writing and causing to be published a letter criticising a decree that the court had recently rendered, and charging the judge with submitting to private interviews with interested parties regarding the case pending his decision, and intimating unfairness and partiality at the hearing. The respondent claimed that the case to which the letter referred was not pending when it was published, and therefore that he could not be dealt with for contempt. But the court said that the case had not then reached the stage at which it could be said not to be pending; but that aside, the court went on to say that the statute did not in terms limit the power to punish for contempt to cases pending in court; that under the respondent's contention a party might threaten to do an act, or to charge corruption upon a judge, or that he had submitted to private interviews with the litigants, and if the case was then pending, he could be summarily punished for contempt; but if the decree had been pronounced, the judgment rendered, or the order made, he could the next moment do the same act or make the same statement with impunity, and leave the judge to the sole remedy of an action for libel or slander, which was too narrow a view of the law of contempt, and not sustained by the best-considered cases.

This subject was before the supreme court of Missouri in *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79. There the respondent, in an article that he caused to be published in a newspaper of which he was the publisher and proprietor, charged the court and the members thereof with bribery and corruption in connection with the disposition of a certain case therein. On the return of a rule to show cause, the common law of contempt of court was thoroughly considered, and the conclusion reached that at that law, one kind of contempt is scandalizing the court itself, and that it need not relate to a pending case, though there the case was still pending. The court said that the distinction Lord Hardwick makes in respect of contempts has been overlooked in ³⁰⁰ some of the cases, and hence the error they have fallen into of saying that the thing complained of must relate to a case pending in order to be a contempt; but that if the case is disposed of, then that will be no contempt which would have been one had the case been pending; that the theory of those cases is, that the act had a tendency to affect injuriously the rights of a party in pending litigation, or to embarrass, though it might not actually influence, the court in its determination; but that such cases fall under the second or the third class pointed out by Lord Hardwick, and do not cover the whole field, for there still remains the first kind of contempt, namely, that of scandalizing the court itself, in which the public is primarily interested, and as to which the injury is just as great whether it refers to a particular pending case or only to the court as an instrumentality of government.

We hold, therefore, that it is a contempt at common law to scandalize a court of record by a newspaper publication in respect of its decision in a case no longer pending.

Contempt of Court by Libelous Newspaper Publications is discussed in the note to *Percival v. State*, 50 Am. St. Rep. 572-585. Such contempts are classified, defined, and the manner of their punishment described in the recent cases of *State v. Shepherd*, 177 Mo. 209, 99 Am. St. Rep. 624; *Burdett v. Commonwealth*, 103 Va. 838, 106 Am. St. Rep. 916. According to these cases, courts possess inherent power to punish, as for contempt, libelous publications upon their proceedings, pending or past, which tend to degrade the tribunals, destroy public confidence and respect for their judgments, and obstruct the free course of justice. But according to *Ex parte Green*, 46 Tex. Cr. 576, 108 Am. St. Rep. 1035, the publisher of a newspaper cannot be held guilty of contempt in using expressions defamatory of a court and its proceedings, unless they relate to some case pending therein: *State v. Howell*, 80 Conn. 668, 125 Am. St. Rep. 141.

PIERSON v. HUNTINGTON.

[82 Vt. 482, 74 Atl. 88.]

BILLS AND NOTES—Bona Fide Holder—Duty to Make Inquiry.—A purchaser of negotiable paper must exercise reasonable prudence and caution in taking it; and if he takes it without making inquiry, when the circumstances are such as would excite the suspicion of a prudent and careful man, he will not stand in the position of a bona fide holder. (p. 1030.)

BILLS AND NOTES—Bona Fide Holder—Burden of Proof.—The production of a negotiable instrument, properly indorsed, is prima facie evidence of the holder's right to recover against the maker. But the maker may compel the holder to support his prima facie case with further evidence, by showing a defense that would have been available against the payee. (p. 1030.)

BILLS AND NOTES—Bona Fide Holder—Fraud and Failure of Consideration.—Where the consideration of a note fails and the note is transferred in fraud of the maker, the transferee, in order to maintain an action on the note against the maker, must offer some evidence tending to show that he purchased it in good faith as well as for a valuable consideration. And to establish his good faith, he must show the circumstances connected with his procurement of the note, and what he paid for it. Evidence that he took the note for value before maturity does not meet the requirement. (p. 1032.)

BILLS AND NOTES.—A Finding That the Purchaser of a Note Received it without notice of a defense available to the maker against the payee is not equivalent to a finding that he acted in good faith. (p. 1033.)

BILLS AND NOTES—Bona Fide Purchaser—Inquiry.—In an action on a note by an indorsee who has the burden of proof to show good faith, the fact that there is no evidence tending to show that he made inquiry justifies an affirmative finding that he made none. (p. 1033.)

William N. Theriault, for the plaintiff.

John G. Wing, for the defendant.

484 **MUNSON, J.** The note in suit was given by the defendant to the Woodford Distilling Company, and was indorsed by that company to the plaintiff. The plaintiff's case was submitted in depositions, and consisted of the note and evidence of its transfer for value before maturity. The defendant's evidence was confined to matters affecting the note in the hands of the payee. The plaintiff offered nothing in reply.

The trial court has found that the note was indorsed to the plaintiff without recourse, for a valuable consideration, and before maturity; and that it was received without notice of a defense, but without inquiry. The court found further that the assignment was not made in due course of business, basing its conclusion upon the fact that the plaintiff took the note thus indorsed without inquiry, when he was wholly unacquainted with the defendant and his finan-

cial condition. The plaintiff claims that there was no evidence to support the finding that he bought the note without inquiry; and that if the finding is sustained, the conclusion drawn from it falls short of a finding that he is not a bona fide holder.

⁴⁸⁵ The note was given for liquors in bond; and at the time it was given the payee agreed, by a separate writing, that if the goods did not give satisfaction they might be held subject to its order, and that the note should be returned on a return of the certificates. The goods were not satisfactory, and the defendant returned the certificates and demanded the note, but the payee refused to return it, and soon after sold it to the plaintiff. These facts were found from evidence received subject to the plaintiff's exception.

The plaintiff claims that the findings touching his conduct, if warranted by the evidence, are not sufficient to support the judgment. We are referred to a list of cases, decided in many jurisdictions, which concur in holding that one who takes negotiable paper before due for a valuable consideration, in good faith, will not be affected by an existing defense, even though he was aware of circumstances that ought to have excited the suspicion of a prudent man. But the cases cited are not in accord with the decisions of this court. It is held in this state that a purchaser of negotiable paper must exercise reasonable prudence and caution in taking it, and that if he take it without making inquiry, when the circumstances are such as would excite the suspicion of a prudent and careful man, he will not stand in the position of a bona fide holder. This doctrine was promulgated in *Roth v. Colvin*, 32 Vt. 125, and was reaffirmed in *Limerick Nat. Bank v. Adams*, 70 Vt. 132, 40 Atl. 166, and again in *Capital Savings Bank v. Montpelier Savings Bank*, 77 Vt. 189, 59 Atl. 827. It remains to be seen whether this distinction will be of importance in the determination of the case presented.

The case states that nothing appeared tending to show that the plaintiff made any inquiry regarding the note or its maker. The defendant contends that the evidence he introduced was such as cast on the plaintiff the burden of showing that he took the note in good faith, and that this required more than proof of a purchase for value before maturity. The questions raised by this claim are the first for consideration.

The production of a negotiable instrument, properly indorsed, is prima facie evidence of the holder's right to recover against the maker. But the maker may compel the holder to support his prima facie case with further evidence by showing a defense that would have been available

against the payee. ⁴⁸⁶ The defenses which have ordinarily been recognized as imposing this additional burden are illegality, procurement by fraud or duress, want of consideration, and an intervening theft or loss. This enumeration is in accord with the statements generally made in our own decisions. It was said, however, in *Quinn v. Hard*, 43 Vt. 375, 5 Am. Rep. 284, that it did not appear to be very clearly settled in what cases and to what extent the burden of proof would be thrown upon the plaintiff by the introduction of matters amounting to a defense against the payee. The more recent cases have apparently relieved the subject of some of its uncertainty, for the statement is now generally framed in terms that cover fraud in the transfer as well as in the inception of the note, and a subsequent failure of consideration as well as an original want of it: 4 Ency. of Law, 320, 322; 8 Cyc. 236; *National Revere Bank v. Morse*, 163 Mass. 283, 40 N. E. 180; *Sperry v. Spaulding*, 45 Cal. 544.

The existence of a rule of this character has long been affirmed in this state, whatever uncertainty may have been felt regarding its application. It was directly involved in the decision of *Sandford v. Norton*, 14 Vt. 228, where it was said that when the defendant makes out a case upon which none but a bona fide holder for value is entitled to recover against him, it is incumbent upon the plaintiff to show that he is entitled to sue in that character. It was recognized in *Blaney v. Pelton*, 60 Vt. 275, 13 Atl. 564, where it was said that if the defendant offers evidence tending to prove fraud in obtaining the note, or an entire failure of consideration for it between the original parties, the burden of proof is thereby cast upon the plaintiff to show that he was an innocent purchaser of the note for value while it was current. It was restated and applied in *Limerick Nat. Bank v. Adams*, 70 Vt. 132, 40 Atl. 166, where it was held that evidence offered by the defendants which tended to show that the note was without consideration and void for fraud as between the original parties was properly admitted as a step in their defense, and for the purpose of casting upon the plaintiff the burden of showing that it was not chargeable with knowledge of the fraud, if the fraud alleged was established.

In some jurisdictions the courts have found no difficulty in applying the rule to defenses not connected with the inception of the instrument. It is said that after proof that the paper was ⁴⁸⁷ once in the hands of a fraudulent holder it may justly be presumed to continue in the hands of a holder of that character until the contrary be proved; that possession is not enough to support a recovery by one who must trace title through fraudulent practices; and that this

is equally true whether the fraudulent practices were connected with the inception of the paper or occurred subsequently: *Parsons v. Utica Cement Co.*, 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785; *Totten v. Bucy*, 57 Md. 446. It is frequently said in cases of wrongful procurement that the reason for the rule is found in the presumption that one who has obtained a note illegally or fraudulently will cause it to be sued in the name of another: 4 Ency. of Law, 323; *Perkins v. Prout*, 47 N. H. 387, 93 Am. Dec. 449; *Kellogg v. Curtis*, 69 Me. 212, 31 Am. Rep. 273. The situation in which the payee is placed by a failure of consideration affords a basis for the same presumption; and this seems to justify the conclusion that no distinction need be made between defenses existing at the inception of the contract and those subsequently arising.

We see no reason why the additional burden should not rest upon the plaintiff in this case. It is true that the defense had no existence when the note was delivered to the payee, and that it never would have existed but for a further contemporaneous agreement of which the note gave no notice. But the terms of the agreement were such that the acts of the parties with reference to it worked an entire failure of the consideration of the note, and operated as a defeasance of the payee's title to it, and made the transfer of it a fraud upon the maker. The objection that the holder ought not to be prejudiced by a matter not ascertainable from the note has no greater force than it would have had if the fraud or defect of title had existed at the making of the contract. The effect of the payee's wrongful act upon the maker, and the inducement to a collusive transfer, would be the same in either case. The rule is not one that abridges the holder's substantive right as determined by the law merchant; it merely puts the burden of proof upon the one who knows the facts. If he is an innocent holder, the fact that the maker has a complete defense against the payee cannot affect him. So when the maker shows a transfer made in fraud of his right, it is not unreasonable to require that the transferee offer some evidence tending to show that he bought in good faith.

⁴⁸⁸ Evidence that the note was taken for value before maturity will not meet the requirement. The plaintiff cannot prove himself a bona fide purchaser of the note merely by showing that he paid value for it before maturity; he must go further, and show that he had no knowledge or notice of the fraud: *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801. He must show that he bought the note in good faith as well as for a valuable consideration; and his good faith can be shown only by proof that he had no knowledge of the payee's fraudulent conduct

and was not equitably chargeable with notice of it: *Parsons v. Utica Cement Co.*, 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785; *Tilden v. Barnard*, 43 Mich. 376, 38 Am. Rep. 197, 5 N. W. 420. To establish his good faith, the plaintiff must show the circumstances connected with his procurement of the note, and what he paid for it: *Holme v. Karsper*, 5 Binn. 469; *Totten v. Bucy*, 57 Md. 446. Evidence that the plaintiff gave value for the note is very different from evidence that he gave full value: *Millard v. Barton*, 13 R. I. 601, 43 Am. Rep. 51. It is proof of the payment of full value that raises a presumption of good faith: *Market etc. Bank v. Sargent*, 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192.

So we hold that the burden was on the plaintiff to show that he took the note in good faith, and that his statement that he bought it for value before maturity did not meet the requirement. The trial court has not found the fact of good faith, and there was nothing before it that required the finding. The plaintiff's contention that the findings made do not amount to a finding that he was not a purchaser in good faith is made immaterial by our holding regarding the burden. The only question now available to the plaintiff is whether any of the facts reported required the conclusion that he was such a purchaser.

We have seen that the note was indorsed to the plaintiff without recourse. It appears from the plaintiff's evidence that he is an attorney, and resides in Chicago, where the payee does business; that he knows the company in a business way; that he bought this and four other notes at the same time; that he is not acquainted with the defendant; and that at the time he bought the note he had no notice of what it was given for. The trial court has found from this evidence that the note was received without notice of a defense. This is not equivalent to a finding that the purchaser acted in good faith, for he may have had ⁴⁸⁹ suspicions that led him to avoid knowledge, and this may have made him a purchaser in bad faith, although without notice: *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934. If a conclusion of good faith might have been drawn from the absence of notice, it was for the trial court to do it. But the court cannot have drawn this conclusion, for it rendered judgment against the plaintiff. The question whether the plaintiff made inquiry was included in the question of good faith, and the fact that there was no evidence tending to show that he made inquiry justified an affirmative finding that he made none. So if the finding that the plaintiff made no inquiry influenced the court in reaching its conclusion on the question of good faith, this will not defeat the judgment. No special consideration need be given to the distinction between the rule prevailing in most jurisdictions

and that adopted here touching the duty of inquiry, for if the case were to be tested by the former, error would not appear.

Judgment affirmed.

Every Holder of a Negotiable Instrument is Deemed Prima Facie to be a holder in due course. But when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course: *Parsons v. Utica Cement Mfg. Co.*, 82 Conn. 333, 135 Am. St. Rep. 278, and cases cited in the cross-reference note thereto. See, also, the recent cases of *Warren v. Smith*, 35 Utah, 455, 136 Am. St. Rep. 1071; *Johnston County etc. Bank v. Scroggin etc. Co.*, 152 N. C. 142, 136 Am. St. Rep. 821.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

DEIGHTON v. HOVER.
[58 Wash. 12, 107 Pac. 853.]

TELEGRAM—Damages for Opening and Using Information.—Where one wrongfully opens a telegram containing an offer to the addressee to purchase his land, and, with the information thus acquired, himself exchanges property of less value for the land, the loss sustained by the addressee is the difference in the values of the two properties, irrespective of the tentative offer in the telegram. And an action for treble damages lies. (p. 1037.)

TRIAL—Counsel Conversing With Juror.—The court has a discretion to deny a new trial on the ground that counsel conversed with a juror, the conversation being in a public place, in the presence of the opposing counsel, and no reference being made to the case. (p. 1038.)

Ernest L. Kolb and Happy, Winfree & Hindman, for the appellant.

Henry J. Snively, Humphrey & Cole and Linn & Boyle, for the respondent.

¹² MOUNT, J. Plaintiff brought this action to recover treble damages, alleging in his complaint that the defendant had opened a telegram addressed to plaintiff, had learned the ¹³ contents of the message, and by reason thereof had made a trade with the plaintiff without informing the plaintiff of the telegram. The case was tried to the court and a jury, and verdict was returned in favor of the plaintiff for the sum of fourteen hundred dollars, but upon motion for a new trial the court required a remission of four hundred dollars from the verdict. On this remission being made, a judgment was entered in favor of the plaintiff for three thousand dollars. The defendant has appealed.

It appears that prior to February, 1908, the respondent owned one hundred and twenty acres of timber land in the state of Oregon. The appellant was engaged in the real estate business, and owned some land near Kennewick in this

state. The respondent had been in the employ of the appellant. He had offered to exchange his land in Oregon to the appellant for certain land then owned by the appellant, but this offer was refused. The respondent thereupon requested his father in law, one L. M. Willcuts, residing in Duluth, Minnesota, to find a purchaser for the Oregon timber land. Mr. Willcuts entered into negotiations with the Weyerhauser Timber Company, which maintained an office at Cloquet, Minnesota, which negotiations resulted in an offer of two thousand dollars by that company for the land; whereupon Mr. Willcuts sent a message to the respondent by the Western Union Telegraph Company, as follows:

“Duluth, Minnesota, February 19, 1908.

“C. H. Deighton, Kennewick, Washington.

“Weyerhauser offers two thousand for the land. What shall I do?
L. M. WILLCUTS.”

This telegram was received at Kennewick on the day of its date. It was sealed in an envelope and delivered to the appellant, who said he was going out to where the respondent lived and would deliver the message to him. The appellant neglected to deliver the telegram to the respondent, and on the next day after its receipt, without informing the respondent about the message, entered into negotiations with him which resulted in the exchange of the respondent's timber¹⁴ land to the appellant for lands near Kennewick which the jury found to be of the value of about sixteen hundred dollars. The evidence tended to show that the respondent's timber at that time was worth three thousand dollars. After the exchange had been made and deeds passed, the respondent learned that the telegram had been sent and delivered to the appellant, who explained that he had forgotten the receipt of the message. Thereafter the respondent desired to rescind the contract, and offered to reconvey the land received from the appellant, but the latter refused a rescission. After the appellant had acquired respondent's land he sought to communicate with the Weyerhauser company at Duluth, but that company had no office at that place.

It is argued by appellant that the court should have directed a verdict for the appellant. While there was no direct evidence that the appellant opened the telegram or knew the contents of it, the circumstances are fairly conclusive that he did so. He had a short time prior refused to consider an offer of exchange for the timber land. The next day after the telegram was delivered to him he proposed an exchange. He did not deliver the telegram until after the exchange was completed. Thereafter he sought to communicate with the Weyerhauser company at Duluth where that company had no office. The telegram was sent from Duluth, and there was nothing

on the outside of the envelope indicating where it was sent from. These are circumstances which the jury had a right to consider, and which with other facts in the case are, we think, sufficient to sustain a finding that appellant had opened the telegram and learned its contents.

It is also argued that the court erred in its instruction to the jury to the effect that the measure of damages was the difference between the value of the land given and the value of the land received, at the date of the exchange. Appellant contends that the court should have instructed that the measure of damage was the difference between the amount of the offer of the Weyerhauser company, viz., two thousand dollars, and the ¹⁵ value of the land received by the respondent. The respondent, however, had not offered the land at that price. He was not bound to accept the offer which was made to him. He might have refused that offer. The proof tended strongly to show that the land was worth three thousand dollars at that time, and that it would have been purchased by the Weyerhauser company at the latter figure. This was, therefore, the value of the land. While the statute under which the action was brought is a penal statute and should be strictly construed, as appellant argues, it provides that the party injured shall recover treble damages "for all loss and damages sustained by reason of such wrongful act": Rem. & Bal. Code, sec. 2977. The loss sustained is plainly the difference between the value of the land given and that of the land received, irrespective of the tentative offer made. The parties were not dealing at arm's-length. If the appellant knew the contents of the telegram, which we must assume to be the fact, he was in possession of information which of right belonged to the respondent, and which respondent had a right to know before the trade was made. The appellant wrongfully withheld this information and deceived the respondent, and thereby consummated a trade which could not otherwise have been made. He appreciated that fact and wrongfully used it to his advantage. If the information contained in the telegram had been given to respondent before the trade was consummated, then the parties would have concluded the contract at arm's-length. But this was not done, and appellant cannot now be heard to say that he and respondent dealt at arm's-length. He was clearly guilty of fraud and deceit.

It is also argued that the court erred in not granting a new trial, because one of the respondent's counsel during the trial held a conversation with one of the jurors. This conversation appears to have occurred in the presence, if not within hearing, of appellant's counsel, in a public place, and no reference was made to this case in such conversation. While such practice is not to be commended, we

think the ¹⁶ trial court did not abuse its discretion, and therefore did not err in denying the motion on this ground.

We find no error in the record, and the judgment is therefore affirmed.

Rudkin, C. J., Parker, Crow and Dunbar, JJ., concur.

Property Rights in Letters, which is a subject perhaps analogous to property rights in telegrams, is discussed in the note to Hoyt v. Mackenzie, 49 Am. Dec. 180. For subsequent cases, see Dock v. Dock, 180 Pa. 14, 57 Am. St. Rep. 617; Barrett v. Fish, 72 Vt. 18, 82 Am. St. Rep. 914.

STATE EX REL. MCKEE v. MCNEILL.

[58 Wash. 47, 107 Pac. 1028.]

EXEMPTIONS—Farmer—Abandonment of Occupation.—If a man has for years made farming his principal occupation, and intends to resume that calling in the near future, the mere fact that he is not presently so engaged, and his team, wagon and harness are not being used in farming, does not deprive him of his exemption as a farmer. (p. 1040.)

EXEMPTIONS—Liberal Interpretation of Statute.—Exemptions in favor of poor debtors are liberally construed. (p. 1040.)

EXEMPTIONS—Value of Property—Waiver.—Where a claim of exemption is made, and the creditor expressly waives the right to the appraisal provided by statute, the court is not called upon to consider the question of the value of the property. (p. 1040.)

H. Dustin, for the appellant.

Linn & Boyle, for the respondents.

⁴⁸ PARKER, J. On June 4, 1909, under a writ of attachment issued out of the superior court against the relators, the defendant as sheriff seized and took into his possession the following property belonging to them: One brown gelding; one bay gelding; two gray mares; two colts; two sets of double harness; one hack; one wagon; and one wheat ranch. On June 5, 1909, the relators made and delivered to the sheriff a list of personal property belonging to them, verified as being a complete list of all their property. The items of property contained in this list included the property so seized and then in possession of the sheriff, and also certain household goods, and none other. The household goods were clearly within the exemptions of subdivision 3, section 563 of Remington and Ballinger's Code. At the same time the relators executed and delivered to the sheriff their claim for exemption in writing, demanding that the sheriff set over to them from the property so seized and in his posses-

sion, the two mares, one set of harness, and the wagon, claiming the same as exempt to them as farmers; and also demanding that the sheriff set over to them the balance of the property so seized and in his possession, which property they selected in lieu of property not possessed by them which would be exempt under subdivision 4, section 563, claiming the same did not exceed two hundred and fifty dollars in value. The plaintiff in the attachment suit expressly waived his right to have the property appraised, refused to take any action in relation thereto, and directed the sheriff ⁴⁹ to continue to hold the same, which the sheriff did, and thereupon this action was instituted seeking to compel the sheriff to deliver the property to the relators. A trial before the court resulted in judgment in favor of the relators, from which the sheriff has appealed.

It is contended by learned counsel for appellant that the evidence does not warrant the conclusion that respondents were farmers at the time of the attachment, within the meaning of subdivision 5 of section 563, and that they are not entitled to the team, harness and wagon claimed by them as farmers. There was competent evidence tending to show the following: The respondent John McKee had been engaged in farming as a livelihood for twenty years past, and since 1903 had been living on a homestead in Benton county, until the fall of 1908. While living on his homestead, he had no stock or farming implements, and was unable to buy any. He worked some upon his own land and also worked for his neighbors. He caused some fifteen acres or more of his land to be brought under a state of cultivation, and rented his land, taking a share of the crop in payment, but continued to live upon it until the fall of 1908, when he moved with his family into the town of Prosser to enable his children to go to school. In the spring of 1909 he traded his homestead for the property here involved and three hundred and sixty-eight dollars in money. This money was mostly consumed in the payment of debts, and the balance was consumed in purchasing supplies for his family and stock. About this time he made arrangements for leasing a ranch in Franklin county, intending to go there and farm upon it. He was still living in Prosser when the property was seized by the sheriff. While there are circumstances shown tending to contradict some of these facts, we think the evidence was sufficient to warrant the trial court in believing them, as it must have done in rendering the judgment it did.

Counsel argues that since respondents were not the owners of or living upon a farm, or actually engaged in farming ⁵⁰ at the time of the attachment, they cannot successfully claim exemptions as farmers, claiming they were not then

farmers within the meaning of subdivision 5 of section 563, which reads: "To a farmer, one span of horses or mules, with harness, or two yoke of oxen, with yokes and chains, and one wagon; also farming utensils actually used about the farm, not exceeding in value five hundred dollars in coin."

Our attention is particularly directed to the words, "actually used about the farm." We do not think that the spirit of our exemption laws contemplate such a strict construction as counsel seeks to apply to this provision. If a man has for years made farming his principal occupation, and intends to do so in the near future, we think the mere fact that he may not be so engaged, and his team, wagon and harness are not being used in farming at the time of the levy thereon, he is not thereby deprived of his exemption right under this provision: *Pease v. Price*, 101 Iowa, 57, 69 N. W. 1120; *Cleveland v. Andrews*, 5 Idaho, 65, 95 Am. St. Rep. 165, 46 Pac. 1025; *Spence v. Smith*, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653; *Hickman v. Cruise*, 72 Iowa, 528, 2 Am. St. Rep. 256, 34 N. W. 316. Following the general rule, this court has liberally construed our exemptions in favor of the poor debtor: *Mikkleson v. Parker*, 3 Wash. Ter. 527, 19 Pac. 31; *Dennis v. Kass & Co.*, 11 Wash. 353, 48 Am. St. Rep. 880, 39 Pac. 656; *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 11 Wash. 466, 48 Am. St. Rep. 885, 39 Pac. 962, 27 L. R. A. 808; *Geiger v. Kobilka*, 26 Wash. 171, 90 Am. St. Rep. 733, 66 Pac. 423; 18 Cyc. 1380.

It is further contended that respondents are about to leave the state with intent to defraud their creditors, and are thus deprived of the right of exemptions under Remington and Ballinger's Code, section 571. This presents only a question of fact, which we think the evidence justified the learned trial court in resolving against appellant. Some contention is made upon the question of the value of the property claimed as exempt. Section 572 of Remington and Ballinger's Code provides for an appraisement⁵¹ upon the claim of exemption being made upon demand of the creditor. Such appraisement having been waived, as we have noticed, we think the trial court was not called upon to consider the question of value.

We conclude that the judgment should be affirmed. It is so ordered.

Rudkin, C. J., Crow, Dunbar and Mount, JJ., concur.

The Loss of Exemption Rights by an Abandonment of His Occupation by the debtor is considered in *Cable v. Hoolihan*, 98 Minn. 143, 116 Am. St. Rep. 348, and note.

The Exemption of Tools and Implements is the subject of a note to *Reeves v. Bascue*, 123 Am. St. Rep. 139.

POULTRY PRODUCERS' UNION v. WILLIAMS.

[58 Wash. 64, 107 Pac. 1040.]

FIDELITY INSURANCE—Warranties or Representations.—Whether the answers made by the applicant for a policy of indemnity are warranties or mere representations must depend upon the character of the question and its answer, the opportunity of the insurer to guard against the representation in the light of its consequences, or whether it is material to the risk. (p. 1042.)

FIDELITY INSURANCE—Warranties or Representations.—A warranty must be strictly true; a representation need only be substantially true. (p. 1042.)

FIDELITY INSURANCE—Condition of Books—Duty to Investigate.—Where an employer has notice that the books of his employé show that he has deposited in bank more money than has been taken in, the employer is charged with the duty of ascertaining the true state of the books, before making a statement in his application for indemnity insurance that on a certain date they were found correct. (p. 1044.)

FIDELITY INSURANCE—Truth of Statements—Knowledge of Employer.—It is the duty of an employer seeking indemnity insurance to use ordinary care to ascertain the truth of his statements before making them. And while he is not to be charged with a knowledge that could be discovered only by an expert, he is charged with such knowledge as a cursory examination would reveal. (p. 1044.)

FIDELITY INSURANCE—Representation That Books are Correct.—A statement by an employer in applying for indemnity insurance that the employé's books have been examined and found to balance is a warranty of a material fact. (p. 1046.)

REFERENCE—Long or Complicated Account.—Where a case involves the examination of a long or complicated account, the court has a discretion to send it to a referee to determine the facts. The right of trial by jury is not thereby denied. (p. 1046.)

R. W. McClelland, Graves & Murphy and Charles H. Winders, for the appellants.

J. H. Allen, for the respondent.

CHADWICK, J. This is an action to recover on a fidelity bond executed by one F. C. Williams, an employé of the respondent. On August 24, 1907, the Poultry Producers' Union was organized and incorporated, and opened up for business in Seattle, Washington. Williams was employed as an office man and bookkeeper, and had considerable to do with the outside business of the corporation, such as the sale of its corporate stock and the purchase and sale of the produce handled by the concern. On September 11, 1907, the then manager of the concern, R. M. Wardell, retired, and Williams was made secretary-treasurer and manager of the company. In this position a fidelity bond was required, and an application was made and signed by C. H. Severance, president of the company. Among other questions asked and answered were the following:

"13. When were his accounts last examined? A. September 11, '07.

"14. Were they at that time in every respect ⁶⁶ correct and funds on hand to balance? A. Yes.

"15. Is there now or has there been any shortage due you by bondsmen? A. No."

The application contained the following stipulation: "It is agreed that the above answers are to be taken as a condition precedent and as the basis of the said bond applied for or any renewal or continuation of the same that may be issued by the Title Guaranty and Surety Company of Scranton, Pennsylvania, to the undersigned upon the person above named."

A bond was thereupon issued, in which it was also recited: "If the employé's written statement hereinbefore referred to shall be found in any respect untrue this bond shall be void."

On September 23d, just one week later, Williams was shorn of his authority and discharged by the board of directors. This action is brought to recover the amount of his embezzlements.

We are met at the threshold of the case by the contention of appellants, (a) that the answers in the application were warranties and, being untrue, the policy is avoided; or (b) if they be held to be representations only, they were made by the president, he knowing them to be false, so that appellant company was defrauded, and hence cannot be held under the policy. Whether the answers made by the applicant for a policy of indemnity or insurance are warranties or mere representations must depend upon the character of the question and its answer, the opportunity of the insurer to guard against the representation in the light of its consequences, or whether it is material to the risk. A warranty must be strictly true: *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427, 43 C. C. A. 270. A representation need only be substantially true: *Missouri K. & T. Trust Co. v. German Nat. Bank*, 77 Fed. 117, 23 C. C. A. 65.

"The crucial distinction between a representation and a warranty is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent ⁶⁷ to a recovery upon the policy or bond to which they relate": *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427, 43 C. C. A. 270.

Measured by these rules, will a court presume that appellant company would have assumed the risk of insuring the employé had the true state of facts been made known to it? It was advised by the president of the respondent that the books had been examined on September 11th, and found to

be correct; that it was then found that there were cash and credits to balance the accounts. The evidence shows that the president had no personal knowledge of the books and accounts; that, in fact, no examination upon which a conclusive or even an approximate judgment could be based had been had. The only justification for the answers to the questions quoted above was an inspection and casting up of the cash-book and bank passbook. This examination was made by N. M. Wardell, a brother of the general manager, at that time. After qualifying himself as an expert bookkeeper, he testified as follows:

"Q. And I will ask you if during that time, and if so, as near the date as you recollect, at the request of your brother, Mr. R. M. Wardell, you examined Mr. Williams' books? A. I examined a portion of them. The cash-book, I believe, and the bank-book. . . .

"Q. State from the result of that examination what you reported to your brother, Mr. R. M. Wardell, as a result? A. I simply made a verbal report. I just went over them hurriedly. My report to him was that apparently all money received had been properly deposited, even showing a little more money deposited than had been received.

"Q. In order to ascertain that what did you do? A. I simply ran up the cash receipts and the bank deposits.

"Q. The cash disbursements? A. Yes, sir. . . .

"Q. Were these the only two books in your possession? A. That is all.

"Q. Did you ascertain how much cash there was in the safe? A. No.

"Q. Did you ascertain whether there were notes and securities in the possession of the defendant Williams? A. No, I did not.

"Q. All you did then was to foot up the cash-book and bank-book and they disclosed to you that there was more money deposited in the bank than appeared to have been taken in? A. That is my recollection of my report to ~~as~~ my brother, that all money had been accounted for in the bank and even a little more. . . .

"Q. Did you at that time report the incompetency of Mr. Williams? A. I think I talked the fact over with my brother that it was pretty poor bookkeeping when there was more money deposited than the books showed they received. I know it was talked over, the fact that it was a case of incompetent bookkeeping there somewhere."

The cash-books did not balance, and an inspection by one at all acquainted with bookkeeping would have revealed the fact that the ledger did not disclose an accurate account of the business. Of the ledger, the bookkeeper (employed at the time Williams became general manager) said: "When

I took charge of it it was in such shape I could hardly do anything with it." Williams admits that he is not an expert bookkeeper, and that it was impossible to take care of the books and do the outside work that was put upon him. The reports of two public accountants are found in the record, and they agree that the books are incomplete and inaccurate, one of them saying: "It is easy to see that there was wholesale robbery of cash or merchandise, or both."

It has been held that, in view of that section of our code (Rem. & Bal. Code, sec. 3686) declaring that the management of a corporation shall be vested in a board of trustees, knowledge on the part of a single officer of facts affecting the risk is not imputable to the corporation, in the absence of proof that it had been brought home to the board: *American Bonding Co. v. Spokane Building & Loan Society*, 130 Fed. 737, 65 C. C. A. 121. But such knowledge as R. M. Wardell had was communicated to the board.

"Q. You reported to the board then at this meeting that apparently more money had been deposited in the bank than was taken in? A. I reported that there were no checks as far as bookkeeping was concerned and urged that we have a competent bookkeeper. Williams said he didn't have time and I guess he didn't have if he had the ability to keep the books properly; but the cash-book showed that apparently Williams was perfectly straight."

⁶⁹ It is made plainly to appear that there was enough to excite inquiry and to charge respondent with the duty of ascertaining the true state of the books, before making a statement that on a certain date they were found to be correct and that cash and securities were on hand to balance them. It is the duty of an employer seeking indemnity insurance to use ordinary care to ascertain the truth of his statements before making them: *United States Fidelity & Guaranty Co. v. Blackly, Hurst & Co.*, 25 Ky. Law Rep. 1271, 77 S. W. 709; *Model Mill Co. v. Fidelity & Deposit Co.*, 1 Tenn. Ch. App. 365. And while he is not charged with a knowledge which could only be discovered by an expert (*Remington v. Fidelity Deposit Co.*, 27 Wash. 429, 67 Pac. 989), he is nevertheless charged with such knowledge as a cursory examination would have revealed: *Carstairs v. American Bonding & Trust Co.*, 112 Fed. 620, 116 Fed. 449, 54 C. C. A. 85. For, as was said in the *Remington* case (27 Wash. 429, 67 Pac. 989): "Respondent should not be required, against its will, to insure against dishonest employes who are known to be such." It has been held in the following cases that a statement as to the correctness of the employe's accounts is a material statement which, if false, avoids the policy, although made in good faith: *Sulli-*

van v. Fraternal Societies' etc. Union, 36 Misc. Rep. 578, 73 N. Y. Supp. 1094; Guaranty Co. of North America v. First Nat. Bank, 95 Va. 480, 28 S. E. 909.

In the latter case the answer alleged that the company was induced to execute the bond upon the representation in writing, made on behalf of the bank by its cashier, that the teller, for whom the bond was sought, was never in arrears or default, and that his books had been examined on December 31, 1903, and found to be correct. The following conclusion of law was drawn by the court:

"These alleged representations were of existing facts, were material and presumably within the peculiar knowledge of the bank and its officers, and constituted an inducement to the guaranty company, on which it had the right to rely, to execute the bond. It was immaterial whether the plaintiff ⁷⁰ knew that they were false, or honestly believed them to be true. If a party innocently misrepresent a material fact by mistake, the effect is the same on the party who is misled by it as if he who innocently makes the misrepresentation knew it to be positively false. The real question in such a case is not what the party making the representation knew or believed, but was the representation false, and the other party misled by it: Lynchburg Fire Ins. Co. v. West, 76 Va. 575, 44 Am. Rep. 177; Grim v. Byrd, 32 Gratt. 293; Max Meadows Land & Imp. Co. v. Brady, 92 Va. 71, 22 S. E. 845, and Wilson v. Carpenter's Admr., 91 Va. 183, 50 Am. St. Rep. 824, 21 S. E. 243."

No authority is cited by respondent or argument made to meet this proposition, other than to say: "We submit the object of examining his accounts was simply to ascertain if he had accounted for the money received, and that only two of his books could throw any light on that subject, that is, his cash-book, exhibit 'A,' which is in evidence, which shows or attempts to show all the cash received and all the cash paid out. For what the cash was received, and for what it was paid out, and the balance of the cash on hand. The bank-book shows that all of this cash on hand had been deposited in the bank to the credit of the Poultry Producers' Union"; predicating, as will be seen, a justification for the declaration that the books had been found correct upon the proposition that, if the books show cash "long," they were all right, whereas if they had revealed a shortage, the representation might be fatal to the right of recovery.

Bookkeeping is an exact science, and a showing that the books do not balance, whether the cash be long or short, should have been enough to awaken the energies of the officers of respondent to find the error, rather than to console themselves with the notion that, if there was an error, it

was in their favor and an indication of honesty. Honesty does not require of any man that he turn to the credit of his employer more than is Caesar's. If he makes his accounts to so appear, it behooves the employer to take notice, for if the employé is not taking that which belongs to the employer, he must be taking from the customer more than is the employer's ⁷¹ due. It is unsafe to employ one who will do either. We hold that the representation that the books were examined and found to balance was a warranty of a material fact; that it was known, or should have been known, by the respondent that the representation was false, and that without it appellant would not have assumed the risk.

Judgment was entered against both defendants, and both of them appealed. The surety company being disposed of, the assignments of error which we shall now discuss pertain only to defendant Williams. It is urged that the court was without jurisdiction to refer the case; that by so doing defendant was deprived of his right of trial by jury. It is unnecessary to discuss this assignment. We have only recently held that, where a case involves the examination of a long or complicated account, the case may be sent to a referee to return the facts. Under the statute it is a matter of discretion with the trial judge: *Lindley v. McGlaulin*, 57 Wash. 581, 107 Pac. 355.

The other assignments go to the question whether the testimony sustains the judgment. It may be that the sum charged to Williams is not the exact amount of his shortage, but it is probably as near to it as can be ascertained by any agency, human or divine. The condition of the business was the result of Williams' negligent bookkeeping or positive defalcation, and the injured party should not be held to prove its case beyond the peradventure of a doubt. The amount is approximately correct, and we are disposed to follow the conclusions of the referee and the trial judge upon the question of fact.

The judgment will be reversed in so far as the Title Guaranty and Surety Company is concerned, with instructions to dismiss the case. As to Williams, the judgment is affirmed.

Rudkin, C. J., Gose, Morris and Fullerton, JJ., concur.

Fidelity Insurance is the subject of a note to *First Nat. Bank v. Fidelity etc. Co.*, 100 Am. St. Rep. 774.

McCORMICK v. SORENSON.

[58 Wash. 107, 107 Pac. 1055.]

ADVERSE POSSESSION—Mistake in Boundaries.—Where the purchaser of land takes possession of the wrong lots by mistake, and he and his grantees, still laboring under that mistake, hold possession and make improvements under claim of right for the period of limitation, title by adverse possession is thereby acquired. (pp. 1048, 1050.)

APPEAL—Costs on Failure to File Brief.—Where the respondents fail to file any brief after being granted permission, costs will not be allowed to them on affirmance of the judgment. (p. 1050.)

Troy & Sturdevant, for the appellants.

Vance & Mitchell, for the respondents.

108 CROW, J. Action in ejectment by Susannah McCormick and husband against Charles Sorenson and wife to recover possession of lots in the city of Olympia. From a judgment in favor of the defendants, the plaintiffs have appealed.

The main contention on which the appellants rely for a reversal is that the trial court erred in overruling their motions for a directed verdict and for judgment non obstante veredicto. At the argument in this court, permission was granted the respondents to prepare and file their printed answer brief. It has not been filed, and we have been deprived of the benefit of any suggestions of their counsel other than those made on the oral argument.

The evidence shows that the appellants hold the record title to lots 3 and 4, in block 1, of Fourth Street Boulevard addition to the city of Olympia, deraigned by mesne conveyances from one T. C. Van Epps, and that they and their grantors have paid all taxes thereon; that the respondents, Sorenson and wife, hold the record title to lots 1 and 2 in the same block, deraigned from one Geo. A. Mottman, and that they and their grantors have paid all taxes thereon; that the lots are numbered in consecutive order from north to south, lot 2 being immediately north of and adjoining lot 3; that in 1893 Mottman sold lots 1 and 2 to one Harry F. Taylor, who, by measurements made with a ten-foot pole, attempted to locate the boundary lines; that the south line of a certain road or highway was the true north boundary of lot 1; that as then used and traveled by the public the road extended across portions of lots 1 and 2, a fact unknown to Taylor; that by measuring from the south line of the road ¹⁰⁹ as then used he made a mistake and failed to locate the true boundary lines of lots 1 and 2; that he immediately built a fence on the lines as then incorrectly located; that he and his wife entered into actual possession of the property

fenced, which included parts of lots 1 and 2, all of lot 3, and lot 4 except the south seven feet thereof; that they believed they were in possession of lots 1 and 2 only; that they built a dwelling-house which extended over a portion of lot 3; that they and their grantees have since been in open, notorious, exclusive and continuous possession of the property fenced; and the respondents now claim title by adverse possession to the portion of lots 3 and 4 included within the fence; that neither the appellants nor any of their grantors have been in possession at any time since 1893, and that this action was commenced by appellants in August, 1907.

It is apparent from the evidence that in 1893 Taylor's original intention was to enter upon and take possession of lots 1 and 2 only; that by mistake he then took possession of and improved lot 3 and part of lot 4, and that he and his grantees, including the respondents, have ever since been in possession thereof under claim of right, although they have continuously entertained the mistaken belief that the property so claimed by them was described as lots 1 and 2, and that they have repeatedly attempted to convey it by that description, making no reference to lots 3 and 4 in their various instruments of conveyance. The question now presented is whether, under such circumstances, they held possession under such a claim of right as would ripen into title by adverse possession, or whether by reason of their mistaken idea as to the true description of the property in their possession and their belief that they were in possession of lots 1 and 2 only they have failed to acquire title by adverse possession.

Two special interrogatories were propounded to the jury, and answered by them as follows: "(1) If the defendants and their grantors have claimed to own the land within the fences for ten years or more, did ¹¹⁰ they do so because they believed they were occupying lots one and two? Answer. Yes. (2) Did the defendants or their grantors ever intend to occupy any other premises than lots one and two? Answer. No."

In their brief the appellants contend that as Taylor and wife, the grantors of respondents, purchased from Mottman with the intention of securing lots 1 and 2, and by mistake encroached upon lots 3 and 4, they cannot predicate their claim of title by adverse possession on such mistake; that it is immaterial whether the mistake was an honest one; that it was in any event simply a mistake as to the location of the property purchased; that it never was the intention of respondents, or any of their grantors, to occupy any property other than lots 1 and 2; that they at no time asserted title to any portion of lots 3 and 4, and that they cannot in this action successfully claim title thereto by adverse possession,

never having made any claim of right to any portion of lots 3 or 4. In support of these contentions they rely on *Preble v. Maine Cent. R. Co.*, 85 Me. 260, 35 Am. St. Rep. 366, 27 Atl. 149, 21 L. R. A. 829, and other cases of those cited in the L. R. A. footnote thereto. The principal case cited, and some of those mentioned in the note, in substance, hold that a mistake will not give title by adverse possession; that in order to obtain such title up to a fence, located beyond the true line, there must have been an intention to go beyond the true line, and that mistake or ignorance of true lines, without meaning to claim beyond them, will not, when discovered, work disseizin of either party. The authorities cited to some extent sustain appellants' position, but this court in *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936, refused to follow the case of *Preble v. Maine Cent. R. Co.*, 85 Me. 260, 35 Am. St. Rep. 366, 27 Atl. 149, 21 L. R. A. 829, and quoted with approval the following excerpt from *Caufield v. Clark*, 17 Or. 473, 11 Am. St. Rep. 845, 21 Pac. 443: "If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseizure, but if, ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the lands up ¹¹¹ to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse."

In this action respondents did make claim to all land within the fence. After citing other authorities announcing the same doctrine, this court, in *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936, said: "As heretofore observed by this court, the question of adverse possession is one of fact; and, though the fence may have been established originally by mistake, if it were followed by a claim to the land and such acts as clearly evinced a determination of permanent proprietorship, the claim is established. The intention of the party claiming adverse possession, and also the notice of such claim to the real owner, must be inferred from the acts and declarations of the parties."

While it is true that Taylor originally made a mistake in fixing the lines, and by reason thereof unintentionally entered into the possession of lot 3 and part of lot 4, it is nevertheless apparent from the evidence that his possession thus obtained was immediately followed by a claim of right to the land; that he and his grantees erected a dwelling-house and other buildings; that they planted fruit trees and otherwise improved the place; that each of the subsequent purchasers, before buying, went upon the property, saw the inclosure and improvements, intended to acquire the identical land so inclosed and improved, and that their mistake was not as to

the particular land claimed or purchased, but as to its true description. These acts, which continued without interruption for a period of more than ten years, and until the commencement of this action, certainly evinced an assertion of permanent proprietorship on the part of respondents and all of their grantors, back to and including Taylor, and constituted notice to the real owners. The Ledgerwood case has been repeatedly followed and approved by this court: *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295; *Erickson v. Murlin*, 39 Wash. 43, 80 Pac. 853; *Thornley v. Andrews*, 45 Wash. 413, 88 Pac. 757; *Weingarten v. Schurtleff*, 51 Wash. 602, 112 99 Pac. 739; *Schlossmacher v. Beacon Place Co.*, 52 Wash. 588, 100 Pac. 1013.

Although the possession of the respondents' grantor, Taylor, originated in his mistake when attempting to fix the true lines and take possession of lots 1 and 2 only, then purchased by him, the evidence is amply sufficient to show adverse possession in him and in his grantees, under claim of right, which possession has been open, notorious, exclusive and continuous for a period of more than ten years prior to the commencement of this action. The conclusion reached by the jury, as expressed in their general verdict, is not inconsistent with their answers to the special interrogatories, for while it is true that the respondents and their grantors did not intend to occupy any other property than lots 1 and 2, such intention grew out of their mistaken belief that the land they were occupying was lots 1 and 2. The evidence shows that they did intend to occupy and claim title to the identical land fenced, and in their possession. Their mistake was not as to the land to which they asserted their claim of right, but as to its true description. Adverse possession under claim of right to the property fenced was therefore shown, and the motions for a directed verdict and for a judgment non obstante veredicto were properly denied.

The above discussion disposes of appellants' other assignments of error, which are based upon instructions given and requested instructions refused. After a careful examination of the entire body of the instructions given by the trial judge, we conclude that they fully, clearly and correctly stated the law applicable to the issues and evidence, and that they covered all requested instructions which the appellants were entitled to have given. We find no prejudicial error in the record. The judgment is affirmed. By reason of the failure of the respondents to file any brief after being granted permission to do so, no costs will be awarded to them on this appeal.

Rudkin, C. J., Fullerton, Dunbar, Parker and Mount, JJ., concur.

Adverse Possession Based upon Mistake is discussed in the notes to *Finch v. Ullman*, 24 Am. St. Rep. 388; *Washington Rock Co. v. Young*, 110 Am. St. Rep. 688. This question is also considered in *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149; *Hess v. Rudder*, 117 Ala. 525, 67 Am. St. Rep. 182; *Fox v. Windes*, 127 Mo. 502, 48 Am. St. Rep. 648; *Wilson v. Hunter*, 59 Ark. 626, 43 Am. St. Rep. 63; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139. A line between adjoining owners may be established by recognition and acquiescence, as where they erect a permanent fence to mark the division line and for over ten years regard it as the true line, although neither of them intends to claim more than his deed gives him. The doctrine of adverse possession, strictly speaking, does not apply to such a case: *Bradley v. Burkhart*, 139 Iowa, 323, 130 Am. St. Rep. 328.

BERNARD v. BENSON.

[58 Wash. 191, 108 Pac. 439.]

RECORDS.—Contracts for the Sale of Real Estate, though not expressly mentioned in the recording statutes, are included within the meaning of the words "deeds, grants and transfers of real property," and their proper registration imparts constructive notice. (p. 1053.)

STATUTES.—In Construing a Statute All Acts in *Pari Materia* will be read together. (p. 1053.)

STATUTES—Contemporaneous Construction.—Where the meaning of a statute is ambiguous, obscure, or indefinite in any respect, contemporaneous construction may be resorted to in arriving at the intention of the lawmakers. (p. 1053.)

RECORDS—Contract to Sell Land—Judicial Notice.—Courts may properly take judicial notice of the fact that it has been the custom in Washington to record executory contracts for the sale of real estate. (p. 1053.)

RECORDS—Contract to Sell Land—Place to Record.—The recording of an executory contract for the sale of real estate in "Miscellaneous Records" does not impart notice. (p. 1054.)

RECORDS—Contract to Sell Land—Place to Record.—The custom to record all instruments affecting the title to real estate in "Deed Records" has been so general in Washington, and has existed for so long a time, that it is the duty of courts not only to judicially notice it, but to apply it as well. (p. 1054.)

VENDOR AND VENDEE—Facts Putting on Inquiry.—What makes inquiry a duty to a prospective purchaser of land is such a visible state of things as is inconsistent with a perfect right in him who purposes to sell. (p. 1055.)

VENDOR AND VENDEE.—A Bona Fide Purchaser's Grantee takes the property free of the rights of persons under an executory contract of sale, regardless of notice to him. (p. 1055.)

SPECIFIC PERFORMANCE—Innocent Third Persons.—Specific performance will be denied when rights of innocent third persons have intervened so that the enforcement of the contract would be harsh, oppressive, or unjust to them. (p. 1056.)

J. C. Cross, A. Emerson Cross and W. I. Agnew, for the appellants.

W. H. Abel, for the respondents.

1923 GOSE, J. The plaintiffs in this suit seek specific performance of an executory contract, and have appealed from the decree. The record discloses the following material facts: On the twenty-eighth day of August, 1903, the Northwestern Lumber Company, the owner of the real estate in controversy, entered into a contract with the appellant Joseph Bernard, whereby it agreed to convey the property to him. The contract was filed for record in Chehalis county, where the land was situated, on September 2, 1903, and recorded in Miscellaneous Records. On May 31, 1905, the appellant Joseph Bernard filed for record a homestead declaration which was recorded in Miscellaneous Records. On March 9, 1907, he contracted to convey a part of the land to one Sorenson. The contract was filed for record March 25, 1908, and recorded in Miscellaneous Records. On November 6, 1907, the appellant Joseph Bernard entered into a contract with the respondent Andrew Benson, whereby it was agreed that the latter should pay the balance due upon the contract with the lumber company, ¹⁹²³ take a deed in his name, and convey to Salme, Eberwine and Sorenson, respectively, upon payment by them of the purchase price, specific tracts which appellant Joseph Bernard had contracted to them, retain for himself a tract which Bernard had contracted to him, and, upon payment of the balance of the purchase price, convey the remainder to the appellant Emma Bernard. The Salme and Eberwine contracts were not recorded. On November 8, 1907, the lumber company conveyed the land to the respondent Andrew Benson, and the deed was filed for record on November 13th following, and duly recorded. Benson conveyed to Salme and Eberwine, but did not convey to either Sorenson or Emma Bernard. On the twenty-fifth day of January, 1908, the respondents Benson and wife conveyed the land in controversy to the respondent Charles Knokey, by a deed of general warranty which was filed for record February 5, 1908, and duly recorded. The consideration for the conveyance of this tract of land was \$1,600, of which \$186 was paid in cash, Knokey agreeing to pay a mortgage on the land amounting to \$1,040, and assuming the payment of a note of \$350 which Benson was owing to another party.

Before conveying to Knokey, the respondents Andrew Benson and his wife had mortgaged the land in controversy for the purpose of paying the purchase price to the lumber company. About March 1, 1908, the respondents Knokey and wife sold to the respondent Fred Lubbe a parcel of the land containing about six acres and a half, for \$400, \$300 of which was then paid, and the balance of \$100 was paid on May 6th, when the deed was delivered. The respondents Knokey and wife took possession of the land immediately

after the purchase, and the respondents Lubbe and wife took possession of the tract which they had purchased about March 8, 1908, and before receiving the deed. The Knokeys and the Lubbes each began clearing the land, and the latter at once ordered lumber for a house which they later built on their ¹⁹⁴land. The entire tract was logged-off timber land, unimproved and uninclosed, when Knokey and Lubbe purchased. Other essential facts will be stated later in connection with the related subjects.

The appellants contend that the recording of their executory contract, declaration of homestead, and the Sorenson contract imparted constructive notice, and that the respondents Knokey and Lubbe are not innocent purchasers. The respondents assert that the recording did not import notice, (1) because there is no statute in this state authorizing the recording of an executory contract for the sale of real estate, and (2) because the several instruments, including the declaration of homestead, were recorded in Miscellaneous Records. We will consider these points in the order suggested.

We think the first proposition is untenable. The code (Rem. & Bal. Code, sec. 8785) requires the county auditor to procure "such books for records as the business of the office requires." Section 8786 makes it his duty to record separately, in "large and well-bound books," "deeds, grants and transfers of real property," and all other papers or writings required by law to be recorded. Section 8781 provides that "all deeds, mortgages and assignments of mortgages, shall be recorded" in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record. Section 8784 provides that "every instrument in writing purporting to convey or encumber real property," which has been recorded in the proper office, shall import notice to third parties. It is true, contracts for the sale of real estate are not expressly mentioned in the recording statutes, but we think they are included within the meaning of the words, "deeds, grants and transfers of real property." They are within the spirit of the statute, liberally interpreted: 2 Am. & Eng. Ency. of Law, 2d ed., sec. 78. In construing a statute, all acts in *pari materia* will be read together, and where the meaning of a statute is not clear or it is ambiguous, obscure ¹⁹⁵ or indefinite in any respect, contemporaneous construction may also be resorted to in arriving at the intention of the lawmakers. We think we may properly take judicial notice of the fact that it has been the custom in this state to record such instruments. The construction contended for by the respondents would be productive of great mischief. Our construction is not in conflict with the points decided in *Howard v. Shaw*, 10

Wash. 151, 38 Pac. 746, *Fischer v. Woodruff*, 25 Wash. 67, 87 Am. St. Rep. 742, 64 Pac. 923, and *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157.

We think the respondents' second point, that the recording of an executory contract for the sale of real estate in Miscellaneous Records does not impart notice, must be sustained. As we have seen, the code (Rem. & Bal. Code, sec. 8785) requires the county auditor to procure such "books for record as the business of the office requires." The custom has been uniform throughout the state to record all instruments affecting the title to real estate in Deed Records, those creating an encumbrance against real estate in Mortgage Records, and those evidencing title to personal property in Miscellaneous Records. This custom has been so general and has existed for so long a period of time that it is our duty, not only to judicially notice it, but to apply it as well. In *Ritchie v. Griffiths*, 1 Wash. 429, 22 Am. St. Rep. 155, 25 Pac. 341, 12 L. R. A. 384, it was held that a deed must be properly indexed by the auditor and recorded in the proper record before operating as a constructive notice, and that constructive notice does not arise from an attempt to comply with the registry laws. In *Ames v. Miller*, 65 Neb. 204, 91 N. W. 250, the court said that the registry law should mean something, and that one claiming an interest in real estate should comply with the letter and spirit of its provisions, and thus prevent injury and damage to those who deal with reference to the record title.

The appellants contend that the respondents Knokey and Lubbe had actual notice of their relation to the property ¹⁹⁰⁸ through the possession of Sorenson and Mrs. Swedblum. In July or August, 1907, it is claimed that Sorenson slashed about two acres of land on the part of the tract which Bernard had contracted to him, and that his cattle were pastured on the entire tract. It is admitted that the slashing was done, but it is not certain that it is on the property in controversy. Moreover, the trial court was justified in finding that Sorenson had abandoned his contract. The record shows that Sorenson's cattle and the cattle of others ranged upon the property, but the testimony as to the land being inclosed is involved in too great doubt to make the pasturing of the cattle the basis for holding that it was sufficient to give notice or put a purchaser upon inquiry. Mrs. Swedblum lived in a small house, but whether upon the land purchased by Lubbe or in the county road we cannot determine from the evidence. However, it is not important, as she is not making any claim, and did not make any claim to the property, or assert any right to the possession, in her conversations with Knokey and Lubbe. Nor did she inform them that Bernard made any claim to the property.

"No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith": *United States v. Detroit T. & L. Co.*, 200 U. S. 321, 26 Sup. Ct. Rep. 282, 50 L. ed. 499.

What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. Benson was the owner of the record title, and there was no such possession as would impart notice or make it the duty of the purchaser to inquire.

It is next urged that, because Knokey received notice after paying \$186 and before paying the balance of the purchase price, equity will only protect him to the extent of the sum paid before receiving notice of Bernard's rights; and that ¹⁹⁷ Lubbe having received notice before the property was actually conveyed to him, equity will not protect him even to the extent of the \$300 paid before he received notice. Knokey received actual notice of Bernard's claim about March 15, 1908, about two months after the property was conveyed to him, and Lubbe received notice about the same time. It is fundamental that, if Knokey was a bona fide purchaser, Lubbe, his grantee, took the property freed from any rights of appellants, regardless of notice to him; and that, if he took without notice, it is not material whether Knokey, his grantor, was a bona fide purchaser. Knokey being a bona fide purchaser, it is material to consider the extent to which he will be protected.

It cannot be questioned that there is authority to support the appellants' contention that he can only be protected to the amount of his payment before receiving notice. As applied to this case, however, such a conclusion would be highly inequitable. The appellants, by their own acts, made Benson the owner of the record title. It is true that, in conveying to Knokey, Benson violated his trust, but the fault is with the appellants and not with the purchaser. We have seen that Knokey paid a part of the purchase price and assumed the debt of his grantor for the remainder, which he later paid to the extent of \$1,040. His liability still exists for the payment of the \$350 note. He also went into the possession of the property and in good faith made improvements. The appellants have tendered to Benson the purchase price of the property, but have tendered nothing to Knokey. Moreover, they allege in their complaint that Knokey colluded and connived with Benson to defraud them. When he assumed payment of the note and mortgage, he became liable to the payee. Whether in a suit to enforce payment against him he

could have pleaded a failure of consideration, it is not necessary to decide. If the appellants intended to seek specific performance against him, it was their duty to take such steps as would protect him. While the mortgage was given by Benson, ¹⁹⁸ the money derived from the loan was used in paying the purchase price of the land. The real benefit of the mortgage loan accrued to the appellants. The court directed a conveyance of the remaining land to the appellants. Benson derived no benefit from the mortgage. He used the proceeds to pay for the property. We think the true rule, and the one which best harmonizes with the broad principles of equity, is that specific performance will be denied when rights of innocent third parties have intervened so that the enforcement of the contract would be harsh, oppressive or unjust to them: 6 Pomeroy's Equity Jurisprudence, sec. 794; Curran v. Holyoke Water Power Co., 116 Mass. 90; Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; Carlisle v. Carlisle, 77 Ala. 339; Hale v. Bryant, 109 Ill. 34. The appellants cannot justly complain of this rule. By their own negligence they placed it in the power of Benson to sell the land, and now to permit them to set aside the sale would defraud innocent parties. As against them the record should be held to import absolute verity.

The decree directs a conveyance to the appellants of that part of the land now held by the Bensons, except the tract contracted to them by Bernard in 1903, and finds that Benson has received from sales of the land \$7.85 in excess of the purchase price paid by him; and a judgment is entered in favor of the appellants and against the Bensons for that sum. The point is made that the court erroneously allowed Benson a credit of \$226.85. As we have seen, in 1903, the appellants contracted to Benson a part of the land embraced in their contract with the lumber company, and their trust agreement with Benson directs him to retain that tract. After receiving a deed for the land from the lumber company, it was discovered that a part of the land which the appellants had contracted to Benson was owned by a third party from whom Benson later purchased it. These facts are affirmatively pleaded in Benson's answer, and we think the evidence justified the trial court in allowing him this credit.

¹⁹⁹ The decree is affirmed, without prejudice to the appellants' right to maintain an action at law against Benson for damages for breach of the contract.

Rudkin, C. J., Fullerton and Chadwick, JJ., concur.

The Effect of the Defective Recording of legal instruments upon the rights of third persons is the subject of a note to Koch v. West, 96 Am. St. Rep. 397.

WOLFE v. SCHOOL DISTRICT NO. 2.

[58 Wash. 212, 108 Pac. 442.]

SCHOOLS—Limit of Indebtedness—Teachers.—A contract by a school district to employ a teacher is unenforceable, if it creates an indebtedness against the district in excess of the amount permitted by statute. (p. 1058.)

SCHOOLS—Limit of Indebtedness.—The Maintenance of a public school throughout the school year is not such a necessity as to warrant the directors in overriding statutory and constitutional limitations on the amount of indebtedness a school district may lawfully incur. (p. 1058.)

Troy & Sturdevant, for the appellant.

Will H. Fouts, for the respondent.

²¹² FULLERTON, J. On July 12, 1894, at a regular meeting of the board of directors of School District No. 2, Columbia county, the appellant was elected to the position of principal of the high school of that district to serve for a term of eight months, beginning October 1, 1894, at a salary of fifty dollars per month. After being informed of her election by the clerk of the school district, she sent a formal letter to that officer accepting the position. No written contract was entered into such as the school law seems to have contemplated, but the appellant took up her duties at the commencement of the school year and performed them for a period of three ²¹³ months, when she was discharged by the school directors. It is agreed that the appellant was duly qualified to teach under the laws of the state, and that her discharge was not because of any fault of her own, but on account of the district's financial condition, the directors having found it necessary, in order to continue the school, to retrench in their expenditures. After her discharge, the appellant in good faith sought employment elsewhere, and, failing to find it, brought this action against the district to recover as damages for a breach of the contract a sum equal to the salary for the unexpired term.

To a complaint setting out the foregoing facts, the respondent answered by way of denials and affirmative defenses, the second of the affirmative defenses being the following:

“(2) For a further and separate defense the defendant alleges: First. That at the time said alleged contract was entered into by plaintiff and defendant the board of directors of defendant had incurred indebtedness against said School District No. 2, the defendant herein, which said indebtedness had been contracted during the year in which said alleged contract was made, and was payable out of the general fund of said district, the defendant herein, and was in a

sum exceeding in the aggregate the amount apportioned to said district at the last quarterly apportionment next following the date on which taxes became delinquent prior thereto, and said indebtedness had not been authorized by a vote of the electors of said district, and there was no money in the treasury of said school district at said time."

At the trial the principal facts were stipulated; it being stipulated, among other things, that the facts stated in the foregoing separate defense were true. The court entered judgment for the respondent, and this appeal is taken therefrom.

The statute in force at the time the appellant was hired as a teacher, relating to the powers of school directors to enter into a contract when the effect of the contract was to create an indebtedness, reads as follows:

214 "It shall be unlawful for any board of directors to contract indebtedness against their district in any one year, payable out of the general fund of said district, in any sum or sums exceeding in the aggregate the amount apportioned to said district at the last quarterly apportionment next following the date on which taxes become delinquent, unless said indebtedness be first authorized by a vote of the electors of said district": Laws 1893, c. 109, p. 266, sec. 3.

This statute clearly forbids the board of directors of any school district to contract an indebtedness against their district in excess of a sum equal to the last quarterly apportionment next following the date on which taxes become delinquent, and, just as clearly, renders void any contract creating an indebtedness after that limitation is reached. The stipulation entered into between the parties covering the second separate defense above quoted brings the appellant's contract within the rule. It is void because made at a time when the school district was incapable of entering into a valid contract of its nature.

The appellant relies upon the case of *Rauch v. Chapman*, 16 Wash. 568, 58 Am. St. Rep. 52, 48 Pac. 253, 36 L. R. A. 407, in support of the validity of the contract. In that case we held that liabilities incurred by counties necessary to the maintenance of county government were not within the purview of the constitutional provision forbidding the incurrence of an indebtedness beyond a fixed limit. But this principle is not applicable to the case at bar. The maintenance of a public school throughout a school year of eight months is not such a necessity as to warrant school directors in overriding statutory and constitutional limitations as to the amount of indebtedness a school district may lawfully incur.

The court rested its decision in part on other grounds, but we shall not notice them, as we think the judgment may well

rest on the ground that the contract was void as in violation of the statute cited.

The judgment is affirmed.

Rudkin, C. J., Chadwick and Gose, JJ., concur.

Municipal Indebtedness Beyond the Constitutional or Statutory Limits is discussed in the note to *Beard v. City of Hopkinsville*, 44 Am. St. Rep. 229. If a contract for the purchase of material for a school-house increases the indebtedness of the school district beyond the constitutional limit it is void; and the fact that the district has had the benefit of such material does not render it liable on an implied contract to pay quantum meruit therefor: *McGillivray v. Joint School District*, 112 Wis. 354, 88 Am. St. Rep. 969.

When a Contract Entered into by a School Township for the payment of school money is void or prohibited by express declaration of statute, the retention by such municipality of the fruits of the contract will not subject it to liability, either under such contract or upon the quantum meruit: *Goose River Bank v. Willow Lake School Township*, 1 N. D. 26, 26 Am. St. Rep. 605.

CHURCH v. WILKESON-TRIPP COMPANY.

[58 Wash. 262, 108 Pac. 596, 109 Pac. 113.]

BROKERS—Breach of Contract by Principal—Damages.—Where the promoters of a mining corporation employ a broker to sell its bonds, and he, obtaining a purchaser, demands that they perfect their title to the property intended to secure the bonds and deliver them, which they fail to do, he may rescind the contract and sue for damages. (p. 1063.)

PARTNERSHIP—Certificate Showing Names of Partners.—Where two persons enter into a contract as individuals, and before suing thereon file a certificate under Remington and Ballinger's Code, section 8369 et seq., showing that they are the only partners doing business under an assumed name, it cannot be contended that they are not entitled to maintain the action because they have not complied with such statute. (p. 1064.)

BROKERS—Sale of Bonds—Waiver of Notice.—Where brokers undertake to sell bonds on commission within a stated time after receiving notice of their deposit, the notice is for the benefit of both parties and may be waived by the principal. (p. 1064.)

BROKERS—Breach of Contract by Principal—Expenses.—Where brokers contract to sell bonds on a commission which shall include all expenses incurred by them, they are not, in a suit to recover all the commissions they would have earned had the principal not breached the contract, entitled to reimbursements for expenses. (p. 1064.)

BROKERS—Breach of Contract by Principal—Evidence.—Where the promoters of a mining corporation employ a broker to sell on commission its bonds secured by coal lands which it intends to acquire, but which it does not acquire, escrow deeds showing the consideration to be paid for the lands are not admissible in evidence in an action by the broker against the principals for their breach of the contract, the deeds not having been delivered and there being no issue as to the title. (p. 1065.)

BROKERS—Breach of Contract—Loss of Profits.—A broker employed to sell bonds on commission is entitled to recover profits actually lost as his damages for a breach of the contract by the principal. But as a condition precedent to a recovery of contemplated profits, it should appear that the loss was reasonably certain, not a fictitious or imaginary one. That fact being established, the damages are to be ascertained by the jury, although not always susceptible of precise measurement. (p. 1066.)

DAMAGES—Loss of Profits from Breach of Contract.—The usual rule of excluding profits in estimating damages does not apply where the earning of the profits is directly contemplated in the contract which has been breached. (p. 1066.)

BROKERS—Damages for Loss of Profits—Opinion Evidence.—In an action by a broker to recover commissions which he would have earned in selling bonds had his principals not broken their contract with him, the opinion of a witness that the broker could have sold all of the bonds contemplated by the agreement is not admissible. It is for the jury to arrive at a conclusion as to the probable results of the broker's efforts. (p. 1067.)

BROKERS—Loss of Profits—Evidence.—In an action by a broker, who was employed to sell bonds on commission, to recover damages for breach of the contract by his principals, much liberality in the admission of evidence tending to show profits lost should be permitted. (p. 1067.)

COSTS—Appeal Bond.—Under the Statute Providing that any receiver, assignee, executor, or other fiduciary may include as part of his lawful expenses a reasonable sum paid for his bond, and that a party entitled to recover costs may include the expense of his bond in the action or proceeding pending, costs are allowable for the premium paid on an appeal bond given by the fiduciary. (p. 1069.)

Hughes, McMicken, Dovell & Ramsey, for the appellants.

Reynolds, Ballinger & Hutson, for the respondents.

264 CROW, J. This action was commenced by L. K. Church and Sidney Drake, copartners as S. Drake & Company, against Wilkeson-Tripp Company, a corporation, James C. Drake, A. G. Bennett, Victor E. Tull, Frank Hanford, James M. Ashton, J. D. Lowman, and C. H. Hanford, to recover damages arising out of the defendants' alleged breach of the following written contract:

"Memorandum of Agreement, Made in duplicate this twenty-fourth (24th) day of January, 1908, by and between James C. Drake and A. G. Bennett—(Trustees for and representing the promoters and organizers of the Wilkeson-Tripp Company, hereinafter named)—parties of the first part and L. K. Church and Sidney Drake of Spokane and Seattle, Washington, hereinafter called the parties of the second part,

"Witnesseth: That whereas, the parties of the first part together with their associates, J. D. Lowman, Victor E. Tull, Frank Hanford, C. H. Hanford and James M. Ashton, are the organizers of a certain company now in the process of incorporation, known as the Wilkeson-Tripp Company, and

as such they are the owners of those certain coal properties with the rights and privileges in connection therewith, located in Pierce county, in the state of Washington, more particularly described as follows: The east half (E. $\frac{1}{2}$) of section fourteen (14) in township eighteen (18), North, range six (6) east. And whereas, when said company is organized, it is the purpose and intent of the parties of the first part and their associates, to bond its properties for the sum of three hundred thousand dollars (\$300,000). And whereas, the parties of the second part have undertaken to place and sell the bonds of said company for the compensation and upon the terms hereinafter mentioned.

“Now therefore, these presents witnesseth: That for and in consideration of the premises and the mutual benefits and ²⁶⁵ compensations hereinafter referred to, the parties hereto hereby stipulate and agree in manner following:

“First: Said bonds are to be of the following denominations the entire issue to have an aggregate face value of three hundred thousand dollars (\$300,000) as above stated.

“Second: The parties of the second part undertake to sell fifty thousand dollars (\$50,000) worth of said bonds within sixty (60) days from the time the bonds are deposited with the trustees, under the mortgage securing the same and written notice of the time such deposit is to be given to the parties of the second part or to one of them. The remainder of said bonds are to be sold by the parties of the second part within ninety (90) days after the expiration of said sixty (60) days.

“Third: All of the bonds are to be sold at par and the parties of the second part are to receive ten per cent commission for their services in selling same, such commission to cover and include all expenses and outlay of every kind incurred by the parties of the second part. In this connection, however, it is distinctly understood that the parties of the second part are to have the exclusive right and privilege to sell the entire issue of said company's bonds during the times above mentioned, but, should any sale be effected by other parties acting for or under direction of any of the above organizers, such party shall be allowed by the parties of the second part, five per cent commission upon such sale.

“Fourth: It is understood that the parties of the first part and their associates, shall proceed forthwith and perfect the organization of such company and take all proper steps in the way of drawing and recording the necessary mortgage, and the lithographing of bonds and stock, and all other matters for the purpose of effecting the thorough organization and legally securing the bonds.

"Fifth: It is understood that the parties of the second part shall offer and deliver to every bond purchaser, a stock bonus of the equivalent to fifty per cent of the par value of any bond or bonds, purchased by him, and that the parties of the first part and their associates are to protect the parties of the second part in so doing and see that such fifty per cent bonus in the stock of the company is forthcoming and at the disposal of the parties of the second part for the purpose of making such delivery.

²⁶⁶ "Sixth: The capital stock of said company is to be not less than six hundred thousand dollars (\$600,000), it being the intent that after the payment of one hundred and fifty thousand dollars (\$150,000) in stock bonus above shown, there shall be four hundred and fifty thousand (\$450,000) dollars of the company's stock available, and that the balance of the \$450,000 worth of stock at par, the parties of the second part shall be entitled to receive as further compensation for their services in effecting the sale of bonds, a payment in stock equivalent to five per cent of said \$450,000 provided the parties of the second part sell all of the aforesaid bond issue; in the event of their selling less than said issue, then the percentage of stock payable to them from said \$450,000 worth, shall diminish in the ratio and proportion that the amount of bonds which they do sell may bear to the entire issue.

"In witness whereof," etc.

A nonsuit was entered in favor of defendants J. D. Lowman and C. H. Hanford, and a verdict for \$26,750 was returned against all other defendants, who have appealed from the final judgment entered thereon.

Appellants contend that the trial court erred in denying their several motions for a nonsuit and judgment. Construing the evidence most favorably to the respondents, the following facts are shown: That at the time the written contract was executed, James C. Drake and his associates did not hold title to the coal land; that they had an option to purchase it from one Tripp for \$65,000; that the Wilkeson-Tripp Company, a corporation, was formed; that most of its capital stock was subscribed but that none was issued; that the contract was ratified by the board of trustees; that the bonds and a trust deed were prepared, executed and left with the American Savings Bank and Trust Company of Seattle, as trustee; that the legal title not being in the Wilkeson-Tripp Company, the trust deed was not recorded; that a deed from Tripp to the appellant Frank Hanford had been placed in escrow to be delivered upon the payment of \$65,000; that Frank Hanford had executed and placed in escrow a ²⁶⁷ deed from himself to the Wilkeson-Tripp Company, reciting a consideration of \$175,000; that the appel-

lants intended to have all the title deeds and the trust deed delivered and recorded as soon as the \$65,000 was paid; that no written notice of the deposit of the bonds with the trustee was given to the respondents, or either of them, but that an oral notice was given them by Frank Hanford, he directing them to immediately proceed with the sales; that written notice was waived by the respondents for themselves and also by Frank Hanford on behalf of himself and the other appellants; that at a meeting of the trustees of the Wilkeson-Tripp Company previously held, the respondents had been directed to take all orders from Frank Hanford, and to consult him on all matters pertaining to their contract; that the appellants A. G. Bennett, James E. Drake, James M. Ashton and Frank Hanford, all trustees, were present and participated in the proceedings; that the appellant Victor E. Tull subscribed for stock and had knowledge of respondents' acts; that in pursuance of the oral notice given by Frank Hanford, the respondents opened an office in Seattle, advertised in Seattle and Tacoma papers, issued a prospectus, and attempted to sell the bonds; that a stock-book containing blank certificates of the Wilkeson-Tripp Company, signed by its president and secretary, and its corporate seal, were left with respondents that they might issue stock to purchasers of bonds; that in March, 1908, respondents tendered \$250 to the trustee, and demanded the delivery of a bond, which they had sold for that amount; that the trustee refused to deliver the bond, being unable to do so, for the reasons that the appellant corporation Wilkeson-Tripp Company had not yet obtained title, that the trust deed had not been recorded, that the \$65,000 purchase money due Tripp had not been paid, and that the bonds were not legally secured; that the respondents demanded of the appellants that they perfect their title, which they failed to do, and that the respondents thereupon notified appellants they would rescind the contract and ²⁶⁸ hold the appellants for their commissions as damages sustained. Upon these facts the nonsuit was properly denied.

The appellants Ashton and Tull earnestly insist that neither of them gave or waived the written notice required by the contract; that they knew nothing of the acts of the respondents, and that Frank Hanford had no authority to represent them in giving an oral notice or in waiving a written one. The evidence offered tending to show the authority of Frank Hanford, although disputed, was sufficient to sustain the jury in finding such authority.

It is contended that the respondents are not entitled to maintain this action, because they failed to comply with chapter 145, Laws of 1907, page 288 (Rem. & Bal. Code,

sec. 8369 et seq.), by filing the certificate therein required, and that one Tom Church, having an interest in the contract, has not been joined as a party. The contract was made by the respondents L. K. Church and Sidney Drake, as individuals. Before commencing this action they filed the required statutory certificate, showing that they were then doing business in the name of S. Drake & Company. The evidence shows they were the only members of the firm, and that Tom Church had no relation to the partnership other than as a clerk or employé.

Appellants next contend that the respondents were not entitled to proceed with the sale of the bonds, no written notice that they were ready being given. The notice contemplated was for the benefit of both parties. It fixed the time within which the bonds were to be sold, and the dates upon which the sixty and ninety day periods would expire. It was also intended to protect the appellants from having the bonds placed upon the market before they were properly secured and ready for delivery. The respondents testified that they did not know the appellants had not acquired title; that Frank Hanford had told them the title was perfect; that the bonds were ready for sale and delivery; that the giving of the written notice would be waived, and that they ²⁸⁹ relied and acted upon his statements. Under this evidence, and other evidence properly admitted, the jury could find, and must have found, that written notice had been waived by all the appellants.

The respondents have sued for all commissions they would have earned, and the par value of all stock they would have received, had they sold the entire issue of bonds. Having done so, they are not entitled to reimbursement for expenses incurred, although the same were pleaded. By the terms of their contract their commission was to cover and include all expenses and outlay of every kind incurred by them; yet on the trial they were permitted to introduce evidence that they had incurred advertising, office and other expenses in large amounts. Contracts for advertising were introduced and specific items of expense were shown. The appellants objected to all this evidence and now insist that it was erroneously admitted. The respondents on the trial, disclaiming any attempt to recover for expenses incurred, introduced other evidence to show how many bonds it did sell and could have sold had there been no breach of the contract. This action being for the recovery of all the commissions, and the respondents having contracted to bear all their own expenses, it is difficult to conceive any theory upon which evidence showing their expenses became material. The evidence should have been excluded.

The complaint alleged, and the answer admitted, that the appellants had not acquired any title to the coal land. There was no issue as to the delivery of the deed from Tripp to Frank Hanford, or from Frank Hanford to the Wilkeson-Tripp Company. During the trial it appeared that Frank Hanford was to pay \$65,000 to Tripp for his deed, and the respondents offered in evidence the deed from Frank Hanford to the Wilkeson-Tripp Company, which recited a consideration of \$175,000. To this offer the appellants objected, contending there was no issue as to the title or failure of title. It having appeared that Frank Hanford was only to ²⁷⁰ pay \$65,000 for the land, it can be readily understood how knowledge of the fact that he immediately conveyed it to the Wilkeson-Tripp Company by a deed reciting a consideration of \$175,000, in the absence of any explanation, which he was not required to make, would prejudice the jury, and affect the amount of the verdict. There was no good reason for permitting the jury to see the deed or know its contents. It tended to prove no issue in the case. This is not an action involving any issue of fraud, but is one arising out of an alleged breach of contract, upon which the respondents predicate their right of recovery. Assuming that Frank Hanford was attempting to defraud his associates—a fact not proven—that circumstance could not, and should not, have any bearing upon respondents' recovery or right of recovery. The failure of title, after being admitted by the pleadings, was not in issue. The trial court erred in admitting the deed in evidence.

The jury returned a verdict for \$26,750, which the appellants now claim was excessive. The respondents were to receive a stock bonus and a ten per cent commission on all bonds sold. The evidence shows that they procured a written contract from one Gordon for \$5,000 of bonds on which he paid \$200; that they sold by oral contract \$10,000 of bonds to one Worms, on which he made a cash payment of \$1,400; that they had the oral promise of one Thompson to purchase \$10,000 of bonds, no payment being made, and that one Pratt purchased and paid for a \$250 bond. No other contracts of sale, written or oral, were made. Respondents claim they had other inquiries from prospective purchasers who were investigating the bonds, but there is no satisfactory evidence to show probable sales to any of these parties, who at the best only contemplated an investigation of the bonds. One J. R. Moore, a broker of quite limited experience in handling securities, testified that he had investigated the bonds and respondents' methods for selling them; that, in his opinion, they could have all been sold at a total ²⁷¹ expense of six per cent of their face value; that he, as an employé of respondents, had tried for about three

weeks to make some sales; that he had made none, but that he had interested several unnamed parties. This, in substance, is all the evidence showing how many bonds the respondents did sell or could have sold.

In an action for damages arising out of the breach of a contract, the plaintiff is entitled to recover such losses as he has actually sustained. When the direct purpose of the contract is to enable one of the parties to earn commissions or profits, he is entitled to recover profits actually lost as his damages for the breach of the contract by the other party. As a condition precedent to a recovery of damages for loss of contemplated profits, it must, as a general rule, appear that such loss was reasonably certain and not a fictitious or imaginary one; that fact being established, the damages are to be ascertained by the jury, although not always capable of being precisely measured by exact methods of computation.

“Special damages may be recovered when the party in default had notice of the special circumstances out of which such damages naturally arose, but not in the absence of such notice. Remote, speculative or conjectural damages are not recoverable. As a general rule, mere prospective profits are too remote to be considered in estimating damages. Profits are not excluded because of anything inherent in their nature, but because they are remote and contingent, and they may be recovered if proven with reasonable certainty. Profits must be certain in their nature, and in respect to the cause from which they proceed”: 13 Current Law, 1184, 1185, and cases cited.

The usual rule of excluding profits in estimating damages does not apply where the earning of the profits is directly contemplated in the contract which has been breached.

“In order to recover profits in a case of breach of contract, such profits must have been within the contemplation of the parties at the time that the contract was made, and where such profits do not enter into the contract itself they will be denied. Anticipated damages, different from those which ²⁷² would ordinarily be sustained, are not always recoverable, but will only be awarded when in view of special circumstances they may be regarded as the natural and direct result of the breach, and are not problematical, but are capable of being foreseen and of being estimated with reasonable accuracy. In all cases the damages claimed should be capable of being definitely ascertained. Where the damages claimed are so speculative and dependent upon numerous and changing contingencies that their amount is not susceptible of actual proof with any reasonable degree of certainty, no recovery can be had”: 13 Cyc. 36.

In *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58, the court says: "The grounds upon which is founded the general rule of excluding profits in estimating damages are, (1) that in the greater number of cases such profits are too dependent upon numerous and changing contingencies to constitute a definite and trustworthy measure of damages; (2) because such loss of profits is ordinarily remote and not the direct and immediate result of a nonfulfillment of the contract; (3) the engagement to pay such loss of profits, in cases of default in performance, does not form a part of the contract, nor can it be said, from its nature and terms, that it was within the contemplation of the parties."

The mere fact that the respondents entered into a contract for commissions upon contemplated sales does not conclusively show their ability to sell all or any of the bonds within the stipulated time. It is difficult to lay down an exact rule by which damages arising from a loss of contemplated profits may be justly measured. It is manifest that the opinion evidence of the witness Moore was not proper as a basis of computation. It was for the jury and not the witness to arrive at a conclusion as to the probable results of the efforts made by the respondents. In *Federal Iron & Brass Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418, this court, discussing profits as an element of damages, said: "Ofttimes in the breach of a contract of this character, the only damages sustained are those of future profits. These may be of a substantial character in contemplation of law,²⁷³ and such as the injured party should be entitled to recover from the party who has without justification broken the contract. The recovery must, of course, be limited to the amount which from all the surrounding conditions may be deemed to have been reasonably certain had the breach not occurred."

In a case of this character much liberality in the admission of evidence tending to show profits lost should be permitted. The circumstances surrounding the parties are to be considered as bearing upon the amount of probable sales the respondents would have made. In an effort to estimate the probable sales and profits arising therefrom, all facts affecting the value and character of the property which secured the bonds should be considered. With this purpose in view, let it be assumed that the appellants had acquired good title to the coal land; that Tripp had been paid; that the title deeds and the trust deeds securing the bonds had been recorded, and that the bonds had been ready for delivery. What amount of bonds could the respondents then have sold? As men of ordinary business capacity and intelligence, they should have anticipated that prospective

investors, before subscribing for the \$300,000 issue of bonds or for any considerable portion thereof, would investigate the nature, value and extent of the security covered by the trust deed. They would not rely upon the advertisements and the prospectus prepared by the interested parties. Upon investigation they would have learned that the only security for the \$300,000 issue of bonds actually covered by the trust deed was a half section of coal land for which the appellant had recently paid \$65,000 only. To conclude that investors would have purchased all or any considerable portion of these bonds under such conditions involves considerable credulity, and is to assume that they were to be misled as to the actual facts, or that they would invest large amounts without any sufficient security and depend upon future advances in value for their protection. Careful investors do not transact business in any such manner. The parties who had severally ²⁷⁴ purchased \$5,000 and \$10,000 of the bonds and had made payments thereon had recently sustained intimate and confidential business relations with one of the respondents, and they undoubtedly confided in him and relied upon his representations. The only other payment actually made was one of \$250.

If this were an action for damages resulting from personal injuries, in which the jury would be permitted much latitude in making an award, an excessive verdict would not be sustained. While, as before stated, a liberal rule should be adopted for estimating the damages in this action, we fail to see how a verdict for \$26,750 can be sustained. The entire compensation the respondents could have earned in cash and in stock at par had they fully performed the contract would have been seventeen and one-half per cent, or \$52,000. The only probable sales shown were those to Gordon, \$5,000; to Worms, \$10,000; to Pratt, \$250; to Thompson, \$10,000; \$25,250 in all. All other evidence offered to show probable sales is too visionary to become the basis of an award. The utmost that could have been earned on these sales in commissions and in stock at par would have been \$4,418.75, and the evidence, which we have liberally construed in favor of the respondents, is not sufficient to sustain a verdict for damages in any greater sum.

Other assigned errors predicated upon instructions given and refused need not be discussed, as the points involved are fully covered by what we have heretofore said. Although we have found that, under the issues framed, the trial court erred in admitting evidence of expenses incurred and the deed from Frank Hanford to the Wilkeson-Tripp Company, reciting a consideration of \$175,000, our conclusion is that such error could have been prejudicial only in so far as it may have affected and increased the amount of damages

awarded, and that it will not be necessary to direct a new trial except at the election of the respondents. It is therefore ordered that, if within twenty days after the filing of the remittitur ²⁷⁵ herein the respondents shall serve upon the appellants and file with the clerk of the superior court their written election to remit all of the judgment entered in excess of \$4,418.75, with interest thereon from the date of the trial, the judgment as thus reduced will be affirmed. Otherwise a new trial will be awarded. The appellants will recover their costs on this appeal.

Parker, Dunbar and Mount, JJ., concur.

ON PETITION TO RETAX COSTS.

DUNBAR, J. This is a petition to retax costs. Respondents, in their motion to retax, object to the item in appellants' cost bill, "premium on appeal bond, \$280." Section 6226, Remington and Ballinger's Code, is as follows:

"Any receiver, assignee, trustee, guardian, executor, administrator, committee, or other fiduciary, required by law to give bond as such, may include as a part of his lawful expenses, such reasonable sum paid to such a corporation for such suretyship, not exceeding one per cent per annum on the amount of said bond, as the head of the department, court, judge or officer by whom, or court or body by which he was appointed, allows, and in all actions and proceedings, the party entitled to recover costs may include therein such reasonable sum as may have been paid such company for executing or guaranteeing any such bond or undertaking therein as may be allowed by the court or judge before whom the action or proceeding is pending."

This section is construed as referring wholly to fiduciary bonds, the expense of which has been allowed by the court, and it is their contention that the term, "all actions and proceedings," found therein, refers to actions in which bonds have been given by receivers and other assistants of the court to carry out the court's functions, and not the proceedings where bonds are given by parties to effectuate their own purposes. This construction, it seems to us, does not give full effect to the statute quoted. A receiver, assignee, trustee, guardian, executor, administrator, etc., under ²⁷⁶ this statute would be entitled to recompense for his official bond where there was no action of any kind whatever involved, and the statute, after making provision for charges of that kind by said officers, provides generally that, "in all actions and proceedings, the party entitled to recover costs may include therein," etc., thereby making a special provision for actions and proceedings. We are unable to give the statute the limited construction con-

tended for by the petitioners, and the petition will therefore be denied.

Rudkin, C. J., Mount, Crow and Parker, JJ., concur.

Upon the Breach of a Contract the Damages Recoverable are such as may fairly and reasonably be considered either as arising naturally from such breach, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of a breach of it: *American Express Co. v. Jennings*, 86 Miss. 329, 109 Am. St. Rep. 708. See, also, *Hurxthal v. Boom City*, 53 W. Va. 87, 97 Am. St. Rep. 954; *Raymond v. Yarrington*, 96 Tex. 443, 97 Am. St. Rep. 914. Loss of business profits as an element of damages for a breach of contract is discussed in the recent cases of *Kelley, Maus & Co. v. La Crosse Carriage Co.*, 120 Wis. 84, 102 Am. St. Rep. 971; *Emerson v. Pacific Coast etc. Co.*, 96 Minn. 1, 113 Am. St. Rep. 603; *Harper Furniture Co. v. Southern Express Co.*, 148 N. C. 87, 128 Am. St. Rep. 588; *Gombert v. New York Cent. etc. R. R. Co.*, 195 N. Y. 273, 133 Am. St. Rep. 794; *Kendrick v. Ryus*, 225 Mo. 150, 135 Am. St. Rep. 585.

The Rights and Liabilities of Stock-brokers are considered in the note to *Horton v. Morgan*, 75 Am. Dec. 313.

BUSSELL v. GILL.

[58 Wash. 468, 108 Pac. 1080.]

CONSTITUTIONAL LAW—Municipal Plans Commission.—An amendment to a city charter providing for a "municipal plans commission" does not violate the constitutional guaranty of local self-government, in that the members of some of the organizations permitted to nominate the commissioners are nonresidents, the commissioners themselves being residents of the city, holding by appointment, not by election, having no legislative powers delegated to them, and constituting an advisory body only, whose proposed plans are subject to final vote by the people. (p. 1074.)

CONSTITUTIONAL LAW—Municipal Plans Commission.—An amendment to a city charter providing for a "municipal plans commission," the commissioners themselves being residents of the city, but being nominated by organizations some of whose members are nonresidents, is not invalid because it confers authority upon the commissioners to approve vouchers for all expenditures incurred, and requires the controller to issue warrants upon the city treasury for the amount of such vouchers to be paid out of the municipal plans commission fund. (p. 1075.)

CONSTITUTIONAL LAW—Municipal Plans Commission.—An amendment to a city charter providing for a municipal plans commission, the members of which are to be appointed by fourteen enumerated organizations, does not offend the constitutional provision that no law shall grant special privileges to any citizen or class of citizens. (p. 1076.)

Milo A. Root, for the petitioner.

Scott Calhoun, Stephen V. Carey, Kerr & McCord and Walker & Munn, for the respondent.

⁴⁷⁰ CROW, J. This is an original proceeding, instituted in this court by petition, for a writ of certiorari to review the final judgment of the superior court of King county, entered in an action commenced by Wallace Adam Bussell, against Hiram C. Gill, as mayor of the city of Seattle, to enjoin him from appointing members of the Municipal Plans Commission. The trial court sustained a demurrer to the complaint, and the cause was dismissed.

The complaint attacks the validity of article 25, an amendment to the city charter, adopted March 8, 1910, creating a Municipal Plans Commission, which article, omitting immaterial sections, reads as follows:

"Section 1. That there be and hereby is created a commission to be known as a Municipal Plans Commission, which shall consist of twenty-one members. It shall be the duty of said commission to procure plans for the arrangement of the city with a view to such expansion as may meet probable future demands. These plans shall take into consideration the extension of the city and city works into adjacent territory; improvement and changes in public utilities and lines of transportation by surface, underground and water; the location, widths and grades of arterial highways necessary for the best treatment of the city, the development of the water front with its seawall and wharves, the location of public buildings municipal decorations, and such further extensions of and additions to the park and boulevard system ⁴⁷¹ of the city as it may, in conjunction with the Park Board, find advisable.

"Section 2. The members of such commission shall be citizens of the city of Seattle and shall be chosen in the following manner, to wit: Three shall be elected from the city council by its members; one shall be elected from the Board of Public Works by its members; in the same way one member shall be elected from the King county commissioners; one from the Seattle Board of Education and one from the Seattle Park Commission. The other members shall be appointed by the mayor in the following manner, to wit: Each organization hereinafter named shall nominate two of its members and the mayor shall appoint one of the two so nominated. The interests representing the water front owners, steam railway companies, street railway companies, and marine transportation companies shall organize, respectively, by mass meetings, at which a chairman and secretary shall be elected, and such official shall certify to the mayor the two names elected at such meetings. The call for such meetings shall be given publicity in the press of the city.

The Pacific Northwest Society of Civil Engineers.

The Washington State Chapter of American Institute of Architects.

The Seattle Chamber of Commerce.

The Seattle Commercial Club.

The Manufacturers' Association.

The Central Labor Council.

The Seattle Clearing House Association.

The Seattle Bar Association.

The Seattle Real Estate Association.

The Carpenters' Union.

The Water Front Owners.

The Steam Railway Companies.

The Marine Transportation Companies.

The Street Railway Companies.

In case of failure of any of said organizations or interests to nominate, then these members are to be appointed by the mayor, and each shall be chosen for his known qualifications with respect to the interests which shall have failed to certify its nominations."

"Section 7. There shall be furnished to said commission suitable quarters for the carrying on of its investigations, together with such engineering and clerical assistance as ⁴⁷² may be necessary, and the commission shall, as soon as practicable after its organization, employ one or more, but in no case to exceed three, men of national reputation recognized as authorities in city planning to prepare a comprehensive plan under its direction and subject to its approval and adoption, embracing in its scope the entire area of the city, and such contiguous territory, as is comprehended in section one (1) of this resolution. The final plans shall be submitted to the commission for approval, and shall be regarded as approved, unless rejected by a two-thirds vote of said commissioners within thirty (30) days after the same shall have been filed with the commission. The Municipal Plans Commission shall hold regular meetings; at least one such meeting every two weeks. Upon the conclusion of the sittings of said commission, it shall submit its findings in full to the mayor and the city council of Seattle in printed form, together with plans. Said report shall be presented to the mayor and city council not later than September 30, 1911, and they shall cause the recommendations of the commission to be submitted to the people at the next general or special city election.

"Section 8. That if a majority of the voters voting thereon shall favor the adoption of said city plan so reported, it shall be adopted and shall be the plan to be followed by all city officials in the growth, evolution and development of said city of Seattle, until modified, or amended at some subsequent election.

"Section 9. There is hereby created a fund to be known as Municipal Plans Commission Fund, which shall consist

of a tax levy to be made during the year 1910 as other taxes are levied of one-fourth ($\frac{1}{4}$) of a mill on the dollar, but no other or further levy or payment into said fund shall ever be made. The Municipal Plans Commission shall have exclusive power to pay out moneys from such fund for any and all purposes specified in section one (1) hereof, and shall, on or before the 10th day of August of the year 1910, prepare and submit to the city council for approval and adoption, an estimate of the amount of money which may be required for its purposes, in conformity with chapter 138 of the Laws of the State of Washington, Session 1909.

"Section 10. All expenditures on account of work done shall be made upon vouchers approved by a majority vote of ⁴⁷³ the Municipal Plans Commission and signed by its president and secretary. Each voucher shall, when accompanied by a detailed statement of such expenditures, be certified to the city comptroller, who shall issue a warrant therefor to the city treasurer, and the same shall be paid by the treasurer out of any money in the Municipal Plans Commission Fund not otherwise appropriated. Said commission may anticipate the revenues to be paid into said fund under the tax levy herein provided for by the issuance of its warrants against said fund to provide money for the necessary expenses of said commission prior to the availability of the funds to be raised by such levy. No expense against such fund shall be incurred after September 30, 1911, nor in excess of the levy provided, and any surplus remaining in said fund after said date, not lawfully appropriated or obligated for, shall be by ordinance transferred into the general fund."

Fourteen different organizations mentioned in the charter amendment are each authorized to nominate two persons as eligibles for appointment on the commission. The complaint alleged that the membership of these several organizations includes persons who are nonresidents of the state of Washington and of the United States, and the appellant now contends that, as the charter amendment in effect permits nonresidents to participate in the municipal affairs of the city of Seattle, by exercising the high privilege of choosing persons to be selected as public officers, it is necessarily void. The constitution of this state, article 11, section 10, provides that: "Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state."

The object of this constitutional provision was to secure to all such cities complete local self-government in municipal affairs, subject only to the restrictions mentioned, and charter provisions adopted under the authority so conferred

should not be held invalid, unless it appears that they are in direct conflict with the constitution or laws of the state.

⁴⁷⁴ In *Hilzinger v. Gillman*, 56 Wash. 228, 105 Pac. 471, this court said: "Both the constitution and the general law recognize that large, growing cities should be empowered to determine for themselves, and in their own way, the many important and complex questions of local policy which arise, and it is only when some act in the execution of that policy conflicts with the general law or contravenes the constitution, that the act can be questioned."

The city of Seattle framed its charter, and the amendment now under consideration was adopted, by proper procedure and vote. It expressly directs that all members of the Municipal Plans Commission shall be citizens of the city. It is therefore apparent that the various organizations mentioned cannot, if they would, by any nominations they may make, impose upon the mayor the duty or necessity of appointing nonresidents. Although nonresident members of the several organizations may have a voice in nominating two candidates as eligibles for appointment, we fail to see how, in the absence of an express constitutional inhibition, that fact invalidates the charter amendment. The commissioners thus selected will be appointive, not elective officers. No resident of Seattle is deprived of any of his rights as a citizen or elector. The people by their own vote have authorized this method of selection. The commissioners will be legally appointed officers, irrespective of the incidental fact that the number of eligible persons from whom the mayor may appoint them is restricted by the charter amendment. The commission will employ men of national reputation to prepare and submit final plans. It cannot originate plans. It can only reject those suggested by a two-thirds vote. The commission itself originated with the people, who adopted the charter amendment, and will cease to exist after September 30, 1911, no provision being made for its continuance. Plans for improvements and works can only be adopted by a vote of the people. No legislative power is delegated to the commission in violation of the constitution or any general ⁴⁷⁵ law. The evident purpose of the amendment is to secure experienced, capable and representative citizens to serve upon the commission and select men of national reputation to prepare and submit comprehensive plans. The commissioners from the various organizations must be appointed by the mayor. The commission will be an advisory body only. Proposed plans are subject to a final vote of the people. It is therefore manifest that the authority conferred originates with the people, and that the plans prepared and suggested can only be validated or adopted by them. They have reserved a supervisory con-

trol in themselves, and are deprived of no constitutional right. It is no concern of ours whether the amendment has provided the best or wisest method for selecting the commission. It was adopted by the people under the authority of the constitution. The commissioners are not vested with legislative powers. They will make no levies of taxes, and the advisory functions which they are to perform do not conflict with any restrictions of the constitution or laws of the state: *Miller v. Louisville*, 30 Ky. Law Rep. 664, 99 S. W. 284.

Appellant further insists that the amendment is void because it confers authority upon the commissioners to approve vouchers for all expenditures incurred, and requires the comptroller to issue warrants upon the city treasury for the amount of such vouchers to be paid out of the Municipal Plans Commission fund. He insists that nonresidents, by nominating eligibles for appointment, will have a voice in the expenditure of the money raised by the tax authorized. We find no merit in this contention. The Municipal Plans Commission will be composed of residents of the city. Authority to approve vouchers for expenditures is lawfully conferred upon it. In *State v. Riplinger*, 30 Wash. 281, 70 Pac. 748, this court sustained a similar charter provision, which compelled the comptroller of the city of Seattle to issue warrants upon the city treasurer solely upon the certification of the library ⁴⁷⁶ board without any action of the city council. The rule there announced is controlling here.

Section 12, article 1, of the state constitution, provides that: "No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

Appellant insists that the amendment under discussion violates this section, as it grants a privilege to each of the fourteen organizations mentioned, and to their members, which is not granted to the members of other similar organizations, such privilege being the right to participate in the selection of members of the commission. This contention cannot be sustained. In *State v. Vance*, 29 Wash. 435, 458, 70 Pac. 34, a similar attack was made upon the jury law of 1901, which authorized the bar of the county to nominate four electors, two of whom were to be appointed as jury commissioners by the superior court; but the validity of the act was sustained. While it is true that some argument was predicated upon the fact that the members of the bar are officers of the court, that argument was not necessary to the conclusion reached. Discussing the term "privileges and immunities," this court said: "These terms,

as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burden which the property or persons of citizens of some other state are exempt from: Cooley's Constitutional Limitations, 6th ed., 597. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution. The right simply of recommendation, which it might be said has been conferred by the act under consideration, and by the order of the court ⁴⁷⁷ made in accordance with the provisions of that act, is not, in its very nature, such a fundamental right of a citizen that it may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law."

The demurrer to the complaint was properly sustained. The judgment is affirmed.

Rudkin, C. J., Dunbar, Parker and Mount, JJ., concur.

A Municipal Corporation may, by Ordinance, Provide for a Commission to act as the agent of the city in the erection of a public hall, and determine the manner in which the members shall be chosen, whether by appointment by the mayor, with or without confirmation by either or both branches of the city council, or in any other reasonable and legal way: Wheelock v. City of Lowell, 196 Mass. 220, 124 Am. St. Rep. 543.

As to the Constitutional Right of a Municipality to Self-government, see the recent cases of Davidson v. Hine, 151 Mich. 294, 123 Am. St. Rep. 267; State v. Broatch, 68 Neb. 687, 110 Am. St. Rep. 477.

SEATTLE v. DENCKER.

[58 Wash. 501, 108 Pac. 1086.]

LICENSE TAX—Power to Impose on Occupation.—It is an attribute of sovereignty to tax occupations for the purpose of raising revenue, and the tax may be imposed in the form of a license fee. (p. 1078.)

LICENSE TAX—Limitation of Power to Impose.—While the policy of an enactment imposing a license tax upon an occupation may not be questioned by the courts, the discretion exercised by the law-making power must be natural and reasonable, and consistent with the fundamental principles of law. When they are violated to the extent of depriving a citizen of his constitutional rights, it is the duty of a court to intervene in his behalf. (p. 1079.)

LICENSE TAX—Automatic Selling Machine.—An Ordinance imposing a license tax for revenue purposes on the operation of automatic vending machines, when no tax is imposed upon merchants for selling articles like those sold by the machines, is an unconstitutional discrimination against that mode of doing business, if it is conceded to be lawful and fair and in no way involving the police power. (p. 1084.)

Lyter & Folsom and I. L. Blair, for the appellant.

Scott Calhoun and Ralph S. Pierce, for the respondent.

⁵⁰¹ DUNBAR, J. This is an appeal from a judgment of the superior court for King county, after trial upon conviction of the violation of an ordinance of the city of Seattle relating to the sale of goods by automatic vending machine, which ordinance reads as follows:

“An ordinance licensing certain automatic devices, and providing a penalty for violation.

“Be it ordained by the city of Seattle as follows:

“Section (1) That it shall be unlawful for any person to maintain, keep, conduct, manage, have in his possession or control for use, any automatic device for the sale of goods of any kind or character, where money or any representative ⁵⁰² of value is used to operate the same, or where gain or trade is the object, without being licensed so to do by the city of Seattle.

“Section (2) The license required by this ordinance shall be secured by paying the required amount to the city treasurer, receiving a receipt therefor and presenting such receipt to the city comptroller, who shall issue such license as the receipt calls for.

“Section (3) The schedule of amount to be paid for licenses, is as follows: Where a deposit of one (1) cent or slug representing the same in trade, is required to operate the same, one (1) dollar per year for each device; where a deposit of five (5) cents or slug representing the same in trade, is required to operate the same, five (5) dollars per year for each device; where a deposit of ten (10) cents or slug representing the same in trade, is required to operate the same, ten (10) dollars per year for each device; where a deposit of twenty-five (25) cents or slug representing the same in trade, is required to operate the same, fifteen (15) dollars per year for each device.

“Section (4) The provisions of this ordinance shall not be held to include or apply to the sale of gas, or other commodities, through prepayment meters, or the installation and use of telephones with slot machine devices, by public service corporations, operating under franchises granted by the city of Seattle, or to the sale of candies or similar confections, by automatic devices in theaters or other such

places of public assembly where a fee is charged for admission."

Defendant is the manager of the Northwestern Automatic Vending Machine Company, a Washington corporation, which is engaged in the business of selling cigars at retail by means of vending machines; owns and operates a great many of these machines in the city of Seattle, and has invested a large sum of money in said machines. The machines are placed in hotels where cigars are required by the patrons, are under the general supervision of the clerks of the hotel, and, as a rule, a certain percentage is given to the hotel men for operating the machines. Under the ordinance in question, the license fee required for the operation of the machines varies from thirty dollars to ninety-five dollars, according to the number of ⁵⁰⁸ devices, the fee being based on the denomination of the coin required for operation and the number of devices, and not on the amount of business done. Each machine has a device for five, ten, and twenty-five cent pieces. The cigars are at all times exposed to view under their proper labels and prices, so that the purchaser can at all times see what he is getting for his money, and he gets just what he pays for. If he drops in a five cent coin in the device calling for a coin of that denomination, and presses the plunger, he gets a five cent cigar; if a ten cent coin, a ten cent cigar; and if a twenty-five cent coin, either a two-for-a-quarter or a three-for-a-quarter cigar, according to his selection. There is no more opportunity for the customer being cheated or defrauded in dealing with this device than by any other one.

The question for determination here is the validity of the ordinance. It is conceded that this ordinance is a revenue measure; that the only ground of difference between licensed and unlicensed sales in this ordinance is in the mode of sales, whether by device or hand. It is conceded that none of the other retail merchants of that occupation are taxed by licenses for the sale of cigars; that if the sale is by this device the license is imposed; and that if it is by hand, in the ordinary way, no license is required.

In the discussion of this question there are certain fundamental principles which may be conceded, viz.: That it is a well-known attribute of sovereignty to tax occupations for the purpose of raising revenues, and that such tax may be imposed in the form of a license fee; that the state may tax all or any occupations or business carried on within its boundaries, imposing the burden upon some and passing by others; that only considerations of general policy determine such selections, and that there is no restriction unless it be imposed by the constitution. This determination, however, must not be exercised arbitrarily or fraudulently, and while

the policy of the enactment may not be questioned by the courts, the discretion exercised by the law-making power⁵⁰⁴ must be natural and reasonable, and consistent with the general principles of law and the fundamental principles upon which our government is founded. When these principles are violated to the extent of depriving the citizen of natural or constitutional rights, it is the duty of the court to intervene in his behalf. A wilderness of authority might be cited on this interesting and fruitful subject of litigation; for, from the beginning of not only our government but of all government, the contest has been waged between legislative powers and individual rights. But from the best considered cases, the general principles above announced can be deduced.

Tested by these principles, can this ordinance be sustained? We think not. It is plain that there is no police power or regulation involved, a power which is the sustaining principle in ninety-nine out of a hundred of the cases cited; for there is no claim that the business discriminated against here affects in any way the public morals or the business interests of the community, except as it affects the interest of others engaged in the same business but purely in the way of competition. The article that is sold does not in any way involve the police power. Hence, it is a matter of no public concern whether it be sold by device or by some other method. And here it is well to note a vital distinction, founded on sound and just principles of law, between the power to tax occupations under the form of a license which, by reason of the character of the occupation, is subject to police regulation, and the power to tax what are termed useful trades and employments, under the guise of a license. It is well settled that the license required of employments of the latter character can carry with it only such fee as is necessary to make compensation for the regulation services, and cannot be perverted into a tax. Especially is this true when the attempt is made to discriminate between occupations alike in principle but differing only in mode of operation in some trifling particular.

⁵⁰⁵ The respondent relies largely upon the case of *St. John v. New York*, 201 U. S. 633, 26 Sup. Ct. Rep. 534, 50 L. ed. 896, 5 Ann. Cas. 909, where the supreme court of the United States sustained an act prohibiting the sale of adulterated milk, where in certain respects it provided different prohibitions and penalties as to producing and nonproducing venders of milk, the enactment making it a penal offense for a person to vend milk that contained more than a certain amount of water and less than a certain amount of milk solids. The objection urged to the law was that it was a discrimination between the vender and the producers

of the milk, and that such discrimination had no basis in right or public policy. In discussing the case, the court said:

“It has been decided many times that a state may classify persons and objects for the purpose of legislation. We will assume the cases are known and proceed immediately to consider whether the classification of the law is based on proper and justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose. By referring to section 20 it will be observed that adulterated milk, as there defined, includes not only that to which something had been added, but milk from which the cream has been removed, or which is deficient naturally in certain substances, or taken from cows fed on certain things, or cows in certain conditions when milked. In other words, the purpose of the law is to secure to the population, adult and infant, milk attaining a certain standard of purity and strength. All other milk is declared to be ‘unclean, impure, unhealthy, adulterated, or unwholesome.’ It is not contended that such purpose is not within the power of the state, but, it is contended, that the power is not exercised on all alike who stand in the same relation to the purpose. . . . Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and regarding it the law fixes its standard by milk in the condition ⁵⁰⁶ that it comes from the herd. It is certain that if milk starts pure from the producer it will reach the consumer pure, if not tampered with on the way. To prevent such tampering the law is framed and its penalties adjusted. As the standard established can be proved in the hands of a producing vender, he is exempt from the penalty; as it cannot be proved in the hands of other venders so as to prevent evasions of the law, such venders are not exempt.”

It would be difficult to discover in principle any similarity between that case and the one at bar. The court in that case, as in nearly all the cases, starts out with the discussion as to what is the purpose of the law. The purpose of the law in the case just cited was to prevent the adulteration of milk, which the state undoubtedly had a right to do under its plain police powers, for the protection of the health of the citizen. But as we have said before, this case is stripped of any police feature, and if we were to start an investigation to determine the purpose of this act, it could only end

in a report that there was no such beneficent purpose as was stated by the court in that case, but that the purpose, if it had any, was to benefit the regular retail cigar merchants by suppressing a business of the same kind, but differing simply in the mode of the delivery of the cigars; or, in other words, to prevent honest competition in the cigar trade. The further reason upon which the court decided that case, viz., that it was more difficult to detect fraud when the milk was in the hands of the vender than when it was in the hands of the original producer, is also absent in this case. As the testimony shows, and as the model of the machine indicates, there is no more opportunity for fraud or deceit in selling cigars under this system than in selling them in any other way.

The case of *Chicago v. Bowman Dairy Co.*, 234 Ill. 294, 123 Am. St. Rep. 100, 84 N. E. 913, 17 L. R. A., N. S., 684, 14 Ann. Cas. 700, also largely relied upon by the respondent, is practically the same kind of a case. Probably the circumstances of that ⁵⁰⁷ case bring it a little nearer to the case at bar. There an act was sustained which required dealers, selling cream and milk in bottles or glass jars, to have the capacity of the bottles or jars permanently indicated upon them; and prescribed a penalty for having in their possession bottles or glass jars of capacity less than that indicated on the outside; while the act did not apply to venders of milk through other agencies. But that case, as the other, was sustained on the doctrine of the police power of the state. Even so, we are doubtful if that case could be indorsed by this court under the decision in *Spokane v. Macho*, 51 Wash. 322, 130 Am. St. Rep. 1100, 98 Pac. 755, 21 L. R. A., N. S., 263, where it was held that, in an ordinance to regulate and license employment agencies, a section making it a misdemeanor for the keeper of an employment agency to make willful misrepresentations or to willfully deceive any person seeking employment, and take a fee for such employment, is unconstitutional, since it is not general and impartial in its operation, but operates upon one class to the exclusion of others in respect to a penal act common to all classes of business, and exceeds the reasonable limit of police regulations. In that case it was stated that it is a fundamental proposition that an ordinance must be fair in its terms, impartial in its provisions, and general in its application; citing *Dillon on Municipal Corporations*, 322, and *McQuillan on Municipal Corporations*, 193. It was also said: "When exercising its power to regulate a business, the municipality may classify subjects of legislation, but the law must treat alike all of a class to which it applies, and must bring within its classification all who are similarly situated or under the same condition"; citing *State v.*

Sheriff of Ramsey County, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112, where the court said: "The classification must be based on some reason suggested by a difference in the situation and circumstances of the subjects treated, and no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar."

⁵⁰⁸ A much worse discrimination would be a discrimination between citizens of the same class engaged in the same business, where there is no reason suggested by a difference in the situation and circumstances of the subjects treated; for not only is the business in this case similar and identical, but it is purely and simply a difference in the mode of transacting the business, a mode which cannot possibly affect any principle or affect deleteriously the consumer or purchaser of the article sold. The general principle announced by Mr. Dillon in his work on Corporations, volume 1, section 322, seems to be specially applicable here: "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation."

The Montana legislature passed a law imposing a license tax of twenty-five dollars per quarter on every laundry business other than that of a steam laundry wherein more than one person was employed or engaged, and but fifteen dollars per quarter upon steam laundries. This law was sustained by the state court of Montana, but was afterward declared unconstitutional by that eminent jurist, Judge Knowles, of the United States circuit court, in *Re Yot Sang*, 75 Fed. 983. In the course of the opinion it was said: "Unless there is something so different in the conducting of a laundry by steam to that of the carrying on of that business by any other means, the law providing a different and more excessive license for the conducting of such business other than by steam is unequal and unjust. . . . It may be said that the state may have wished to encourage steam laundries. If so, it had no right to do it at the expense of any person carrying on such business other than by means of steam. Such an argument would imply that it ⁵⁰⁹ was in the power of a state to force a man who conducted a business in one mode to abandon the same in order that he who conducted such business in another mode should be encouraged and built up."

The court concluded that, where the same business is conducted by different modes, it was unjust and in violation of the rule that each man should have the protection of equal laws, to place upon one a greater burden than upon the other. It is stated by counsel for appellant, as a matter of history, that, since the determination of this case in the United States court, it has been accepted as the law of the state, and that there have been no prosecutions under the statute. However this may be, we are satisfied that the decision of the United States court expresses the true principles governing such cases.

In the case of *Covington v. Dalheim*, 126 Ky. 26, 102 S. W. 829, the court, in passing upon the constitutionality of an act which imposes a tax on a certain class of grocers without the imposition of the same tax on others, held that the tax must apply to all grocers in the city, and that the act was unconstitutional, saying: "It is competent for the city to select any of the enumerated classes as subjects for license taxes. But it is not competent for it to tax some members of a class set apart by the legislature and not tax others of the same class."

And the principle announced in that case was reaffirmed by the court of appeals of Kentucky in the case of *Read v. Graham*, 31 Ky. Law Rep. 569, 102 S. W. 860. These last three cases which we have mentioned seem to be exactly in point on the question under discussion.

It is very well suggested by counsel for appellant that it would be just as reasonable to discriminate against a merchant who used a patent carrier for the transmission of money and change instead of a cash boy. The same rule might apply to a thousand different improvements that have a tendency to cheapen products by reason of the fact that ⁵¹⁰ they are labor-saving machines, and do away with the necessity for so many clerks and employés. It is a legitimate business, and it makes no difference to the public whether the cigar is delivered by means of this automatic device or in the ordinary way. A strict or puritanical conception of the business of selling cigars might be that it was harmful to the health of the consumers, but the mode of selling them would not enter into that thought. Nor can the objection that it is particularly attractive be urged, for handsome girls are ordinarily employed around hotels for the purpose of selling cigars, and no doubt many susceptible men are induced to buy more cigars than they otherwise would by reason of the employment of this delivery agency.

Fairly considered, this seems to be a tax on invention, for invention in most cases, as in this, lessens the expense of the business, and thereby necessarily cheapens the product. This was one of the arguments advanced in favor of

sustaining the validity of this ordinance, viz., that the machine could be manufactured and operated for less money than a retail cigar store could be equipped and operated. It would seem that the reduction in price of an article of commerce would savor of the quality of a blessing rather than of a curse, when the welfare of the consumer is taken into consideration; and to hold otherwise would reverse the general rule that legal restraints may be imposed upon the few for the benefit of the many. The tendency of this kind of an income is to foster monopolies, for a monopoly exists when the manufacture and sale of any commodity is restrained to one or a certain number. It is said that it has three inseparable consequences—the increase of the price, the badness of the wares, the impoverishment of others. Hence, it naturally follows that monopolies are odious to the law, and the law will concern itself to restrain rather than to nourish them. If this ordinance can be sustained, there is no limit to the arbitrary, capricious or tyrannical imposition of taxes, and the constitutional guaranty that “no law shall ⁵¹¹ be passed granting to any citizen, class of citizens or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations,” becomes a dead letter. Discrimination to the extent exhibited in this ordinance discourages enterprise, paralyzes progress, is a deprivation of liberty, and is entirely inconsistent with the true principles and the genius of our government. None of the cases cited, from either this or any other court, numerous as they are, go to the extent of discriminating against a simple mode of doing business, which is conceded to be lawful and fair, and which in no way involves the principles of police power or regulation.

The judgment will be reversed, with instructions to dismiss the action.

Rudkin, C. J., Crow, Mount and Parker, JJ., concur.

The Constitutionality of License Taxes is the subject of a note to *Hager v. Walker*, 129 Am. St. Rep. 249.

STATE v. MAMLOCK.

[58 Wash. 631, 109 Pac. 47.]

INDIANS—Liquors.—A State Statute Prohibiting the sale of intoxicating liquors to Indians is a valid exercise of the police power. It does not, as applied to Indian citizens of the United States, violate the fourteenth amendment; nor does it, in the case of Indian wards of the United States, violate section 8 of article 1 of the federal constitution conferring authority on the general government to regulate commerce with Indian tribes. (p. 1087.)

J. L. McMurray and A. B. Bell, for the appellant.

John Leo, for the respondent.

⁶³¹ RUDKIN, C. J. An information was filed in the court below charging the defendant Mamlock with the crime of selling intoxicating liquor to an Indian, in violation of section 6288, Remington and Ballinger's Code. A demurrer to the information was sustained, ⁶³² and from an order of dismissal the state has prosecuted this appeal. In support of the demurrer in the court below, and in support of the judgment here, the respondent contends that the legislative act, under which the information was filed, violates the fourteenth article of the amendments to the constitution of the United States, in so far as it prohibits the sale of intoxicating liquors to Indians who are citizens of the United States, and section 8 of article 1 of the constitution of the United States, conferring authority on the general government to regulate commerce with the Indian tribes, in so far as it prohibits sales to Indians who are wards of the United States under charge of an Indian agent or superintendent.

The validity of state laws prohibiting the sale of intoxicating liquors to certain classes of persons who are peculiarly liable to be injured morally or physically by their use, such as minors, persons already intoxicated, habitual drunkards, idiots, and insane persons, has so often been affirmed by the courts that the question is no longer an open one: Black on Intoxicating Liquors, sec. 42; 23 Cyc. 163. That the American Indian falls within the classes thus defined, whether he be a citizen of the United States or otherwise, is equally well settled: Black on Intoxicating Liquors, sec. 427; Territory v. Coleman, 1 Or. 191, 75 Am. Dec. 554; Territory v. Guyott, 9 Mont. 46, 22 Pac. 134; State v. Wise, 70 Minn. 99, 72 N. W. 843; People v. Bray, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158; People v. Gebhard, 151 Mich. 192, 115 N. W. 54; Tate v. State, 58 Neb. 296, 78 N. W. 494.

As said by the supreme court of Minnesota in State v. Wise, 70 Minn. 99, 72 N. W. 843: "The statute is a police regulation. It was enacted in view of the well-known social condition, habits and tendencies of Indians as a race. While

there are doubtless notable individual exceptions to the rule, yet it is a well-known fact that Indians as a race are not as highly civilized as the whites; that they are less subject to moral restraint, more liable to acquire an inordinate appetite for intoxicating liquors, and ⁶³³ also more liable to be dangerous to themselves and others when intoxicated. In view of these considerations, it was thought wise to protect persons of that race as well as the community at large by prohibiting the sale of intoxicating liquors to them altogether. We are therefore of opinion that the statute applies to and includes all Indians as a race, without reference to their political status. Thus construed, the statute is a valid exercise of the police power of the state. It is neither arbitrary class legislation, nor does it abridge the privileges or immunities of citizens of the United States, or deprive any person of liberty or property without due process of law, within the meaning of the fourteenth amendment of the federal constitution. The difference in conditions between Indians as a race and the white race constituted a sufficient basis of classification."

Similar language was used by the supreme court of California in *People v. Bray*, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158. The conclusion that the regulation in question is a mere police regulation is perhaps a sufficient answer to the claim that the statute violates the commerce clause of the federal constitution.

"The police of a state, in a comprehensive sense, embraces its system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others": Cooley on Constitutional Limitations, 6th ed., 704.

"Police power is the name given to that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires": 8 Cyc. 863.

The police power inheres in state sovereignty and was not delegated to the federal government by the original ⁶³⁴ constitution, or by any of the later amendments. As said by Mr. Justice Field in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923, speaking of the four-

teenth amendment: "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity": See, also, *Slaughter-house Cases*, 16 Wall. 36, 21 L. ed. 394; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; *Territory v. Guyott*, 9 Mont. 46, 22 Pac. 134; *Cooley's Constitutional Limitations*, p. 11; 8 Cyc. 865.

We are therefore of opinion that the law in question is a valid exercise of the police power of the state, and inasmuch as the information charges a crime under its provisions, the judgment of the court below is reversed, with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

Mount, Dunbar, Parker and Crow, JJ., concur.

The Constitutionality of a State Statute Forbidding the Sale of Liquor to Indians is recognized in *Territory v. Coleman*, 1 Or. 191, 75 Am. Dec. 554; *People v. Bray*, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158; *Territory v. Guyott*, 9 Mont. 46, 22 Pac. 134.

McLIESH v. BALL.

[58 Wash. 690, 109 Pac. 209.]

JUDGMENT—Collateral Attack.—An Attack upon a Judicial Sale on the ground that the judgment on which it is based has been paid is not a collateral attack on the judgment. (p. 1089.)

JUDICIAL SALE.—After a Judgment has Been Paid it ceases to be operative, and no sale based upon it can confer title. (p. 1089.)

JUDICIAL SALE—Confirmation Where Judgment was Paid.—A judicial sale based on a judgment which had been paid is not cured by confirmation. (p. 1089.)

QUIETING TITLE—Cancellation of Void Judgment.—Where the plaintiffs in an action under section 785 et seq., Remington and Balingier's Code, set forth that they are the owners and entitled to possession of certain land, and the defendant denies the allegation of ownership and alleges ownership in himself, the question for determination is, who has the superior title, whether legal or equitable, and the defendant, maintaining that the plaintiffs' execution sale was void because the judgment had been paid, is not required to first institute a direct proceeding to cancel the judgment before answering the complaint. (pp. 1089, 1090.)

Karr & Gregory, for the appellants.

Brady & Rummens and W. H. B. Thomas, for the respondents.

⁶⁹⁰ DUNBAR, J. This is an action by the appellants to dispossess the respondents James Ball and Sarah Ball, his wife, of lots 28 and 29, block 167, Gilman's addition to the city of Seattle, King county, Washington. The facts upon ⁶⁹¹ which the action is based, in brief, are as follows: On February 11, 1907, James G. Combs, who had been an attorney for the respondents, brought an action against said respondents for attorney's fees, and recovered a judgment in the sum of ninety-five dollars and sixty cents. On February 15, 1907, Combs filed a transcript of said judgment in the superior court of King county, Washington, and on March 5, 1907, execution on said judgment was issued and levied by the sheriff of King county, and on April 13, 1907, the sheriff sold the property to satisfy the said judgment, Combs being the purchaser at the execution sale, for the sum of one hundred and nine dollars and seventy-eight cents. The return of the sale was made, and the same was confirmed April 27, 1907. On April 16, 1908, the sheriff executed his deed to said lots to the said James G. Combs to satisfy said judgment. Said deed was duly entered in the proper records. In the month of May, 1908, Combs and wife executed a quitclaim deed to said land to Alexander McLiesh, one of the appellants herein. The purchase price was one thousand dollars, two hundred dollars being paid in cash and a mortgage given for the balance in the sum of eight hundred dollars.

Before the sale of the land, it appears from the evidence that Combs had notified Ball that sale would be made if the judgment was not satisfied. Prior to the sale, however, and shortly after the judgment was obtained, according to the testimony of Ball and his witness, he had a communication from Combs, the judgment creditor, and Combs instructed him to pay the money for the satisfaction of the judgment to one Cummings, an attorney in Seattle; and that he would be responsible for the payment of the money to him by Cummings. This transaction is denied by Combs. It is claimed that the money was paid in accordance with Combs' instructions to Cummings, and that there were some delays on the part of Cummings in turning the money over to Combs for a few days; that in the meantime Combs had incurred some expense in the way of having a transcript of the judgment properly entered in the superior court, and that he refused ⁶⁹² to accept said money until such extra expenses, amounting to a few dollars, had been paid; that Cummings refused to pay said extra expenses, and that Combs then proceeded with the sale of the land. The answer also alleged fraud on the part of Combs and the appellants

herein in the transfer of the title to the lots in question; denied that the appellant was an innocent purchaser; and upon these issues the cause went to trial, the jury finding in favor of the defendants. The court entered a judgment canceling the deeds upon which plaintiffs relied, and quieting defendants' title. From this judgment, this appeal is taken.

The assignments are that the court erred (1) in permitting the judgment to be attacked collaterally in this proceeding; (2) in refusing to give an instructed verdict for the plaintiffs; and (3) in allowing certain evidence to be admitted, which it is claimed is prejudicial to the jury in rendering a fair and impartial verdict. As to the first assignment, we do not think the cases cited by appellants reach the particular case under consideration. There is no attempt here to question the regularity of any of the proceedings leading up to the judgment, or to question or attack the judgment itself. The contentions which are vital to the case are over matters arising subsequently to the rendition of the judgment, viz., that the judgment has been paid; and if that contention be true, the judgment thereafter, under all authority, ceased to be operative, and it follows that no sales based upon it could confer title. Nor was this lack of jurisdiction to sell cured by the confirmation of sale. A sale on a void judgment is not one of the irregularities contemplated by the statute. In *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264, it was held that a mortgage foreclosure sale of land, situated in a county other than the one in which the sale was had, was not cured by confirmation, the court saying: "Under the express provision of our statute and numerous decisions of this court, irregularities in the manner of conducting sales are the only defects cured by confirmation. We ⁶⁹⁸ hold, therefore, that the sale was utterly void in its inception, and remains so notwithstanding the direction in the decree of foreclosure and the order of confirmation."

As to the form of the action, while denominated by the appellants an action in ejectment, it is in reality an action brought under section 785 et seq., Remington and Ballinger's Code. Section 785 provides that any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, and section 793 provides that the plaintiff in such action shall set forth in his complaint the nature of his estate, claim or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail. In this case the plaintiffs

brought their action in the superior court, and, in accordance with the direction of the statute, set forth that they were owners of, and entitled to the possession of, the land, and the defendants' answer denied the allegations of ownership and alleged ownership in them. The case was then ready for trial on the issues made by the pleadings. The question for determination under the express terms of the statute was, who had the superior title, whether legal or equitable. It would be out of harmony with the spirit of the code and the decisions of this court to compel the defendants to first institute a direct proceeding to cancel the judgment before they would be allowed to answer the plaintiffs' complaint. This is the construction placed upon this statute in *Povah v. Lee*, 29 Wash. 108, 69 Pac. 639, though the decision in that case was hampered by the previous decision of this court in *Spithill v. Jones*, 3 Wash. 290, 28 Pac. 531, which case, however, has since been overruled in *Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483, where the broad rule was announced that, no matter what the form of action might be, the court would give the relief which the facts stated and proved showed the party entitled to.

On the merits of the case, the verdict of the jury leaves ~~604~~ little to be said. The jury found by general verdict that the plaintiffs were not entitled to the possession of the property described in the complaint, and by special verdict as follows: "We, the jury in the above-entitled cause, do find that James G. Combs did appoint John B. Cummings as agent for the purpose of collecting a judgment in favor of Combs in the action of *Ball v. Combs and wife* in Justice Carroll's court."

It is proven conclusively, and is not disputed, that the money was paid by Ball to Cummings for the purpose of satisfying the judgment, and under the finding that Combs had appointed Cummings his agent for the purpose of collecting the judgment, which finding we think was based upon substantial testimony, the defendants' case was successfully proven.

It is earnestly contended by the appellants that the respondents should be estopped from claiming the invalidity of the sale, after having stood by with the knowledge that the title was passing to an innocent purchaser. Under the instructions of the court, which are not assigned as error, the jury must have come to the conclusion that the appellants were not innocent purchasers, and without reviewing the testimony specifically, we think there is sufficient to warrant such conclusion.

No error appearing in the trial of the cause, the judgment is affirmed.

Rudkin, C. J., Crook, Parker and Mount, JJ., concur.

VALIDITY OF SALES UNDER A SATISFIED JUDGMENT.

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I. General View of Subject and Previous Monographic Notes.

The validity of sales under satisfied judgments has long furnished a theme for discussion among lawyers on and off the bench. We have already said in another place (Freeman on Judgments, 4th ed., sec. 480) that while the courts have generally protected all third persons, acting bona fide and without notice on their confidence in judicial records, from all "secret vices and infirmities" in the proceedings of the courts or their officers, this protection has not been extended so as to shield purchasers from the perils of secret satisfactions of judgments. The laws usually, if not universally, provide that the entry of satisfaction may be made on the docket, and that the execution, with a memorandum of the proceedings under it, shall be returned to the court, and thus lead purchasers to expect that if, from an examination of the dockets and papers on file in the case, no release or satisfaction of the judgment is disclosed, that none in fact exists. Principles of public policy are said to require that bidders at judicial sales shall have confidence in the titles there to be acquired; and that in order to create such confidence, they should not be prejudiced by any defect not known to them, nor discoverable by examining the record. Therefore it seems that good faith toward purchasers, as well as the principles of public policy, recognized and enforced for the benefit of the whole community, demands that purchasers and other third persons, acting in good faith, should not be injured through secret releases, in order to preserve the interests of those persons whose negligence in not making those releases apparent on the record produced the mistake of fact under which the purchaser acted. This law of good faith underlies the whole proceeding, and Mr. Freeman goes on to say: "Nevertheless, we have the authority of many cases showing that a sale or other proceeding under a satisfied judgment is void under all circumstances": *Wood v. Colvin*, 2 Hill, 566, 38 Am. Dec. 598; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Murrell v. Roberts*, 33 N. C. 424, 53 Am. Dec. 419.

In *Craft v. Merrill*, 14 N. Y. 456, the reasoning on which these and other like cases was based was thus stated: "The judgment was the sole foundation of the sheriff's power to sell and convey the premises, and if the judgment was paid when he undertook to sell and convey, his power was at an end, and all his acts were without authority and void. The purchaser under a power is chargeable with notice, if the power does not exist, and purchases at his peril." Mr. Freeman points out that there are "a few authorities tending to establish the proposition that a sale under a judgment satisfied in fact, but not of record, is valid if made to a stranger to the execution having no notice, actual or constructive, of its satisfaction." Satisfied judgments have been dealt with in this series in the note to *Trapnall v. Richardson*, 58 Am. Dec. 350, satisfaction of judgments and executions by levy on real or personal property, and in the notes to *Jones v. Burr*, 53 Am. Dec. 701, vacating satisfaction of judgments when title of purchaser at execution fails, and *Sturdivant v. Ward*, 134 Am. St. Rep. 35, on the same subject, and much information parallel to that which is contained herein will be found, that in the last note mentioned bringing the cases up to nearly the present date.

The early decisions on the validity of a sale under a satisfied judgment were based, not on the power of the vendor, but on the notice or lack of notice of the purchaser. Where the judgment was satisfied of record, the purchaser had at least constructive notice of the satisfaction and took no title, but where the satisfaction did not appear of record it was generally held that the purchaser took a good title unless he had actual notice that the judgment under which the sale was held had been satisfied: *Boren v. McGehee*, 6 Port. 432, 31 Am. Dec. 695; *Reynolds v. Ingersoll*, 11 Smedes & M. 249, 49 Am. Dec. 57; *Reed v. Austin's Heirs*, 9 Mo. 722, 45 Am. Dec. 336; *Nichols v. Dissler*, 31 N. J. L. 461, 86 Am. Dec. 219; *Van Campen v. Snyder*, 3 How. (Miss.) 66, 32 Am. Dec. 311; *Hoffman v. Strohecker*, 7 Watts, 86, 32 Am. Dec. 740.

This manner of adjudging the validity of a sale from the viewpoint of the purchaser was inherently fallacious and no longer prevails. We now look to the existence of the debt as the sole basis on which the power to sell depends. The doctrine of caveat emptor is applied to the purchaser in all its rigor, for he who buys from one acting under a power does so at his peril, and takes nothing if the power does not exist: *Schobee v. Dedman*, 2 Litt. 116; *Hammatt v. Wyman*, 9 Mass. 138; *King v. Goodwin*, 16 Mass. 63; *Laval v. Rowley*, 17 Ind. 36; *State v. Salyers*, 19 Ind. 432; *McClure v. Logan*, 59 Mo. 234; *Carpenter v. Stillwell*, 11 N. Y. 61; *Craft v. Merrill*, 14 N. Y. 456; *Neilson v. Neilson*, 5 Barb. 565; *Swan v. Saddlemire*, 8 Wend. 676; *Wood v. Calvin*, 2 Hill, 566, 38 Am. Dec. 598; *Jackson v. Morse*, 18 Johns. 441, 9 Am. Dec. 225; *Finley v. Gaut*, 8 Baxt. 148.

Defects in this power are not cured by confirmation of the sale, as the court, in confirming a sale, adjudicates only the proceedings of the sheriff or other officer in conducting such sale: *Capital Bank v. Huntoon*, 35 Kan. 577, 11 Pac. 369; *Short v. Short*, 2 Penne. (Del.) 62, 45 Atl. 541; *McLiesh v. Ball*, 58 Wash. 690, ante, p. 1087, 109 Pac. 209.

II. Under a Judgment Satisfied of Record.

a. **When Completely Satisfied.**—When a judgment has been actually and completely satisfied by payment of the original debt to—

gether with the costs which are incidental to and a part of the judgment, and such satisfaction has been duly recorded, all has been done that is called for by the judgment. Its power is thus wholly destroyed, and a subsequent sale thereunder is obviously and unquestionably void.

In *Boos v. Morgan*, 130 Ind. 305, 30 Am. St. Rep. 237, 30 N. E. 141, one Lucas had been the owner of several parcels of land, all of which were subject to the lien of a judgment held by one Hendricks. Lucas sold one parcel of the land to Morgan, and later Morgan took an assignment of the judgment from Hendricks. Morgan then levied upon his own property, sold it by execution, bought it in himself, and satisfied the judgment of record, all by virtue of his assignment from Hendricks. After the satisfaction of the judgment Lucas sold another parcel of the land to Boos. Morgan considered himself as having become subrogated to Hendricks' rights by the assignment of the judgment, disregarding the extinction of those rights by the satisfaction of the judgment under the former execution sale. Accordingly he secured the issuance of another execution under the same judgment, and by means of it sold the land which Boos had acquired from Lucas. In passing upon the validity of this sale, the court said: "In our judgment, Morgan had no right to disregard the first sale at his own pleasure, and make a second one after having the judgment entered satisfied. If a stranger had bought the property, we think it quite clear that Morgan could not, by his own act, have treated the sale as a nullity. The sale was complete, the receipt of Morgan to the sheriff for the price of the property was as effective as payment in actual money would have been, for it is settled that where a judgment creditor buys at his own sale, his entry of satisfaction of the judgment is equivalent to payment in money, inasmuch as there is no reason for going through the empty form and idle ceremony of handing the money over to the sheriff and then receiving it back from him. It is also well settled that a sale upon a satisfied judgment is void."

b. When Costs, Properly Taxable as a Part of the Judgment, have not Been Paid.—While the clerk's fees, accruing through the trial of a case, are properly chargeable as a part of the judgment, still the clerk cannot enforce them by execution, or defeat the satisfaction of a judgment in order to secure them. He must look for his fees solely to the plaintiff or his attorney. And although his fees have not been paid when a judgment is satisfied of record, a subsequent sale under the judgment for the purpose of collecting the fees is void.

This doctrine is plainly laid down in *Snipes v. Beezley*, 5 Or. 420, where, after satisfaction of the judgment had been put on record, the respondent filed an additional cost bill in the same cause, and the clerk, without any authority of law, undertook to enter a judgment in the lien docket against the appellant for the amount of the additional bill and to issue an execution thereon. The court held that, the costs being only an incident of the judgment, when the judgment itself was paid and satisfied, there was no authority for the issuance of a subsequent execution thereon. And, while the clerk still had recourse for his fees against the respondent, the satisfaction of the judgment operated to estop the respondent from making further demands based on the same cause of action. In *Wills v. Chandler*, 1 McCrary, 276, 2 Fed. 273, the validity of the sheriff's sale was attacked on the

ground that the judgment was satisfied by the plaintiff, and therefore the sale was void. The facts were very similar to the case last above mentioned. After the judgment was rendered, he under whom the plaintiff claimed became the owner of the land and paid to the attorney for the judgment plaintiff the amount thereof except the clerk's costs, and a receipt in full was given. When the clerk failed to get his fees, he caused an execution to issue and sold the land to defendant, and the court, in the action to quiet title, held that the judgment was satisfied by the judgment plaintiff's receipt through his attorney for the money and the sale was consequently void.

III. Under a Judgment Satisfied, but not Satisfied of Record.

a. By Payment of the Judgment.

1. **To the Judgment Creditor.**—This is the most direct and obvious way of discharging the obligation and thereby satisfying the judgment. That the payment has not been made a matter of public record through a formal satisfaction entered upon the judgment-roll is immaterial. The decision of the court of appeals of New York in *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627, states the law clearly and emphatically. In this case it had been agreed between the judgment creditor and a subsequent mortgagee that the mortgage should take precedence over the judgment as a lien upon the property by which both were secured. The agreement, though in writing, was not made a matter of public record in any way. Some time afterward an execution was issued on the judgment, and the land was sold to a purchaser who had no notice of the agreement giving priority to the mortgage. It was held, nevertheless, that the property was still subject to the lien of the mortgage by virtue of the agreement between the mortgagee and the judgment creditor. In so deciding the court said: "The docket of a judgment is not for the protection of purchasers under the judgment. It is for the benefit of the judgment creditor and the protection of purchasers from the judgment debtor. The sole purpose of an execution is to enforce a judgment for just what is due, and no more. An execution and the sheriff are instrumentalities provided by law, by which a judgment creditor enforces his judgment, and the sheriff can give no better title or greater right by a sale on an execution than the judgment creditor could give, if he were allowed to seize property and sell by virtue of his judgment without an execution. If the judgment is void or has been paid, the purchaser takes nothing. The rule of caveat emptor applies to every purchaser at a sheriff's sale, of either real or personal property, by virtue of an execution. He buys at his peril, and if by any valid agreement the judgment has lost its apparent position as a lien upon real estate, his lien under his purchase is just that which the judgment creditor had. It is true that thus purchasers at sheriffs' sales may sometimes be misled, but the courts have ample power usually in such cases to relieve them." This doctrine has been recognized as the foundation for the application of the principle: *Knight v. Morrison*, 79 Ga. 55, 11 Am. St. Rep. 405, 3 S. E. 689; *Soukup v. Union Inv. Co.*, 84 Iowa, 448, 35 Am. St. Rep. 317, 51 N. W. 167; *Shaffer v. McCrackin*, 90 Iowa, 578, 48 Am. St. Rep. 465, 58 N. W. 910; *Drefahl v. Tuttle*, 42 Iowa, 177; *Shelly v. Lash*, 14 Minn. 498; *Durette v. Briggs*, 47 Mo. 356; *Durfee v. Moran*, 57 Mo. 374; *McClure v. Logan*,

59 Mo. 234; Pope v. Benster, 42 Neb. 304, 47 Am. St. Rep. 703, 60 N. W. 561; Swan v. Saddlemire, 8 Wend. 676; Lewis v. Palmer, 6 Wend. 367; Wood v. Colvin, 2 Hill, 566, 38 Am. Dec. 598; Carnes v. Platt, 59 N. Y. 405; Murrell v. Roberts, 33 N. C. 424, 53 Am. Dec. 419; Hunter v. Stevenson, 1 Hill (S. C.), 415; Terry v. O'Neal, 71 Tex. 592, 9 S. W. 673; Hardin v. Clark, 1 Tex. Civ. App. 565, 21 S. W. 977; O'Brien v. Allen, 42 Wash. 393, 85 Pac. 8.

And it is held that when a sale under an execution has been regularly held, and thereafter and prior to the confirmation of the sale the judgment debt is paid, the court will order the sale set aside: *Fiedelvey v. Diserens*, 26 Ohio St. 312.

The action of the court in this regard is analogous to the holding where an appeal has been perfected after sale and before confirmation, and, indeed, harks back to the basic theory that the purpose of an execution and a sale thereunder is to collect the debt, and not to dispose of the property. In *Reed v. Radigan*, 42 Ohio St. 292, where, after sale on execution under a judgment but before confirmation, the judgment debtor paid the debt in full, the court said: "If the order of confirmation is a part of the proceedings to enforce a judgment, and a proceeding which suspends the operation of a judgment (viz., an appeal, as per cases there cited) will defeat the confirmation of a sale made under it, it is difficult to see why payment and satisfaction in full, which actually extinguishes the judgment, should be less operative to defeat a confirmation of the sale made under it."

2. **To the Judgment Creditor's Attorney.**—Since payment to the judgment creditor will void a subsequent sale under execution on the judgment, it follows naturally that payment to any duly authorized agent of the judgment creditor, as to his attorney, will have a similar effect. Such is the holding of the court in *McLiesh v. Ball*, 58 Wash. 690, ante, p. 1087, 109 Pac. 209. As the supreme court of Kentucky said, in a recent case: "The lawyer represented his client. What he did was the act of his client. When he accepted the deposit in the bank, and agreed to stop the sale, the judgment was satisfied. In *Freeman on Executions*, section 442, the rule is thus stated: 'As writs of execution exist only for the purpose of enforcing judgments, it is evident that, whenever a judgment is by any means satisfied, the writ which is issued for its enforcement must also be treated as satisfied. . . . The first question in regard to payment made by or for the defendant is this: To whom may the payment be made? The answer is that it may be to the plaintiff, or to one of several plaintiffs, or to the officer holding the writ, or to the plaintiff's attorney, except where the defendant knows that the attorney has no authority to receive it, or to a *prochein ami*, or to the attorney of such *prochein ami*'": *Davis v. Gott*, 130 Ky. 486, 113 S. W. 826. Payment to the judgment creditor's attorney has been similarly sustained in *Haden v. Walker*, 5 Ala. 86; *Miller v. Scott*, 21 Ark. 396; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Mourain v. Beauvais*, 10 La. 477; *Rogers v. McKenzie*, 81 N. C. 164; *Wilkinson v. Holloway* (Va.), 7 Leigh, 277; *Yoakum v. Tilden*, 3 W. Va. 167, 100 Am. Dec. 738; *Harper v. Harvey*, 4 W. Va. 539.

It should be noted in this connection that the law is different in England, for there an attorney's authority, and consequently his agency, terminate with the entry of judgment, and so a subsequent

payment to him will not operate to satisfy the judgment: *Lovegood v. White*, L. R. 6 Com. P. 440; *Butler v. Knight*, L. R. 2 Ex. 109.

3. **To the Sheriff.**—As the judgment creditor's attorney is authorized by him to receive payment in satisfaction of a judgment, so the sheriff of the court in which the judgment lies and from which execution has issued is authorized by virtue of his office to receive payment with the same effect. And such payment will void any subsequent sale under the execution, although the sheriff may have applied the money received by him upon the wrong judgment, or even embezzled it.

In *Murrell v. Roberts*, 33 N. C. 424, 53 Am. Dec. 419, the court said: "Payment to the sheriff discharges the execution. If the sheriff have a ca. sa., and after payment by the debtor, within his knowledge, he, the sheriff, arrest him, it is undoubtedly false imprisonment. It must also be illegal to act on a fl. fa. after satisfaction to the sheriff, and he is a trespasser if he seize goods afterward: *Lefans v. Moregreen*, 1 Keb. 655. As was said in the case cited at the bar, the execution became thereby *functus officio*: *Hammatt v. Wyman*, 9 Mass. 138. It follows that a subsequent sale under it is void, and it was so held in that action, which was trespass by the purchaser at that sale, for a second taking of the goods, upon another execution against the same defendant. If it were not so, the sheriff might, upon another execution for a trifling sum, ruin any person, since he might raise the money over and over again by sale after sale. For there is no difference between satisfaction by a payment by the debtor in money and one by the sale of his property. After satisfaction to the sheriff in either way, he cannot lawfully seize and sell property, more than he could without having had an execution at all."

That the sheriff after satisfaction cannot lawfully levy execution is now established law: *Planters' Bank v. Spencer* (Miss.), 3 Smedes & M. 305; *Banks v. Evans*, 10 Smedes & M. 35, 48 Am. Dec. 734; *Reynolds v. Ingersoll*, 11 Smedes & M. 249, 49 Am. Dec. 57; *O'Neill v. Lusk*, 1 Bail. 220.

4. **To Other Officials.**—Of course, where the clerk of the court in which the judgment is entered has authority by virtue of his position to receive payment in satisfaction of judgments, payment to him effects a complete discharge of the debt, and will void a subsequent sale under the judgment so satisfied: *Freeman on Judgments*, sec. 462. And payment to any official authorized by law to receive such payment will be of the same effect. For instance, a tax on the land of a nonresident had been duly paid, but the collector, having failed to enter the payment on his tax-book, sued, taking judgment by default. After the judgment had been entered, but before the execution had been issued, the owner produced the receipt of the collector, who then entered the fact of payment on his tax-book only. Subsequently execution issued, under which the land was sold. An action in ejectment was brought by the original owner, and it was held that the sale was void, and that the purchaser had taken no title: *Huber v. Pickler*, 94 Mo. 382, 7 S. W. 427.

b. By Operation of Law.

1. **Through Bankruptcy.**—Where the judgment debtor is discharged in bankruptcy subsequent to the entry of judgment and prior to the

issuance of execution, such discharge operates as a satisfaction of the judgment, and will void a subsequent sale.

On this subject the supreme court of Pennsylvania says in *Curtis v. Slosson*, 6 Pa. 265: "The judgment was entered in 1840, and opened in 1842, to let the defendant into proof of certain specific facts sworn to in his affidavit of defense. He filed his petition in 1843, was discharged as a bankrupt in 1844, and obtained his certificate in 1845. All these matters were posterior to the signing of the judgment, and could not be set up at the trial of the defense in 1845, not only for that reason, but because they were no part of the issues, the proceeding not being *de novo*. The judgment, nevertheless, was discharged by the defendants' bankruptcy, the effect of which was not waived by the retraction of his plea, because he was not at liberty to plead any fact that was not stated in his affidavit, and because he could not have sustained it by proof, as his certificate would have shown it to be subsequent to the judgment. As the writ of *audita querela* is not in use with us, what could he do? Certainly, no more than wait till he should be molested by having his subsequently acquired property seized in execution. That event soon occurred; and as the conclusiveness of the certificate of bankruptcy superseded the necessity of a trial by jury, the court very properly relieved him summarily, by quashing the execution."

2. Through the Payment of the Other Judgment Where There are Two on the Same Cause of Action.—Where there are two judgments resting upon the same cause of action, the payment of one will operate as a satisfaction of the other, and a sale by virtue of the latter will be void.

In *Craft v. Merrill*, 14 N. Y. 456, the judgment debtor gave a note, signed by himself and another as surety, as a collateral security for the payment of the judgment. It was not paid at maturity, and the plaintiff's attorneys had execution issued on the judgment. They also sued and secured judgment on the note and by execution received payment of the same. After this satisfaction of the second judgment property belonging to the judgment debtor was taken and sold by virtue of the execution which had been issued earlier upon the original judgment. In deciding such sale to be invalid, the court said: "I am of the opinion that this action may be maintained by the plaintiff against the defendants, if the sheriff's deed, under which they claim, was void. This depends upon the question whether the judgment, on which the execution in the sheriff's hands was issued, was paid at the time of the sale by the sheriff. The judgment was the sole foundation of the sheriff's power to sell and convey the premises, and if the judgment was paid when he undertook to sell and convey, his power was at an end, and all his acts were without authority and void. The purchaser under a power is chargeable with notice, if the power does not exist, and purchases at his peril. . . . The note which was taken as collateral security to the judgment was for the full amount of the judgment, damages and costs, and, of course, is to be presumed to have included the usual prospective costs of the attorney. This note was prosecuted to judgment, and the judgment upon it collected by execution before the sheriff's sale under which the defendants claim. Nothing can be clearer, I apprehend, than that this operated as a payment and satisfaction of the principal debt, both in fact and in law, in whatever form it existed."

3. Through an Appeal Which Voids the Judgment Under Which the Sale is Made.—Where a judgment has been appealed from and a supersedeas bond has been given, or where the appeal itself acts as a supersedeas, the judgment so appealed from will not support a sale on execution: *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Levi v. Karrick*, 15 Iowa, 444; *Campbell v. Howard*, 5 Mass. 376; *Keyser v. Farr*, 105 U. S. 265, 26 L. ed. 1025; *Rulo v. Murphy* (Ky.), 51 S. W. 312; *Chesapeake Bank v. McClellan*, 1 Md. Ch. 328.

This rule is plainly stated in *Bullard v. McArdle*, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193, where the court says: "Even though there was a judgment in existence at the time the writ of execution was issued, yet, if it has been vacated or satisfied before any sale is made under the execution, the power to make the sale has also been destroyed; and it is immaterial whether the judgment was directly satisfied or vacated, as by payment, or an order of court, or indirectly, as by granting a new trial in the action, or by an appeal whose effect is to prevent its execution."

c. By Payment of a Note Given for the Judgment.—While the giving of a note for a judgment does not operate as a satisfaction of the judgment, the payment of such note does, and a subsequent sale based on a judgment so paid is void: *Craft v. Merrill*, 14 N. Y. 456.

IV. Where the Sale More Than Satisfies the Judgment.

This situation arises where a judgment has been partially satisfied, and thereafter an execution is issued for the full amount, making no allowance for credits, or where, by error or otherwise, the execution is issued originally for a larger amount than the judgment calls for. A sale under an execution faulty in this respect is not void, for it is not a departure from the power conferred by the judgment. It is merely an error in the proceedings of the sheriff, and accordingly is voidable only, either by objection to confirmation of the sale, or in a direct proceeding by the parties to the action. It cannot be attacked collaterally, or by strangers to the original action. In *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404, the plaintiff claimed title founded upon a sale under an execution to which neither he nor the defendant was a party. It was objected by the defendant that the sale was void on the ground that the execution under which the sale was had was for an amount in excess of the judgment on which it purported to be founded. The court said, after reviewing the authorities, that the cases "all proceed upon the theory that, in respect to mere variances between the judgment and the execution, the latter is amendable, and is, therefore, not void, but voidable only. That executions which are merely voidable cannot be attacked collaterally admits of no debate, where, as in this state, the common law controls the question. A collateral attack can no more be made upon an erroneous execution than upon an erroneous judgment. Like an erroneous judgment, an erroneous execution is valid until set aside upon a direct proceeding brought for that purpose; and until set aside, all acts which have been done under it are also valid. In a collateral action it cannot be brought in question, even by a party to it, much less, as in this case, by a stranger to it. Even directly it cannot be attacked by a stranger, for it does not lie in the mouth of A

to say by it B has been made to pay too much money, and that therefore all proceedings under it are null and void. That is a question which concerns B only, and if he is content A cannot complain." We find the same rule laid down and consistently followed in: *McCollum v. Halbert*, 13 Ala. 282, 48 Am. Dec. 56; *Cunningham v. Felker*, 26 Iowa, 117; *Brace v. Shaw*, 16 B. Mon. 43; *Smith v. Keene*, 26 Me. 411; *Miles v. Knott's Lessee*, 12 Gill & J. 442; *Morse v. Dewey*, 3 N. H. 535; *Avery v. Bowman*, 40 N. H. 453, 77 Am. Dec. 728; *Bachelder v. Chaves*, 5 N. M. 562, 25 Pac. 783; *Jackson v. Pratt*, 10 John. 381; *Jackson v. Walker*, 4 Wend. 462; *Jackson v. Page*, 4 Wend. 585; *Parmlee v. Hitchcock*, 12 Wend. 96; *Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 11; *Stevenson v. Castle*, 1 Chit. 349; *King v. Harrison*, 15 East, 615; *Morriss v. Leake*, 8 Term Rep. 416, note a.

V. Under a Satisfied Judgment, for Interest on the Judgment.

While interest on judgments has been well-nigh universally allowed, it is deemed rather a freshly accruing right on the part of the judgment creditor against the judgment debtor, than an integral part of the judgment itself. For that reason the courts generally hold void a sale for interest on the judgment after the entire judgment proper has been paid: *French v. Eaton*, 15 N. H. 337; *Hodgdon v. Hodgdon*, 2 N. H. 169; *Fake v. Eddy's Exr.*, 15 Wend. 76; *Lansing v. Rattoone*, 6 Johns. 43; *Watson v. Fuller*, 6 Johns. (N. Y.) 283.

In *Watson v. Fuller*, 6 Johns. 283, an execution was issued for interest on a judgment which, by payment from time to time, had been fully satisfied. In granting a motion to set aside the execution Chief Justice Kent said: "It is an abuse of the process of the court to make use of the execution to enforce the payment of interest accruing subsequent to the judgment. This is acting without authority. The execution must follow the judgment, and can only be commensurate with it. To levy interest, in the given case, is to levy more under the judgment than it authorizes."

VI. Under a Satisfied Judgment, for Sheriff's Fees on the Execution.

A sale for sheriff's fees on the execution is doubly hopeless. Like interest on the judgment the sheriff's fees have accrued subsequent to the entry of judgment, and like the clerk of the court the sheriff is not a party to the action. His sole recourse is to the plaintiff or the plaintiff's attorney, and a sale for his fees after the judgment is satisfied is void: *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457; *Ex parte Hampton*, 2 G. Greene, 137; *Craft v. Merrill*, 14 N. Y. 456; *Jackson v. Anderson*, 4 Wend. 474; *Wills v. Chandler*, 1 McCrary, 276, 2 Fed. 273.

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torney who testifies as a witness from participating in the argument of the case, if he is also represented by another attorney who has ample opportunity to prepare and make argument, and counsel are advised of the rule. (Cal.) Estate of Gird, 131.

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8. **ATTORNEY—Dismissal of Action by Client.**—Plaintiff in an action may, without the consent of his attorney, dismiss his action by proceeding in the manner pointed out by section 4195, Revised Laws of 1905. (Minn.) Gibson v. Nelson, 549.

9. **ATTORNEY—Notice of Limits on Authority.**—Plaintiff dismissed the action referred to in the second paragraph hereof, but the settlement of the action as therein mentioned was made before the dismissal was completed. Held, that the rules of law applicable to principal and agent control the relation between attorney and client, and persons dealing with the attorney are bound to take notice of the extent of his authority, and of his lack of authority to compromise the action. (Minn.) Gibson v. Nelson, 549.

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10. **ATTORNEY—Agreement and Lien for Compensation.**—An agreement between attorney and client in a personal injury case that the former shall have one-half of the amount of any judgment recovered or settlement obtained, and shall have a lien thereon, is valid and operates as an assignment to the attorney of any judgment or settlement obtained, to the extent of the lien. (Mich.) Grand Rapids etc. Co. v. Cheboygan Circuit Judge, 495.

11. **ATTORNEY—Agreement and Lien for Compensation.**—The plaintiff in a personal injury case can give the defendant no valid discharge of his claim to the prejudice of the lien of his attorney, if the defendant has notice of the lien. (Mich.) Grand Rapids etc. Co. v. Cheboygan Circuit Judge, 495.

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3. **AUTOMOBILE—Defective Highway — Unregistered Machine.**—Persons riding in an automobile which is not registered as required by law, though they are ignorant of that fact, have no action against the city for injuries received through defects in the highway. (Mass.) *Feeley v. City of Melrose*, 445.

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2. **BANKING** — Directing Payment of Check Through Certain Bank.—Where a check was drawn on a bank located in another town than that in which the drawer resided, and immediately following the direction to the drawee bank, which was in the lower left-hand corner of the check, there were stamped, at the time when the check was drawn, the words, "Payable through [a named bank in another city of the same state] at current rate," this was a material part of the direction; and the drawee bank was not required to pay the check when not presented through the bank thus named, but directly by a third bank. (Ga.) *Farmers' Bank of Nashville v. Johnson & King Co.*, 242.

3. **BANKING** — Check Payable Through Certain Bank—Protest.—Under such circumstances, if the third bank, which held the check, presented it to the drawee bank, and the latter indorsed on it the statement that it would be paid when presented through the named bank, this did not authorize the bank holding the check to have it protested. (Ga.) *Farmers' Bank of Nashville v. Johnson & King Co.*, 242.

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1. **ILLEGITIMATES—Adoption by Father—Sufficiency of Evidence.**—In determining the sufficiency of the evidence to sustain findings that a father adopted his illegitimate children under section 230 of the Civil Code, the supreme court will not apply a different rule than in other cases. (Cal.) Estate of Gird, 131.

2, 3. **ILLEGITIMATES—Adoption by Father—Treating as Legitimate.**—Under section 230 of the Civil Code, providing that "the father of an illegitimate child . . . otherwise treating it as if it were a legitimate child thereby adopts it," the criterion referred to is the treatment usually accorded to legitimate children. (Cal.) Estate of Gird, 131.

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5. **ILLEGITIMATES—Adoption by Father—Reception into Family.**—When a man has a home of which he is the head and in which he lives with a woman and others, he has a family within the meaning of section 230 of the Civil Code, into which he may receive an illegitimate child by her. (Cal.) Estate of Gird, 131.

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7. **ILLEGITIMATES—Adoption—Reception into Family.**—The brothers and sisters of a man who have never lived with him in the state constitute no part of his family within the meaning of section 230 of the Civil Code. (Cal.) Estate of Gird, 131.

8. **ILLEGITIMATES—Adoption by Father.—An Instruction,** on the issue of the adoption by a father of his illegitimate child, which is argumentative in stating in effect that mothers of nameless children will not hesitate at fraud or perjury, and which also informs the jury that to hold that there has been an adoption would require "liberality of construction destructive of language of the statute itself," is properly refused. (Cal.) Estate of Gird, 131.

9. **ILLEGITIMATES—Adoption—Reception into Family.**—An instruction to the effect that the father of illegitimate children does not receive them into his family unless he acknowledges his paternity to every relative, friend and acquaintance who visits his house after their birth, is properly refused. (Cal.) Estate of Gird, 131.

10. **ILLEGITIMATES—Adoption by Father.—The Existence of a Family** into which the father of an illegitimate can receive the child is essential to an adoption under section 230 of the Civil Code. (Cal.) Estate of Gird, 131.

Proof of Paternity.

10a. **ILLEGITIMATES—Proof of Paternity—Mother as Witness.**—Where both the trial judge and the jury conclude that the mother of an illegitimate child was, as a witness, entitled to full credit on the question of its paternity, their conclusion is not open to review by an appellate court. (Cal.) Estate of Gird, 131.

11. ILLEGITIMATES—Proof of Paternity—Testimony of Mother. Nonaccess by the husband being proved to a reasonable certainty, the positive testimony of the wife that another man is the father of her children is competent evidence and a sufficient basis for findings on the question of paternity. (Cal.) Estate of Gird, 131.

12. ILLEGITIMATES—Proof of Paternity—Mother as Witness.—Where a mother has testified as to the paternity of her illegitimate children, the effect of an attempted impeachment of her testimony, by showing inconsistent statements and conduct, is for the trial court. (Cal.) Estate of Gird, 131.

13. ILLEGITIMATES—Proof of Paternity—Mother as Witness.—Where a mother of illegitimate children has testified as to their paternity, evidence tending to show her unchaste conduct with other men is allowable only in so far as it tends to show that another may be the father of the children, and hence it must be directed to about the question of paternity. (Cal.) Estate of Gird, 131.

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BILLS AND NOTES.

1. JOINT NOTE.—Parol Evidence is not Admissible in favor of a joint and several maker of a note to show an understanding at the time he signed it that he was to be liable for only one-half the amount thereof. (S. C.) Parker v. Mayes, 912.

2. BILLS AND NOTES—Liability for Wrongful Protest.—For the holder of a check to unlawfully cause a protest of it to be made, and notice to be given to the drawer and indorsers, without proper presentation for payment, according to its terms, furnishes a cause of action to the drawer. (Ga.) Farmers' Bank of Nashville v. Johnson, 242.

3. BILLS AND NOTES—Parting With Value by Vendor of Chattel.—Where a seller of an automobile keeps it under control by putting it in the hands of one of his employes as driver until he can ascertain whether a certificate of deposit received in payment is good, he does not part with value for the instrument, and cannot recover thereon. (Mich.) American Trust and Sav. Bank v. Moore, 518.

4. BILLS AND NOTES—Warranty—Holder Without Notice.—Purchasers for value before maturity of a promissory note are not affected by a warranty, of which they have no notice, in the sale of a chattel for which the note was given. (Ky.) Deavenport v. Green River Deposit Bank, 386.

5. BILLS AND NOTES—Effect of Purchase by Joint Maker.—Although a joint maker of a note cannot purchase it, and an assign-

ment to him will not pass title but only the right to contribution for its payment, courts will, in his suit upon the note, allow him to amend in such a manner as to enforce contribution. (Ky.) *Deavenport v. Green River Deposit Bank*, 386.

6. BILLS AND NOTES—Bona Fide Holder—Duty to Make Inquiry.—A purchaser of negotiable paper must exercise reasonable prudence and caution in taking it; and if he takes it without making inquiry, when the circumstances are such as would excite the suspicion of a prudent and careful man, he will not stand in the position of a bona fide holder. (Vt.) *Pierson v. Huntington*, 1029.

7. BILLS AND NOTES—Bona Fide Holder—Burden of Proof.—The production of a negotiable instrument, properly indorsed, is prima facie evidence of the holder's right to recover against the maker. But the maker may compel the holder to support his prima facie case with further evidence, by showing a defense that would have been available against the payee. (Vt.) *Pierson v. Huntington*, 1029.

8. BILLS AND NOTES—Bona Fide Holder—Fraud and Failure of Consideration.—Where the consideration of a note fails and the note is transferred in fraud of the maker, the transferee, in order to maintain an action on the note against the maker, must offer some evidence tending to show that he purchased it in good faith as well as for a valuable consideration. And to establish his good faith, he must show the circumstances connected with his procurement of the note, and what he paid for it. Evidence that he took the note for value before maturity does not meet the requirement. (Vt.) *Pierson v. Huntington*, 1029.

9. BILLS AND NOTES.—A Finding That the Purchaser of a Note Received it without notice of a defense available to the maker against the payee is not equivalent to a finding that he acted in good faith. (Vt.) *Pierson v. Huntington*, 1029.

10. BILLS AND NOTES—Bona Fide Purchaser—Inquiry.—In an action on a note by an indorsee who has the burden of proof to show good faith, the fact that there is no evidence tending to show that he made inquiry justifies an affirmative finding that he made none. (Vt.) *Pierson v. Huntington*, 1029.

See Partnership, 2-5.

BONDS.

See Costs; Municipal Corporations, 1, 2; Replevin, 3-9.

BOUNDARIES.

1. BOUNDARIES.—Variations in the Description in a subsequent deed from the original description, such as a change from "northeasterly to northwesterly," may be immaterial. (Vt.) *Sowles v. Minot*, 1010.

2. BOUNDARIES.—The Expression "Southerly or South," used in fixing a definite course so many degrees west, must be read south, unless the course is controlled by an ascertained monument. (Vt.) *Sowles v. Minot*, 1010.

3. BOUNDARIES.—A Line Called in a Grant Fifty Feet More or Less must be taken to be of the length stated, unless the distance is controlled by other calls. (Vt.) *Sowles v. Minot*, 1010.

4. BOUNDARIES.—A Court is not Justified in Disregarding the direction of the starting point as given in a deed without some definite information concerning the location. (Vt.) *Sowles v. Minot*, 1010.

See Adverse Possession, 6.

BROKERS.

1. BROKERS—Sale of Bonds—Waiver of Notice.—Where brokers undertake to sell bonds on commission within a stated time after receiving notice of their deposit, the notice is for the benefit of both parties and may be waived by the principal. (Wash.) *Church v. Wilkeson-Tripp Co.*, 1059.

2. BROKERS—Breach of Contract by Principal—Damages.—Where the promoters of a mining corporation employ a broker to sell its bonds, and he, obtaining a purchaser, demands that they perfect their title to the property intended to secure the bonds and deliver them, which they fail to do, he may rescind the contract and sue for damages. (Wash.) *Church v. Wilkeson-Tripp Co.*, 1059.

3. BROKERS—Breach of Contract by Principal—Expenses.—Where brokers contract to sell bonds on a commission which shall include all expenses incurred by them, they are not, in a suit to recover all the commissions they would have earned had the principal not breached the contract, entitled to reimbursements for expenses. (Wash.) *Church v. Wilkeson-Tripp Co.*, 1059.

4. BROKERS—Breach of Contract by Principal—Evidence.—Where the promoters of a mining corporation employ a broker to sell on commission its bonds secured by coal lands which it intends to acquire, but which it does not acquire, escrow deeds showing the consideration to be paid for the lands are not admissible in evidence in an action by the broker against the principals for their breach of the contract, the deeds not having been delivered and there being no issue as to the title. (Wash.) *Church v. Wilkeson-Tripp Co.*, 1059.

5. BROKERS—Breach of Contract—Loss of Profits.—A broker employed to sell bonds on commission is entitled to recover profits actually lost as his damages for a breach of the contract by the principal. But as a condition precedent to a recovery of contemplated profits, it should appear that the loss was reasonably certain, not a fictitious or imaginary one. That fact being established, the damages are to be ascertained by the jury, although not always susceptible of precise measurement. (Wash.) *Church v. Wilkeson-Tripp Co.*, 1059.

6. BROKERS—Damages for Loss of Profits—Opinion Evidence.—In an action by a broker to recover commissions which he would have earned in selling bonds had his principals not broken their contract with him, the opinion of a witness that the broker could have sold all of the bonds contemplated by the agreement is not admissible. It is for the jury to arrive at a conclusion as to the probable results of the broker's efforts. (Wash.) *Church v. Wilkeson-Tripp Co.*, 1059.

7. BROKERS—Loss of Profits—Evidence.—In an action by a broker, who was employed to sell bonds on commission, to recover damages for breach of the contract by his principals, much liberality in the admission of evidence tending to show profits lost should be permitted. (Wash.) *Church v. Wilkeson-Tripp Co.*, 1059.

CANCELLATION OF DEED.

1. CANCELLATION—Deed Obtained by Fraud from Co-owner.—Where land is jointly owned by two persons, and one obtains a deed from the other of his interest by means of an intentionally false and fraudulent promise to sell the land at its true value and pay off an encumbrance and account for the balance, or, failing to find a purchaser, he will procure a new loan to discharge the present encumbrance, and, having thus obtained the title, he retains, uses and claims the property as absolutely his own, the whole transaction by which ownership is obtained is such a fraud as will entitle the grantor to have the deed canceled. (Ga.) *Jones v. McElroy*, 276.

2. CANCELLATION—Deed Obtained by Fraud from Co-owner.—In such a case equity affords relief, not because of the mere breach of the verbal promise, but because of the fraud of the grantee in procuring an absolute deed to be made to him upon his false and fraudulent representation and promise that he will use the title for the grantor's benefit. (Ga.) *Jones v. McElroy*, 276.

CAR-COUPLES.

See Railroads, 2, 3.

CARRIERS.

Of Passengers.

1. STREET RAILWAY—Passenger Boarding Car on Wrong Side. Where a woman attempts to board a car on the wrong side where the door is closed, and the conductor sees her standing on the steps and knows her purpose, the railway company owes her the duty of exercising reasonable care until at least an opportunity is given in which she may safely step down. (Mass.) *Yancey v. Boston Elevated Ry.*, 431.

2. STREET RAILWAY—Passenger Boarding Car on Wrong Side. Where a conductor starts a car, knowing that a woman is standing on the steps trying to gain entrance on the wrong side where the door is closed, and she is thrown to the ground, it is a question for the jury whether the conductor is so negligent as to make the railway company liable. (Mass.) *Yancey v. Boston Elevated Ry.*, 431.

3. STREET RAILWAY—Passenger Boarding Car on Wrong Side. A woman, not accustomed to traveling on street-cars is not careless as a matter of law in trying to gain entrance to a car on the wrong side where the door is closed, and the car stationary. (Mass.) *Yancey v. Boston Elevated Ry.*, 431.

4. STREET RAILWAY—Passenger Boarding Car on Wrong Side. For a conductor deliberately and without warning to start a car at a speed which may compel a crippled woman, who is standing on the steps and trying to gain entrance to the wrong side of the car where the door is closed, to fall to the ground, may be found by the jury to be such a disregard of the consequences which reasonably should be anticipated as to amount to willful misconduct. (Mass.) *Yancey v. Boston Elevated Ry.*, 431.

5. CARRIER—Passenger Alighting from Moving Car.—It is not negligence, as a matter of law, for a woman in the dark, encumbered with bundles, to step off an electric car in motion. (Ala.) *Birmingham Ry. etc. Co. v. Girod*, 17.

6. CARRIER—Passenger Alighting Before Stopping Place.—A carrier is not relieved from liability to a passenger alighting while the car is in motion, because the crew did not know that she intended to alight before reaching the usual stopping place. (Ala.) *Birmingham Ry. etc. Co. v. Girod*, 17.

7. CARRIER—Negligence in Riding on Platform.—In an action by a passenger for injuries sustained while alighting from an electric car, a plea that she was guilty of contributory negligence proximately contributing to her injuries, in that she rode on the platform in violation of a rule of the carrier published in the car in such a way that she could have seen it, is insufficient, in that it does not show that she had notice of the rule nor allege causal connection between its violation and the injury. (Ala.) *Birmingham Ry. etc. Co. v. Girod*, 17.

8. CARRIER.—A Passenger Riding on the Platform of an electric car, with packages in her hand, and not holding or supporting herself

with either hand, is not negligent as a matter of law. (Ala.) Birmingham Ry. etc. Co. v. Girod, 17.

9. **CARRIER—Passengers Riding on Top of Car.**—Passengers on a free train who, with the acquiescence of the conductor, and because the train is crowded, ride on top of the cars, take the risk of that mode of travel, and have no cause of action if thrown from the cars by a jerk which is not of such a character as to show want of care in managing the train. (Ky.) Patterson v. Louisville etc. R. R. Co., 405.

10. **CARRIER—Putting off Passenger at Wrong Station.**—Where the employes of the Pullman company by mistake put a passenger off at the wrong station, and there is evidence tending to show a willful failure to stop the train and allow her to get on again after the discovery of the mistake, the question of punitive damages against the railroad company is for the jury. (S. C.) Campbell v. Seaboard Air Line Ry., 824.

11. **CARRIER—Notice to Passenger of Arrival at Station.**—One of the duties embraced in a contract of carriage is to give the passenger reasonable notice of arrival at his destination. Where he takes a Pullman berth, the railroad company, in relying on the conductor and porter of the sleeping-car to give such notice, adopts them as its agents and is liable for their default. (S. C.) Campbell v. Seaboard Air Line Ry., 824.

12. **CARRIER—Contract of Passenger With Sleeping-car Company.** A railroad company is not relieved of any of the duties which it owes to a passenger by reason of his making a separate contract with a sleeping-car company for special accommodations. The sleeping-car company may, by its contract, impose upon itself some of the obligations that the railroad company undertakes in its contract of carriage, but that does not release the railroad company. The only effect of the contract is to give the passenger the benefit of the care and protection of both companies. (S. C.) Campbell v. Seaboard Air Line Ry., 824.

13. **CARRIER.—A Passenger by Going into a Pullman Car and taking a berth does not release the railroad company from any of its duties as a carrier.** (S. C.) Campbell v. Seaboard Air Line Ry., 824.

14. **CARRIER—Liability for Acts of Pullman Employes.**—With respect to those matters embraced in a contract of carriage, which the railroad company depends upon the employes of a Pullman company to perform, the employes are agents of the railroad company. (S. C.) Campbell v. Seaboard Air Line Ry., 824.

15. **CARRIER—Liability for Acts of Pullman Porter.**—A railroad company is liable for the act of the porter on a Pullman car in awakening a passenger and putting her off at the wrong station. (S. C.) Campbell v. Seaboard Air Line Ry., 824.

16. **CARRIER—Ejection of Passenger—Res Judicata.**—Where a passenger is ejected from a train because he fails to produce a ticket or pay fare, but re-enters the train and continues his journey after a friend, whom he subsequently reimburses, pays the fare, a judgment in his favor, in an action to recover from the carrier the amount so paid, is not, in his subsequent action in trespass for being ejected from the train, conclusive that he was rightly on the train and is entitled to recover damages. (Vt.) Wells v. Boston & Maine R. R., 987.

17. **CARRIER—Ejection of Passenger—Evidence.**—In an action against a carrier for wrongfully ejecting a passenger on his failure to produce a ticket, evidence that one not called as a witness was in the car and told the conductor that he saw the former conductor take up the ticket, is not admissible either as part of the res gestae or as

bearing on the question of exemplary damages. (Vt.) *Wells v. Boston & Maine R. R.*, 987.

18. **CARRIER—Damages for Ejecting Passenger.**—In an action against a carrier for wrongfully ejecting a passenger, such special damages may be shown as are the natural and proximate, not the necessary, consequences of the act complained of. (Vt.) *Wells v. Boston & Maine R. R.*, 987.

19. **CARRIER—Damages for Ejecting Passenger.**—In an action against a carrier for damages in wrongfully ejecting a passenger from a train, his loss of profits which he might have made in carrying out a lumber contract that he abandoned because partly disabled by his injuries, but which is not the natural and proximate result of the ejection, does not constitute an element of recoverable damages. (Vt.) *Wells v. Boston & Maine R. R.*, 987.

20. **CARRIER—Ejection of Passenger—Exemplary Damages.**—In an action against a carrier for wrongfully ejecting a passenger, an instruction that if the jury find the plaintiff is entitled to recover and that the act of putting him off the car was willful and malicious, they may add exemplary damages, is erroneous in permitting such damages without regard to whether the carrier was guilty of the wrong committed by its servant. by directing, participating in, or subsequently approving it. (Vt.) *Wells v. Boston & Maine R. R.*, 987.

21. **CARRIER—Action for Assault in Ejecting Passenger.**—In trespass against a carrier for assault and battery in ejecting a passenger from a train, it is necessary for the plaintiff, in making his opening, to prove not only the assault and battery, but also such facts as in law make the defendant responsible therefor. (Vt.) *Wells v. Boston & Maine R. R.*, 987.

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23. **CARRIER—Action for Assault in Ejecting Passenger.**—The order in which the plaintiff introduces his evidence in trespass against a carrier for ejecting him from the train is within the discretion of the court. (Vt.) *Wells v. Boston & Maine R. R.*, 987.

Of Livestock.

24. **CARRIER OF LIVESTOCK—Merger of Contract in Bill of Lading.**—All previous contracts between a shipper of livestock and the carrier are merged in the contract evidenced by the bill of lading. (Ark.) *St. Louis etc. Ry. Co. v. Jones*, 99.

25. **CARRIER OF LIVESTOCK—Release of Accrued Damages.**—A bill of lading limiting a carrier's liability does not have the effect of releasing his liability for damages already accrued, if there is no separate consideration therefor. (Ark.) *St. Louis etc. Ry. Co. v. Jones*, 99.

26. **CARRIER OF LIVESTOCK—Time for Transportation.**—Although a bill of lading does not stipulate that cattle are to be transported within any specified time, or delivered at any particular hour, the carrier is nevertheless bound to transport them within a reasonable time. (Ark.) *St. Louis etc. Ry. Co. v. Jones*, 99.

27. **CARRIER OF LIVESTOCK—Liability Before Loading.**—A stipulation in a bill of lading that the carrier shall not be liable for the animals while they are in the pen and before they are loaded on cars does not change the duty of the carrier to furnish cars for their

transportation within a reasonable time. (Ark.) St. Louis etc. Ry. Co. v. Jones, 99.

28. CARRIER OF LIVESTOCK—Liability While Animals Unloaded.—To avail itself of a stipulation in a bill of lading that the shipper of livestock shall load and unload the animals at his own risk, and feed, water and attend them at his own expense and risk, the carrier must show that injury to the animals while unloaded is not caused by its negligence. (S. C.) Gilliland v. Southern Ry., 861.

29. CARRIER OF LIVESTOCK—Liability While Animals Unloaded.—Where a bill of lading provides that the shipper of livestock shall load and unload the animals at his own risk, and feed, water and attend them at his own expense and risk, but he does not attend the animals, and the carrier unloads them for feed and water at a place where they are exposed to cold and storm to their injury, it is liable for the injuries which such negligence causes. (S. C.) Gilliland v. Southern Ry., 861.

30. CARRIER OF LIVESTOCK—Unloading Animals.—Under the Federal statutes, if an interstate carrier of livestock unloads the animals for food and water in the cold and storm without shelter or protection, it is liable for resulting injuries to them, although the bill of lading stipulates that the shipper shall load and unload the animals at his own risk, and feed, water and attend them at his own expense and risk, and he fails to attend them. (S. C.) Gilliland v. Southern Ry., 861.

31. CARRIER OF LIVESTOCK—Waiver of Notice of Damage.—Where a shipper of livestock telephones to the carrier's agent that the animals have been injured, and is told in reply to get a veterinary surgeon, have them examined, and the carrier will settle the bill, this is evidence to go to the jury of a waiver of stipulations in the bill of lading that notice of injury shall be given in writing before the stock is unloaded and mingled with other animals. (S. C.) Gilliland v. Southern Ry., 861.

32. CARRIER OF LIVESTOCK—Contract to Pay for Lost Cattle. Where a bill of lading stipulates that the shipper of livestock assumes the risk and care of the animals until they are loaded on cars, and they escape from a pen while awaiting shipment, and some of them are never recovered, an agreement by the railway agent that the carrier will pay for the lost animals if the shipper will ship such as he can find is without consideration, and not binding on his principal. (Ark.) St. Louis etc. Ry. Co. v. Jones, 99.

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Of Goods.

36. **CARRIER—Damage to Goods—Presumption.**—Where a carrier received a consignment of goods in good order, but delivered it in bad order, a presumption arises that it was damaged in the hands of the carrier. (S. C.) *Kelly v. Southern Railway*, 842.

37. **CARRIER—Damages for Delay—Loss of Profits.**—In an action for damages on account of delay by a common carrier in delivering goods, it was error to admit evidence of the profit which the plaintiff would have made by selling such goods if he had received them promptly, after proof only of the shipment and the delay in delivery. (Ga.) *Southern Express Co. v. Hanaw*, 227.

38. **CARRIER—Measure of Damages for Delay in Delivery.**—The general rule is that the measure of damages for unreasonable delay by a common carrier in delivering goods is the difference between their market value when they should have been delivered and their market value when they were delivered, with interest from the former date, less the freight, if unpaid. (Ga.) *Southern Express Co. v. Hanaw*, 227.

39. **CARRIER—Damages for Delay—Special Expense.**—No special expense was shown to have been incurred by the shipper or consignee on account of the delay. (Ga.) *Southern Express Co. v. Hanaw*, 227.

40. **CARRIER—Delay in Delivery—Remedy of Consignee.**—Delay in the delivery of goods by a common carrier will not authorize the consignee to reject them upon their arrival and recover their full value from the carrier. His remedy is to sue for the damages he has sustained by reason of the delay. (Ga.) *Southern Express Co. v. Hanaw*, 227.

41. **CARRIER—Filing Claim—Burden of Proof.**—The burden of proof is on the carrier to show that a claim for damages to a consignment of goods was not filed within the time limited by the bill of lading. (S. C.) *Kelly v. Southern Ry.*, 842.

42. **CARRIER—Waiver of Notice of Damages.**—A stipulation in a bill of lading limiting the time for filing a claim for damages does not apply where the injury to the goods is examined by the carrier's agent for the purpose of ascertaining its extent. (S. C.) *Kelly v. Southern Ry.*, 842.

43. **CARRIER—Waiver of Notice of Damages.**—A stipulation in a bill of lading limiting the time for filing a claim for damages is waived where the carrier's agent, after examination and ascertainment of the injury, directs the disposition of the goods or promises to adjust the claim. (S. C.) *Kelly v. Southern Ry.*, 842.

Conflict of Laws.

See ante, 34, 35; post, 51–54.

44. **CARRIER—Contract of Shipment—Conflict of Laws.**—If goods are shipped in one state on a through contract, to be transported by a common carrier and delivered in another (omitting any question of public policy), the general rule is, that, in the absence of anything to show a contrary intent, the validity, form and effect of the contract of shipment will be determined by the laws of the state where the contract was made and partly to be performed. (Ga.) *Southern Express Co. v. Hanaw*, 227.

45. **CARRIER—Contract of Shipment—Conflict of Laws.**—If goods are shipped for transportation by connecting common carriers from New York to a point in this state, and suit is here brought for damages arising from delay in delivering them by the final carrier after arrival, whether or not the delivery and taking of the shipping receipt constituted a contract by the shipper with the initial carrier

will be determined by the laws of New York, if they be shown. (Ga.) *Southern Express Co. v. Hanaw*, 227.

Limitation of Liability.

See ante, 33.

46. **CARRIER—Contract Against Liability for Negligence.**—Common carriers cannot contract for exemption from liability from losses occurring through their negligence. (Ark.) *St. Louis etc. Ry. Co. v. Jones*, 99.

47. **CARRIER—Limitation of Liability—Value of Goods.**—A stipulation in a bill of lading that the amount of loss or damage for which the carrier shall be liable shall be computed at the value of the property at the time and place of shipment, must be construed to mean the value when received by the carrier, including freight paid. (S. C.) *Kelly v. Southern Ry.*, 842.

48. **CARRIER—Receipt Limiting Liability for Goods.**—The mere insertion, in a printed form of receipt used by an express company, of terms limiting its liability, and the delivery of such a receipt to a shipper, without more, will not in this state suffice to make an express contract for the purpose of limiting its liability as a common carrier. (Ga.) *Southern Express Co. v. Hanaw*, 227.

49. **CARRIER—Limitation of Liability—Value of Goods.**—Where no value is put upon goods shipped by an express company, and no effort is made to arrive at a valuation, the mere fact that in the prepared form of receipt used by the company and issued to the shipper there is contained a statement that "the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein," will not suffice to limit the liability of the company to fifty dollars, regardless of the value of the property shipped. Such a statement in the receipt is not a valuation, but an arbitrary limitation sought to be placed upon the extent of the liability of the common carrier. (Ga.) *Southern Express Co. v. Hanaw*, 227.

50. **CARRIER—Limitation of Liability—Value of Goods.**—While a bona fide agreement may be made as to the value of property to be transported, as a basis for fixing the charges, and may be valid, yet a common carrier cannot, even by express contract, put an arbitrary limitation upon its liability for damages arising from negligence of its agents. Such a contract is contrary to public policy. (Ga.) *Southern Express Co. v. Hanaw*, 227.

51. **CARRIER—Limitation of Liability—Interstate Commerce Law.** If the point were distinctly made for decision, it would seem that the federal interstate commerce law could not be held to render valid an arbitrary limitation upon the liability of a common carrier for damages arising from negligence of its servants, stated in a shipping receipt given when the shipment commenced, so as to be binding in the state where the goods were to be delivered, and where suit was brought, although contrary to public policy and void according to the laws of such state. (Ga.) *Southern Express Co. v. Hanaw*, 227.

52. **CARRIER—Limitation of Liability—Conflict of Laws.**—In so far as stipulations of such contract (if it be such) limit the common-law liability of the carrier as an insurer, or for losses occurring by unavoidable accident, they will be enforced by the courts of this state; but in such a case, it being contrary to the public policy of this state to allow a common carrier, even by express contract, to make an arbitrary limitation upon its liability for negligence of its

agents or servants, stipulations to that effect will not be enforced. (Ga.) *Southern Express Co. v. Hanaw*, 227.

53. CARRIER—Limitation of Liability—Conflict of Laws.—The mere fact that an express company to which is delivered goods for shipment gives to the shipper a receipt which contains a stipulation that, in the absence of valuation, the company's liability shall be limited to a certain amount, and the taking of such a receipt by the shipper, without more, does not constitute a fraud on his part which will relieve the carrier from liability for damages. (Ga.) *Southern Express Co. v. Hanaw*, 227.

54. CARRIER—Contract of Shipment—Foreign Laws.—Where a party seeks to rely on the law of another state as furnishing the basis for a right of recovery or defense different from what it would be under the laws of this state, or the common law, the law of such foreign state should be pleaded and proved. (Ga.) *Southern Express Co. v. Hanaw*, 227.

See Railroads; Street Railways.

CHATTEL MORTGAGE.

In General.

1. CHATTEL MORTGAGE—Affidavit Required by Statute.—Under a statute requiring that a chattel mortgage, in the absence of change of possession, must be filed, and that, before filing, an affidavit must be annexed to it setting forth that the mortgage is given in good faith and for adequate consideration, a mortgage is not entitled to record, and if recorded is not notice, if the notary does not fill out or sign the blank jurat, although the mortgagor may have sworn to and signed the affidavit. (Mich.) *People v. Burns*, 466.

2. CHATTEL MORTGAGE.—The Title of the Mortgagee of chattels, after condition broken, is not absolute in the strict legal sense of that term. (S. C.) *Wilkes v. Southern Ry.*, 890.

3. CHATTEL MORTGAGE—Actual Notice to Creditors.—As to subsequent purchasers and mortgagees notice of a chattel mortgage is equivalent to filing, but to a creditor actual notice of the existence of a mortgage does not appear to be sufficient. (Mich.) *People v. Burns*, 466.

Recording and Change of Possession.

4. CHATTEL MORTGAGE—Recording or Change of Possession.—Under the Michigan statute nothing short of a change of possession or a filing for record as prescribed by statute can save a chattel mortgage, as against creditors of the mortgagor. As to them his good faith, in the absence of a compliance with the statutes, is immaterial. (Mich.) *People v. Burns*, 466.

5. CHATTEL MORTGAGE — Recording — Creditors Affected.—A statute providing that a chattel mortgage is invalid as against creditors, if not put on file when the goods remain in the mortgagor's possession, applies to persons who become creditors during the interval while the mortgage is not on file, and not merely to those who have obtained judgment or levied attachment before the filing. (Mich.) *People v. Burns*, 466.

Actions by Mortgagor or Mortgagee.

6. CHATTEL MORTGAGE — Action by Mortgagor.—The mortgagor of a chattel may, after condition broken, maintain an action against a third person for negligent injury to it. (S. C.) *Wilkes v. Southern Ry.*, 890.

7. CHATTEL MORTGAGE—Actions by Mortgagor or Mortgagee. The right of the mortgagee of a chattel, after condition broken, is

superior to that of the mortgagor. Hence the pendency of an action by the mortgagee against a third person in respect to the property is a good plea in abatement to an action by the mortgagor, and a judgment in an action by the mortgagee is a good plea in bar of an action by the mortgagor. (S. C.) *Wilkes v. Southern Ry.*, 890.

8. CHATTEL MORTGAGE—Actions by Mortgagor or Mortgagee. After condition broken, a chattel mortgagee may bring an action himself against a third person in respect to the property, or the mortgagor may bring it by the consent, express or implied, of the mortgagee, or against his consent after demand and his refusal to bring it. (S. C.) *Wilkes v. Southern Ry.*, 890.

Mortgage of Crops.

9. MORTGAGE OF CROPS—Sufficiency of Description.—A mortgage containing a description of the property mortgaged in the following language: "Our crop planted this year, and on which said fertilizer is used," is not void for uncertainty in the description of the property upon which a lien is created. (Ga.) *Duke v. Neisler*, 250.

10. MORTGAGE OF CHATTELS—Enforcement Against Property of Husband.—Where a mortgage *fi. fa.*, issued upon the foreclosure of a chattel mortgage, is being enforced by a levy upon property of a husband, as appears from statements in the affidavits of illegality filed by the husband and by the wife, the question as to whether the wife signed the mortgage note as principal or as surety is not material, inasmuch as the mortgage, if valid in other respects, is being enforced solely against the property of the husband. (Ga.) *Duke v. Neisler*, 250.

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CHECKS.

See Banks and Banking; Lost Instruments.

CIVIL DEATH.

See Convicts.

CLOUD ON TITLE.

See Quieting Title.

COMITY.

COMITY.—How Far Foreign Laws Should be Enforced under the doctrine of comity depends upon whether any wrong or injury will be done to citizens of the domestic state, whether the policies of its laws will be contravened or impaired, or whether the courts can do complete justice to those affected by the decree. (Ill.) *Edwards v. Schillinger*, 308.

COMMERCE.

1. INTERSTATE COMMERCE—Authority of States and of Congress.—The authority of Congress to regulate interstate commerce is exclusive, and no state, except in the exercise of the police power for the security of the lives, health and comfort of persons and the protection of property, can make any law or regulation which will affect the free and unrestrained intercourse and trade between the states as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states coming or brought within its jurisdiction. (Ill.) *Lehigh Portland Cement Co. v. McLean*, 322.

2. INTERSTATE COMMERCE—Corporations.—The Right of Free and unrestrained intercourse between the states is not confined to natural persons, but extends to corporations. (Ill.) *Lehigh Portland Cement Co. v. McLean*, 322.

3. CONSTITUTIONAL LAW—Interstate Commerce—Police Power.—The regulation of commerce among the states is within the exclusive jurisdiction of Congress, but a state statute, enacted in the exercise of its police power, not regulating or directly affecting interstate commerce or in conflict with federal regulations, but merely regulative of the instrumentalities of commerce, is not void. And when such state regulations do conflict with federal regulations, they are not void on the ground that the state has exercised a power exclusively in Congress, but because the constitution and the laws of the

United States made in pursuance thereof are the supreme law of the land. (Ohio St.) *Detroit etc. Ry. Co. v. State*, 758.

See Corporations, 32, 33; Railroads, 2, 3.

COMMISSION FORM OF GOVERNMENT.

See Constitutional Law, 9-11.

COMPROMISE.

See Attorney and Client, 5-7.

CONFESSIONS.

See Criminal Law, 4.

CONFLICT OF LAWS.

See Carriers, 34, 35; Insurance, 2; Telegraph and Telephones, 7, 8, 31, 32.

CONSTITUTIONAL LAW.

In General.

1. **CONSTITUTIONAL LAW.**—There is No Public Policy which prohibits the legislature from doing anything which the constitution does not prohibit. (Ky.) *Flowers v. Logan County*, 347.

2. **CONSTITUTIONAL LAW.**—Upon Questions of Due Process the decisions of the supreme court of the United States are conclusive. (Ala.) *Hudson v. Wright*, 55.

3. **CONSTITUTIONAL QUESTION.**—When will not be Decided.—Generally a court will not pass upon a constitutional question and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. (S. C.) *Ross v. Lipscomb*, 794.

4. **CONSTITUTIONAL LAW.**—Who cannot Question Statute.—A party invoking the provisions of a statute is not in a position to raise the question of its constitutionality. (S. C.) *Ross v. Lipscomb*, 794.

5. **CONSTITUTIONAL QUESTION.**—Waiver by Delay in Raising. The right of a defendant to raise a constitutional or federal question is waived if, his motion to quash the return of service being overruled, he makes no attempt to exercise his right until the next term and after judgment by default has been taken. (Mo.) *Kahn v. Mercantile Town Mut. Ins. Co.*, 665.

Retrospective Statute.

6. **CONSTITUTIONAL LAW.**—A Statute is Retrospective in its legal sense which creates a new obligation on transactions or considerations already past, or destroys or impairs vested rights. A statute does not operate retrospectively because it relates to antecedent facts, but if it is intended to affect transactions which occurred or rights which accrued before it became operative as such, and ascribe to them essentially different effects, in view of the law at the time of their occurrence, it is retroactive in character. (Ga.) *Ross v. Lettice*, 281.

7. **CONSTITUTIONAL LAW.**—Retrospective Statute.—A statute which creates a liability against a county for services rendered by an attorney, when no such liability existed at the time they were rendered, is retrospective and opposed to the constitution. (Ga.) *Ross v. Lettice*, 281.

8. **CONSTITUTIONAL LAW.**—Retrospective Statute.—An act of the General Assembly which creates a new obligation and imposes a new duty in respect to transactions or considerations already past

is retroactive in character, and in violation of article 1, section 3, paragraph 2, of the constitution (Civil Code, section 5730), which forbids the General Assembly to pass a retroactive law. (Ga.) *Ross v. Lettice*, 281.

Municipal Plans Commission.

9. CONSTITUTIONAL LAW—Municipal Plans Commission.—An amendment to a city charter providing for a “municipal plans commission” does not violate the constitutional guaranty of local self-government, in that the members of some of the organizations permitted to nominate the commissioners are nonresidents, the commissioners themselves being residents of the city, holding by appointment, not by election, having no legislative powers delegated to them, and constituting an advisory body only, whose proposed plans are subject to final vote by the people. (Wash.) *Bussell v. Gill*, 1070.

10. CONSTITUTIONAL LAW—Municipal Plans Commission.—An amendment to a city charter providing for a “municipal plans commission,” the commissioners themselves being residents of the city, but being nominated by organizations some of whose members are nonresidents, is not invalid because it confers authority upon the commissioners to approve vouchers for all expenditures incurred, and requires the controller to issue warrants upon the city treasury for the amount of such vouchers to be paid out of the municipal plans commission fund. (Wash.) *Bussell v. Gill*, 1070.

11. CONSTITUTIONAL LAW—Municipal Plans Commission.—An amendment to a city charter providing for a municipal plans commission, the members of which are to be appointed by fourteen enumerated organizations, does not offend the constitutional provision that no law shall grant special privileges to any citizen or class of citizens. (Wash.) *Bussell v. Gill*, 1070.

See Commerce; Criminal Law, 1; Disorderly House, 6; Food; Jury; Railroads, 2, 3; Statutes; Taxation, 2-7; Vagrancy.

CONSULS.

See Executors and Administrators.

CONTEMPT.

1. CONTEMPT—Newspaper Publication Scandalizing Court.—It is a contempt at common law to scandalize a court of record by a newspaper publication in respect of its decision in a case no longer pending. (Vt.) *State v. Hildreth*, 1022.

2. CONTEMPT—Statute Changing Common Law.—A statutory provision that a person who defames a court of justice, or a sentence or proceeding thereof, or defames the magistrate, judge, or justice of such court as to an act or sentence therein passed, shall be fined not more than so much, does not change the common law of the subject. (Vt.) *State v. Hildreth*, 1022.

See Divorce, 3.

CONTRACTS.

In General.

1. MARRIAGE—How Far a Valuable Consideration.—While marriage is a valuable consideration, it is such in ways differentiated from that valuable consideration which will support a contract, in that ordinarily the word “valuable” signifies that the consideration so described is pecuniary or convertible into money. (Ala.) *Nelson v. Brown*, 61.

2. CONTRACT.—Upon the Death of One of Several Joint Contractors before complete performance, ordinarily the survivors are

bound by the obligations of the contract and entitled to its benefit. (Ill.) *Babcock v. Farwell*, 284.

3. **CONTRACTS.**—Every Contract Embodies the Law Governing such contracts as much as if so stipulated in the contract in express terms. (S. C.) *Owen v. Bankers' Life Ins. Co.*, 845.

Quasi Contracts.

4. **QUASI CONTRACT**—Implied Promise to Return Money.—Where, pending negotiations for the purchase of real estate, the vendee makes a payment on the purchase price to the vendor's agent, who has no authority to accept it, and the negotiations fail before any contract is entered into, and the agent returns part of the money thus paid, the law implies a promise to return the balance, and this obligation is termed a quasi contract. (Mont.) *Schaeffer v. Miller*, 746.

5. **QUASI CONTRACT.**—The Mythical Creation of the Law, called a quasi contract, was adopted for the purpose of enforcing a legal duty by an action in form *ex contractu*, but in reality in the nature of a bill in equity. (Mont.) *Schaeffer v. Miller*, 746.

6. **QUASI CONTRACT.**—It was for the Purpose of Making Applicable the form of action in *assumpsit* that the common law created the fiction of a promise in what is known as a quasi contract. (Mont.) *Schaeffer v. Miller*, 746.

Rescission.

7. **CONTRACT.**—The Right to Rescind must be Exercised in Toto. The contract must stand in all its provisions, or fall altogether. (Ill.) *Babcock v. Farwell*, 284.

8. **CONTRACT—Rescission—Return of Consideration.**—A party to a contract cannot retain the consideration or a part of it, and refuse to be bound by the contract or a part of it. And his inability to restore the consideration will not relieve him from the necessity of so doing, nor is it sufficient to offer to set off the amount against what is claimed from the other party. (Ill.) *Babcock v. Farwell*, 284.

9. **CONTRACT—Rescission—Return of Consideration.**—Whatever may be the relation of the parties, or on whatever party may rest the burden of proof, the right of rescission of a contract can be exercised only upon a return of the consideration, which must be alleged in the bill. (Ill.) *Babcock v. Farwell*, 284.

CONVERSION.

See Chattel Mortgages; Landlord and Tenant, 2-4.

CONVEYANCES.

See Deeds; Vendor and Vendee.

CONVICTS.

Civil Rights—Actions.

1. **CONVICTS—Suspension of Civil Rights.**—The Statutes of Missouri manifest a legislative intent to modify the rigid rules of the common law suspending the civil rights of convicts. (Mo.) *McLaughlin v. McLaughlin*, 680.

2. **CONVICTS—Suit Attacking Estate—Trustee to Defend.**—The Missouri statutes contemplate that when the estate of a person serving a term in the penitentiary is being attacked by suit, the convict should be in court through his trustee before a valid judgment can be entered touching his property. (Mo.) *McLaughlin v. McLaughlin*, 680.

3. CONVICTS—Actions Against at Common Law.—Under the common law a convict in prison could be made a party defendant, but he was deprived of capacity to make a contract or adopt other means of making a defense. (Mo.) *McLaughlin v. McLaughlin*, 680.

Divorce.

4. CONVICTS.—Summons in a Divorce may be Served on a convict in the penitentiary, and no trustee need be appointed for him, if no alimony or sequestration of property is sought. (Mo.) *McLaughlin v. McLaughlin*, 680.

5. CONVICTS—Divorce and Alimony—Appointment of Trustee.—Under the Missouri statutes a judgment, in an action for divorce against a convict in the penitentiary, cannot divest him of his title to land if no trustee is appointed to represent him. (Mo.) *McLaughlin v. McLaughlin*, 680.

CORPORATIONS.

By-laws of Company.

1. CORPORATION.—By-laws of a Corporation, to be Valid, must not contravene the policy defined in the statute of its creation. (Ohio St.) *Nicholson v. Franklin Brewing Co.*, 764.

2. CORPORATION—Authority to Enact By-laws.—When statutes under which corporations are formed authorize them to make by-laws upon specifically named subjects, there is an implied denial of authority to make by-laws upon subjects not named. (Ohio St.) *Nicholson v. Franklin Brewing Co.*, 764.

Stock and Stockholders, in General.

3. CORPORATE STOCK—Issuance as Fully Paid.—The issuance of a certificate of stock, which upon its face does not show that it is not full paid stock, is not a representation by the corporation that it has received the par value of the stock. (Cal.) *Perkins v. Cowles*, 158.

4. CORPORATION—Stockholders' Liability, Contract Limiting.—A contract of a corporation limiting the liability of its stockholders to a portion of the par value of their stock is invalid both as to creditors and the assignee in bankruptcy. (Ill.) *Edwards v. Schillinger*, 308.

5. CORPORATION.—The Relation of a Stockholder Who has not Paid for his stock to the corporation is the ordinary one of debtor. (Ill.) *Edwards v. Schillinger*, 308.

Right to Vote Stock.

6. CORPORATION.—The Test of the Right to Vote as a Stockholder at corporate meetings is ordinarily the ownership of shares, as disclosed by the proper record-books of the corporation. (Cal.) *Royal Consolidated Min. Co. v. Royal Consolidated Mines*, 165.

Transfer of Stock—Liability of Purchaser.

7. CORPORATE STOCK—Negotiability of Certificates.—Certificates of stock are not negotiable instruments. (Cal.) *Perkins v. Cowles*, 158.

8. CORPORATION—Notice of By-laws to Transferee of Stock.—One who acquires the stock of a corporation organized in another state, but having its principal place of business in the state where he resides, is deemed to know all restrictions which the laws of the first state, or by-laws of the corporation not inconsistent with them, impose upon the alienation of stock. (Ohio St.) *Nicholson v. Franklin Brewing Co.*, 764.

9. CORPORATION—Transfer of Stock—Motive of Transferee.—A corporation may not refuse to transfer stock because of the motive which may have prompted the transferee to acquire it. (Ohio St.) *Nicholson v. Franklin Brewing Co.*, 764.

10. CORPORATION—Statute Restricting Transfers of Stock.—A statute which expressly authorizes a corporation formed under it to adopt by-laws regulating the issuance and transference of shares in its capital stock and aiding in the promotion of its business gives validity to a by-law which requires a stockholder who desires to sell and transfer his stock, before doing so, to notify the directors of such desire and to give them a reasonable time to sell the stock to classes of persons designated in the by-laws because of the belief that their occupations would render them efficient promoters of the business of the corporations. (Ohio St.) *Nicholson v. Franklin Brewing Co.*, 764.

11. CORPORATION—Statute Restricting Transfers of Stock.—A suit cannot be maintained against the corporation to compel it to register stock which a holder has attempted to transfer in violation of such by-law. (Ohio St.) *Nicholson v. Franklin Brewing Co.*, 764.

12. CORPORATION.—One Who Purchases Treasury Stock from the agent of the corporation cannot be compelled to receive and retain instead thereof stock that belongs to the agent. (Mass.) *Newhall v. Enterprise Mining Co.*, 461.

13. CORPORATE STOCK—Liability of Purchasers.—A purchaser in good faith of stock from the original subscribers is liable for unpaid subscriptions of which he has no actual notice but which appear from the books of the corporation, although the sellers of the stock (including the president of the corporation acting in their interest and not in its behalf) represent that the stock is fully paid. (Cal.) *Perkins v. Cowles*, 158.

14. CORPORATE STOCK—Liability of Purchasers.—A purchaser of stock from the original subscribers is liable, without an express promise, for the unpaid balance of the subscription price. (Cal.) *Perkins v. Cowles*, 158.

15. CORPORATE STOCK — Liability of Purchasers.—After the original subscribers to stock sell it, and the transfer is entered on the corporate books, the corporation can look only to the purchasers for the unpaid balance of the original subscriptions. (Cal.) *Perkins v. Cowles*, 158.

16. CORPORATE STOCK — Liabilities of Purchaser in Open Market.—A purchaser of certificates of stock in the open market, in good faith and for value, without anything on the face of the certificates indicating that the stock has not been fully paid, does not take them free from liability for unpaid subscriptions, either at the instance of the corporation or its creditors. (Cal.) *Perkins v. Cowles*, 158.

17. CORPORATE STOCK—Liability of Purchasers.—By purchasing stock from the original subscribers and becoming stockholders of record on the books of the company, the transferees assume, as a matter of law, all the liabilities that the transferrers were under, and take the stock subject to all their obligations. (Cal.) *Perkins v. Cowles*, 158.

18. CORPORATION.—The Purchaser of Shares of Stock Acquires no greater rights than his vendor. He holds by the same title and subject to the same liability. (Ill.) *Babcock v. Farwell*, 284.

19. CORPORATION—Balance Due on Stock.—The Liability of an Assignee of stock for the unpaid balance thereon is the same, whether his promise is directly to the corporation or to the assignor of the stock for its benefit. (Ill.) *Edwards v. Schillinger*, 308.

Examination of Books.

20. **CORPORATION—Examination of Books of Foreign Company.** The right of a stockholder to examine the books of his company will be enforced against a foreign corporation, when its usual place of business, and its books and the officer having their custody, are in this state. (Mass.) *Andrews v. Mines Corporation, Limited*, 428.

21. **CORPORATION—Examination of Books.**—Mandamus is a Proper Remedy to enforce the right of a stockholder to examine the books of his corporation. (Mass.) *Andrews v. Mines Corporation, Limited*, 428.

Stockholder's Suit.

22. **CORPORATION.—The Theory of a Stockholder's Suit** is, that he has sustained a wrong through the injurious effect upon his stock of the wrong done to the corporation. If he has himself consented to or participated in the acts constituting such wrong, or has waived his right to object to them, he cannot afterward maintain a bill, on account of such transactions, for the benefit of the corporation or of other stockholders. (Ill.) *Babcock v. Farwell*, 284.

23. **CORPORATION.—Stockholders cannot Ordinarily Maintain a Suit** to enforce any right of the corporation. That privilege belongs to the corporation itself, acting through its directors. And the mere failure of the directors to bring suit does not entitle any stockholder to do so. (Ill.) *Babcock v. Farwell*, 284.

24. **CORPORATION—Stockholder's Suit.**—A Demand upon the Directors to bring suit is, in general, essential before a stockholder may himself maintain a bill to enforce a right of the corporation. His remedy must first be sought within the corporation, and it is only where the majority of the directors are themselves involved in the matters complained of, so that it is evident that the demand would be unavailing, that it can be dispensed with. (Ill.) *Babcock v. Farwell*, 284.

25. **CORPORATION—Suit by Stockholder After Ratifying Acts.**—A stockholder who, for a valuable consideration, settles matters in dispute between himself and the directors, and expressly waives his objections to the transactions between them and the corporation, cannot seek relief against the transactions by bringing suit in his own right or in the right of the corporation or other stockholders. (Ill.) *Babcock v. Farwell*, 284.

26. **CORPORATION—Suit by Stockholder After Ratifying Acts.** A stockholder who has waived his objections to transactions of the directors cannot maintain a suit in his personal capacity to obtain relief therefrom; neither can his executor nor his legatee sue. (Ill.) *Babcock v. Farwell*, 284.

27. **CORPORATION—Suit by Assignee of Stock.**—An assignee of stock cannot maintain a suit in regard to transactions with the corporation done or assented to by his assignor. (Ill.) *Babcock v. Farwell*, 284.

Creditor's Suit.

28. **CORPORATION—Creditor's Suit—Necessity of Call.**—A creditor of an insolvent corporation may proceed in equity against stockholders without a call being made by the corporation or the bankruptcy court. (Ill.) *Edwards v. Schillinger*, 308.

29. **CORPORATION.—A Creditor of a Corporation Seeking Satisfaction** of his debt need look no further than to find a solvent stockholder who is liable for it, and he sustains no relation to the corporation which requires him to adjust equities between stockholders or between the corporation and others. (Ill.) *Edwards v. Schillinger*, 308.

Foreign Corporation—Insolvency.

30. FOREIGN CORPORATION—Insolvency and Dissolution.—The courts of one state have no power to dissolve a foreign corporation and wind up its affairs, but it will retain its legal existence until dissolved by a proceeding in the state which created it. But even in that case, assets which are a trust fund for shareholders and creditors will be administered by the domestic courts where they are found. And it is the duty of a state to keep the legal assets for the satisfaction, in the first instance, of local claims. (Ill.) *Edwards v. Schillinger*, 308.

31. FOREIGN CORPORATION—Jurisdiction of Creditor's Suit.—An Illinois court will assume jurisdiction of a suit by the trustee in bankruptcy of a Missouri corporation against resident stockholders (the nonresident stockholders being insolvent) to set aside a dividend declared in fraud of creditors and applied by stockholders in payment of their subscriptions, and to compel payment of the amount of their subscriptions represented by the fraudulent dividend certificates. (Ill.) *Edwards v. Schillinger*, 308.

Foreign Corporations—Regulation—Actions.

32. FOREIGN CORPORATION—Power to Regulate—Interstate Commerce.—The legislature has power to impose such conditions as it may choose upon foreign corporations for the exercise of powers and privileges within the state, subject to the power of Congress to regulate commerce among the several states. (Ill.) *Lehigh Portland Cement Co. v. McLean*, 322.

33. FOREIGN CORPORATION—Failure to Comply With Law—Interstate Commerce.—A foreign manufacturing corporation selling its products to merchants through salesmen, without maintaining a place of business within the state, is engaged in interstate commerce, and is not within the Illinois statute regulating the admission of foreign corporations to do business in the state. Hence it may sue therein to enforce its contracts, although it has not complied with such statute. (Ill.) *Lehigh Portland Cement Co. v. McLean*, 322.

34. FOREIGN CORPORATIONS.—Corporations may Institute Suits in the courts of other states and countries than those under whose laws they may have been established. (Ill.) *Edwards v. Schillinger*, 308.

35. FOREIGN CORPORATIONS.—Business Corporations may be Sued Wherever they can be served with process in accordance with the local law. (Ill.) *Edwards v. Schillinger*, 308.

36. FOREIGN CORPORATIONS.—A Business Corporation is Constructively present, outside of the state of its origin, wherever it has property and carries on its operations by means of agents. (Ill.) *Edwards v. Schillinger*, 308.

37. FOREIGN CORPORATIONS—Right to Maintain Suit.—A foreign mercantile corporation may bring suits in our courts to collect debts arising from the sale and delivery of goods, though it has no general office in the state nor any agent upon whom process may be served, so that it cannot be sued here. (Ill.) *Edwards v. Schillinger*, 308.

Foreign Corporations—Jurisdiction.

38. FOREIGN CORPORATION—Jurisdiction Over Internal Affairs. The reasons which influence courts of chancery to refuse to interfere in the management of the internal affairs of a foreign corporation are, that the rights arising between a corporation and its members out of such management depend upon the laws of the state under which the corporation is organized; that the courts of that state afford the most appropriate forum for adjudication upon the relation

between the stockholders and the corporation; and that frequently such courts alone possess power adequate to the enforcement of all decrees that justice may require. (Ill.) *Babcock v. Farwell*, 284.

39. FOREIGN CORPORATION—Jurisdiction Over Internal Affairs. It is the inability of the court to do complete justice by its decree, not its incompetency to decide the question involved, that determines the exercise of its power to entertain suits affecting the internal affairs of a foreign corporation. (Ill.) *Babcock v. Farwell*, 284.

40. FOREIGN CORPORATION—Jurisdiction Over Internal Affairs. The general statement that courts will not interfere with the management of the internal affairs of foreign corporations must be construed in connection with the particular facts. The rule rests more on grounds of policy and expediency than on jurisdictional grounds; more on want of power to enforce a decree than on jurisdiction to make it. Where the wrongs complained of are merely against the sovereignty by which the corporation was created or the law of its existence, or are such as require for their redress the exercise of the visitorial powers of the sovereign, or where full jurisdiction of the corporation and of its stockholders is necessary to such redress, the courts will decline jurisdiction. (Ill.) *Babcock v. Farwell*, 284.

41. FOREIGN CORPORATION—Jurisdiction Over Internal Affairs. Acts which affect the relation of stockholders to one another or to the corporation as individual stockholders or as classes of stockholders must be regarded as acts of internal management of the corporation, relief against which must be sought in the courts of the country where the corporation was organized. Where, however, the relief sought is within the general jurisdiction of a court of chancery, where all the parties necessary to the full and proper adjustment of the rights involved are before the court, and where the relief sought does not require the exercise of the visitorial power of the government, the court should exercise the power of determining controversies brought before it instead of remitting suitors to a foreign jurisdiction. (Ill.) *Babcock v. Farwell*, 284.

42. FOREIGN CORPORATION—Jurisdiction Over Internal Affairs. Where minority stockholders in a foreign corporation seek by suit in equity to have restored to the corporation property fraudulently appropriated to their own use by directors who, together with the corporation itself, are personally subject to the jurisdiction of the court, the court should exercise its jurisdiction for the determination of the controversy. (Ill.) *Babcock v. Farwell*, 284.

43. FOREIGN CORPORATION—Jurisdiction.—The Term "Internal Affairs," in the rule that courts will not assume jurisdiction of the internal affairs of foreign corporations, must be confined to relations affecting only the stockholders and the corporation among themselves. (Ill.) *Edwards v. Schillinger*, 308.

44. FOREIGN CORPORATION.—If a Court can Make No Effective Decree, it will not assume jurisdiction of a suit affecting a foreign corporation. (Ill.) *Edwards v. Schillinger*, 308.

45. FOREIGN CORPORATION.—Courts cannot Exercise Visitorial Powers over corporations of other states, such as requiring them to pay such dividends as on an accounting of the affairs of the corporation may appear to be proper, nor to determine whether a stockholder has been wrongfully excluded from his privileges, and matters of that kind. (Ill.) *Edwards v. Schillinger*, 308.

46. FOREIGN CORPORATION.—If a Court has Jurisdiction of the Necessary parties and of the subject matter, and has power to grant an effective remedy, it may assume jurisdiction of a suit involving a foreign corporation, but it will not afford remedies denied the parties in the foreign state which will operate with hardship on citizens of the domestic state. (Ill.) *Edwards v. Schillinger*, 308.

47. FOREIGN CORPORATION—Laws of Foreign State.—A court will not decline to take jurisdiction of a suit affecting a foreign corporation, on the ground that the laws of the foreign state are unknown, when such laws can be pleaded and proved as facts. (Ill.) *Edwards v. Schillinger*, 308.

Foreign Corporation—Service of Process.

48. FOREIGN CORPORATION—Service of Officer Temporarily in State.—If a foreign corporation confines its operations to the state within which it was created, does not transact any business in another state, and has no office or agent located there, jurisdiction cannot be obtained by serving process upon an officer or agent temporarily in the latter state. (Ill.) *Edwards v. Schillinger*, 308.

See Evidence, 4; Process, 11.

COSTS.

1. COSTS—Appeal Bond.—Under the Statute Providing that any receiver, assignee, executor, or other fiduciary may include as part of his lawful expenses a reasonable sum paid for his bond, and that a party entitled to recover costs may include the expense of his bond in the action or proceeding pending, costs are allowable for the premium paid on an appeal bond given by the fiduciary. (Wash.) *Church v. Wilkeson-Tripp Co.*, 1059.

2. APPEAL—Costs on Failure to File Brief.—Where the respondents fail to file any brief after being granted permission, costs will not be allowed to them on affirmance of the judgment. (Wash.) *McCormick v. Sorenson*, 1047.

COTENANCY.

See Parties.

COUNTIES.

1. COUNTY—Estoppel to Recover Money Illegally Expended.—Where the fiscal court of a county and the taxpayers have for many years allowed public money to be expended in an irregular manner, the county is estopped to recover the money from the officer making the expenditure, if he has made it in good faith for an authorized purpose and the county has received the benefit. (Ky.) *Flowers v. Logan County*, 347.

2. COUNTY—Estoppel to Recover Money Illegally Expended.—An officer who has expended county funds for a legal purpose, but in an irregular manner, has the burden, in a suit against him by the county to recover the money, to show a proper application thereof. (Ky.) *Flowers v. Logan County*, 347.

3. COUNTY—Recovery of Funds Expended by Officer.—The fact that a public officer, who has been directed to make repairs on certain roads, in paying the costs thereof uses money appropriated to construct a bridge, does not entitle the county to recover the same from him, if it is a part of the "road and bridge fund" of the county. (Ky.) *Flowers v. Logan County*, 347.

4. COUNTY—Recovery of Compensation Paid Officer.—Where a member of a fiscal court as committeeman has been paid for services ordered by the court and rendered in good faith in maintaining roads, the county cannot recover the money so paid, on the theory that members of the fiscal court cannot be allowed anything for their services except their attendance upon sessions of the court. (Ky.) *Flowers v. Logan County*, 347.

See Estoppel.

COURTS.

See Judges; Justices of Peace.

CREDITOR'S SUIT.

See Corporations, 28, 29.

CRIMINAL LAW.

1. CONSTITUTIONAL LAW—Offense Against Both State and United States.—The same act may constitute an offense equally against the United States and a state, subjecting the guilty party to punishment under the laws of each government. (Ohio St.) *Detroit etc. Co. v. State*, 758.

2. CRIMINAL LAW—Common Law.—If a Statute Fixing a Penalty for an offense does not expressly nor by implication cut off the common-law prosecution or punishment for the same offense, it is taken to intend a cumulative remedy only. (Vt.) *State v. Hildreth*, 1022.

3. CRIMINAL TRIAL—Evidence on Former Trial.—The absence or inaccessibility of a witness, who is not shown to be dead or without the state, does not render admissible the evidence which he gave on a former trial. (Tex. Cr.) *Wyatt v. State*, 926.

4. CRIMINAL LAW—Confessions Voluntarily made while the accused was in jail, or in the jail-yard, are admissible in his trial for murder. (Ark.) *Crosby v. State*, 80.

5. CRIMINAL TRIAL—Allusion by Counsel to Former Conviction.—For the prosecuting attorney to ask the defendant, "Have you not been convicted and given ten years in this case?" is reversible error, although the court promptly stops and reprimands him, and instructs the jury that the question is improper and not to be considered. (Tex. Cr.) *Wyatt v. State*, 926.

CROPS.

See Chattel Mortgages, 9, 10.

DAMAGES.

1. DAMAGES—Penalty or Liquidated Damages.—An agreement between the vendor and vendee of a lot that if the vendee fails to build a specified partition wall, the vendor shall have a lien on the land for a certain sum, provides for liquidated damages, not for a penalty, if the damages from a breach thereof would be uncertain and difficult to prove. (Ark.) *Cox v. Smith*, 89.

2. DAMAGES—Loss of Profits from Breach of Contract.—The usual rule of excluding profits in estimating damages does not apply where the earning of the profits is directly contemplated in the contract which has been breached. (Wash.) *Church v. Wilkeson-Tripp Co.*, 1059.

3. DAMAGES—Loss of Ability to Earn is a factor that enters into an employé's damages for personal injuries. (Vt.) *Lincoln v. Central Vermont Ry. Co.*, 998.

4. DAMAGES—Whether Excessive Because for Full Amount Prayed.—That the verdict of a jury responds fully to the relief asked in the petition is not evidence of passion, prejudice, or a welter of mere sentimental emotion and effervescence. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

5. DAMAGES—Measure of Recovery for Loss of Eye.—A verdict of seven thousand five hundred dollars for the loss of one eye and the impairment of the other is not so excessive as to bespeak passion or prejudice, although the injured man lost little time and at the trial had resumed his work as driver of a laundry wagon at the wages before received. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

6. DAMAGES—Specific Allegations of Injuries.—In an action for personal injuries it is not necessary for the plaintiff to aver in specific terms each injury or pain suffered. The injury, its character and extent, may be sufficiently averred, without detailing or specifying each separately. (Ala.) *Birmingham Ry. etc. Co. v. Girod*, 17.

See Brokers; Death; Husband and Wife; Telegraph and Telephones.

DANCE-HOUSE.

See Disorderly House.

DEATH.

1. DEATH—Survival of Action for Suffering.—An action for causing pain and suffering does not survive to the administrator under Code, sections 2486 and 3912, and counts in a complaint by an administrator which do not aver that the acts or omissions caused the death of his intestate, but that they merely aggravated or intensified his suffering, are subject to demurrer. (Ala.) *Whitmore v. Alabama Consol. Coal etc. Co.*, 31.

2. DEATH—Burden of Proof on Plaintiff to Show Care.—The burden of proof is on the plaintiff in an action for negligent death to show that the deceased was in the exercise of ordinary care at the time he was injured. (Ill.) *Stack v. East St. Louis Ry. Co.*, 318.

3. DEATH—Exercise of Care a Question of Fact.—Whether the deceased was in the exercise of ordinary care at the time of his injury is a question of fact, in an action to recover damages for his death, to be determined by the circumstances attending the event. Whether the evidence tends to prove such care is a question of law, which a court can determine adversely to the plaintiff, only when no other conclusion can reasonably be drawn from uncontradicted facts and from the evidence favorable to the plaintiff. (Ill.) *Stack v. East St. Louis Ry. Co.*, 318.

4. DEATH.—Five Thousand Dollars Damages are not Excessive for the death of an industrious man, with a wife and several minor children, who had a natural expectancy of life for nineteen years and was earning two dollars and twenty-five cents per day. (Minn.) *Peterson v. Merchants' Elevator Co.*, 537.

DECLARATIONS.

See Evidence, 9-12; Homicide, 3.

DEDICATION.

DEDICATION—Absence of Signature of Wife.—A dedication of part of a homestead to the public cannot be implied from a lease thereof, not signed by the wife of the lessor, to a township for municipal purposes, and the subsequent occupancy of the premises for nearly forty years for a town hall. (Mich.) *Township of Jasper v. Martin*, 508.

DEEDS.

In General.

1. DEED—Evidence as to Date of Execution.—When there are no indications of falsity on the face of a deed, the presumption of law is that it was executed upon the day of its date. And while the presumption is controllable by evidence aliunde, the mere suggestion of fraud or falsity does not put upon the party producing the deed the burden of proving that it was actually made upon the day of its date. (Ala.) *Nelson v. Brown*, 61.

2. DEEDS—Reservation of Life Estate.—A deed in the usual form, except that after the description it recites, "this deed is not to

go into effect until after my death," conveys a fee with reservation of a life estate. (S. C.) Merck v. Merck, 815.

3. **VOLUNTARY CONVEYANCE—Confidential Relations.**—The burden of proving the existence of a confidential relation between the parties to a voluntary conveyance rests upon the party who asserts it. (Ala.) Nelson v. Brown, 61.

4. **VOLUNTARY CONVEYANCE—Confidential Relations.**—Although the relation of stepson and stepmother is not one of those technical relations from which trust and confidence are presumed by law to arise, it may in fact be a relation of that character in which he is the dominant party, so that in case of a voluntary conveyance by her to him he will have the burden to show her independence at the time of the transaction. (Ala.) Nelson v. Brown, 61.

5. **DEED—Impeachment of Deed by Parties to It.**—In a case between third persons, a grantor or grantee in a deed, under which one of the parties claims, is a competent witness to impeach it. (S. C.) Merck v. Merck, 815.

6. **DEED—Fraud in Procuring—Estoppel.**—An instruction that if a deed was surreptitiously taken from the grantor, and without his knowledge or consent placed upon record, it was not delivered and therefore is not valid, is erroneous in leaving out of consideration his negligence and consequent estoppel, if such issue is made. (S. C.) Merck v. Merck, 815.

Consideration and Payment.

7. **DEED.**—The Consideration of a Deed is open to investigation. (Mo.) Chambers v. Chambers, 567.

8. **DEED.**—The Fact That No Consideration was Paid for a Deed from a father to his infant child is of no importance in his suit to cancel the deed. (Mo.) Chambers v. Chambers, 567.

9. **DEED.**—The Clause in a Deed Acknowledging Payment of the purchase money is somewhat in the nature of a receipt, and is subject to parol explanation for some purposes. But such explanation, in the absence of fraud or mistake of fact, should not be so pressed as to defeat the operative words of the instrument as a grant. (Md.) Chambers v. Chambers, 567.

Effect of Registry Act.

10. **DEEDS.**—The Effect of the Registry Act is to make the record of a deed take the place of the common-law ceremony of livery of seisin. It is a solemn proclamation to the world, of which the world must take notice, that there has been a transfer of title from the grantor to the grantee, precisely as in olden times there was a symbolical public transfer by delivery of a twig, a clod or a key. (Mo.) Chambers v. Chambers, 567.

Delivery.

11. **DEEDS—Delivery.**—The Fact That a Deed is on Record is prima facie evidence of delivery. (Vt.) Morgan v. Morgan, 1006.

12. **DEEDS—Delivery.**—The Mere Fact That a Deed has Been Recorded, even if done by the grantor's direction, does not of itself constitute a delivery. (Vt.) Morgan v. Morgan, 1006.

13. **DEEDS—Delivery by Recorder to Grantee.**—Where a town clerk receives a deed from the grantor with instructions to file it but to delay the recording, the subsequent recording of the deed and its delivery by the clerk to the grantee at her direction do not constitute a delivery. (Vt.) Morgan v. Morgan, 1006.

14. **DEEDS—Delivery.**—The Record of a Deed by the grantor is presumptive evidence of delivery. (Mo.) Chambers v. Chambers, 567.

15. **DEEDS—Delivery.**—The Record of a Deed by the Grantor is Evidence of a most cogent character tending to show delivery. (Mo.) *Chambers v. Chambers*, 567.

16. **DEED—Evidence of Delivery in a Case of Grant to Child.**—Where a father records a deed to his infant child, and the grant is beneficial, the grantor has the burden of rebutting the presumption of delivery in his suit in equity to cancel the deed; and the evidence must not be loose or inconclusive, but clear and convincing. (Mo.) *Chambers v. Chambers*, 567.

17. **DEEDS—Necessity of Delivery.**—Delivery is the Life of a deed. Without delivery an instrument purporting to convey real estate, "though it be never so well sealed and written," and acknowledged under the due guard of the formalities of the law, yet it is a mere dead scroll and hath no life in it. (Mo.) *Chambers v. Chambers*, 567.

18. **DEEDS.**—The Delivery of a Deed is Consummated when the grantor by act, word, or both parts with his domination over the instrument with the intention to make it operative, and it is accepted by the grantee. Such intent, however elusive and difficult to seek out, is of the essence of delivery. (Mo.) *Chambers v. Chambers*, 567.

19. **DEEDS.**—Whether There has Been a Delivery of a Deed is usually a mixed question of law and fact, and is to be determined by all the facts and circumstances of the concrete case. Delivery is not controlled by any fixed and arbitrary rule, but must be worked out with reference to all the facts in judgment. (Mo.) *Chambers v. Chambers*, 567.

20. **DEEDS — Delivery — Personnel of Parties.**—In determining whether there has been a delivery of a deed, the personnel of the parties is of some weight. Facts tending to show delivery to an infant child may not be held so conclusive as if the grantee were an adult. (Mo.) *Chambers v. Chambers*, 567.

21. **DEED—Delivery—Secret Intention of Grantor.**—In a suit by the grantor to cancel a voluntary deed to his child on the ground that it was not delivered or accepted, he may testify to a secret intention in making the conveyance, if it is not so weighed down by his acts as to mislead other persons to their injury and thereby estop him. But such testimony, many years after the event, only goes for what it is worth. It may inform but cannot bind a court of conscience. It is to be weighed and interpreted in the light of his admissions and declarations off the stand, and in the light of what he did and his whole course of conduct in relation to the subject matter. (Mo.) *Chambers v. Chambers*, 567.

22. **DEED—Sending to Bank for Delivery to Vendee.**—Deeds were sent by the vendor in a contract for sale of land to a bank for delivery to the vendee on payment of a named sum. The vendee tendered a less amount, and offered to pay what balance should be found due to the vendor on an accounting. The bank was not named in the contract as a repository in escrow. It is held that the bank was merely an agent of the vendor, and that under these circumstances an action did not lie against it to compel the delivery of the deed. (Minn.) *Van Valkenburg v. Allen*, 561.

23. **DEED—Delivery—Control During Life.**—It is essential to the delivery of a deed that it should pass beyond the control of the grantor. If he retains the custody and control during his life, the instrument cannot have effect as a deed at his death. (S. C.) *Merck v. Merck*, 815.

Acceptance by Grantee.

24. **DEEDS—Delivery.**—Acceptance by the Grantee is an essential element of delivery, but acceptance will be presumed if the grant is beneficial. (Mo.) *Chambers v. Chambers*, 567.

25. DEEDS—Delivery—Acceptance by Infant Grantee.—In case the grantee in a deed is the infant child of the grantor, and the grant is beneficial, courts are fond of resting on a presumptive acceptance to give operative effect to the conveyance. (Mo.) *Chambers v. Chambers*, 567.

See Cancellation of Deed; Escrows; Records; Vendor and Vendee.

DEFINITIONS.

See Words and Phrases.

DESCENT AND DISTRIBUTION.

1. ESTATE OF DECEDENT—Scope of Partial Distribution.—The law does not contemplate the distribution of all the property of an estate under partial distribution proceedings, or prior to the settlement of the final account of the executor or administrator. (Cal.) *Estate of Gird*, 131.

2. ESTATE OF DECEDENT—Time for Final Distribution.—The distribution of all the property of an estate can be had only upon the final settlement of the account of the executor or administrator. The court must necessarily retain, until such time, what reasonably may be anticipated as necessary to pay debts and expenses of administration. (Cal.) *Estate of Gird*, 131.

3. ESTATE OF DECEDENT.—On Partial Distribution the court should reserve what it deems a sufficient portion of the estate to pay expenses of administration and claims, including any probable deficiency on a mortgage debt. But if the land mortgaged is ample security, the mortgage debt may be disregarded so far as partial distribution is concerned, the land being subject to the mortgage after distribution. (Cal.) *Estate of Gird*, 131.

4. DECREE OF DISTRIBUTION—Who may Appeal.—Only a Party Aggrieved by it can question a specific provision of a decree of distribution entered in probate court. (Minn.) *Casey v. Brabec*, 531.

5. DECREE OF DISTRIBUTION — Costs.—Upon Affirmance by the District Court of such decree, respondent is entitled to costs: Revised Laws 1905, section 3880. (Minn.) *Casey v. Brabec*, 531.

DEVISES.

See Wills.

DISORDERLY HOUSE.

1. DANCE-HOUSE—Offense of Permitting Attendance of Minors. The Minnesota statute makes it a misdemeanor for the keeper of dance-houses or concert saloons to permit any person under twenty-one years of age to be there, whether or not in fact such places are conducted in a manner injurious to morals. (Minn.) *State v. Rosenfield*, 557.

2. A DANCE-HOUSE is a Place Maintained for Promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation. (Minn.) *State v. Rosenfield*, 557.

3. DANCE-HOUSE.—A Complaint Charging the Offense, in the language of the statute, of permitting a person under twenty-one years of age to be or remain in a dance-house, is sufficient. (Minn.) *State v. Rosenfield*, 557.

4. DANCE-HOUSE.—A Statute is Constitutional which makes it a misdemeanor for the keeper of a dance-house to permit any person under twenty-one years of age to be there. (Minn.) *State v. Rosenfield*, 557.

5. DANCE-HOUSE.—A Statute Making It a Misdemeanor for the keeper of a dance-house to permit any person under twenty-one years of age to be there is not unconstitutional as class legislation because not fixing the age limit of females at eighteen years, the statutory limit of their minority. (Minn.) *State v. Rosenfield*, 557.

6. DANCE-HOUSE—Constitutional Law—Attendance of Minors. The defendants were convicted of the offense of permitting, contrary to Revised Laws of 1905, section 4936, a person under the age of twenty-one years to be and remain in a dance-house conducted by them. Held, that the statute is a proper exercise of the police power; that it is not class legislation; that a dance-house, as the term is used in the statute, is a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation; that the complaint states a cause of action; that the trial court did not err in its instructions to the jury; and that the verdict is sustained by the evidence. (Minn.) *State v. Rosenfield*, 557.

7. DANCE-HOUSE—Offense of Permitting Attendance of Minors. The Minnesota statute, making it a misdemeanor for the keeper of a dance-house to permit any person under twenty-one years of age to be there, does not make knowledge on the part of the person accused an essential element of the offense. (Minn.) *State v. Rosenfield*, 557.

DIVORCE.

In General.

1. DIVORCE—Collateral Attack.—Where a Woman Who has Obtained a divorce marries another man, and the record in the divorce case does not affirmatively show lack of jurisdiction, the decree cannot be assailed collaterally by the former husband so as to disqualify her to testify against him in a criminal case. (Tex. Cr.) *Douglas v. State*, 930.

2. DIVORCE—Collateral Attack—Waiver of Citation.—Where the defendant in divorce signed a waiver of citation three days prior to the date of filing the suit, it must be assumed in a collateral attack on the decree, if there is nothing to negative the fact, that the waiver was filed by him or under his authority after the institution of the action. (Tex. Cr.) *Douglas v. State*, 930.

Alimony.

3. ALIMONY—Compelling Husband to Earn Money.—A court cannot, by punishment as for contempt, compel a man, who has no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and by the exercise thereof derive an income to pay a judgment for alimony. (S. C.) *Messervy v. Messervy*, 873.

See Convicts, 4, 5.

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DOGS.

See Animals; Railroads, 11-14.

DOWER.

1. MARRIAGE—Deed in Fraud of Intended Wife.—A conveyance executed by a man in contemplation of marriage, without the knowledge of the prospective wife, and intended to prevent her rights of dower and homestead from attaching to the land, is a fraud upon her rights against which a court of equity will grant relief. (Ala.) Nelson v. Brown, 61.

2. MARRIAGE—Wife as Purchaser Under Registry Act.—Persons entering into a contract of marriage cannot claim the protection of the statute of registration. Hence a deed made by a man prior to his agreement to marry is not invalid as against his wife because not recorded until after their marriage. (Ala.) Nelson v. Brown, 61.

3. MARRIAGE—Deed in Fraud of Intended Wife.—A conveyance made by a man prior to his agreement to marry, and without reference to any anticipated rights of the prospective wife, is valid at that time, and its subsequent withholding from record, and the fact that it is voluntary, do not impair its validity. (Ala.) Nelson v. Brown, 61.

DYING DECLARATIONS.

See Homicide, 8.

ELECTIONS.

1. ELECTIONS — Referendum — Qualified Voters.—The act approved August 16, 1909 (Acts 1909, p. 425), providing for the creation of a board of commissioners for Madison county, defining their duties, etc., and which further provided that the act should not go into effect until ratified by the people of the county, clearly discloses the legislative plan to be that all persons voting at such election should be constitutionally qualified voters; and as the designation of such voters in the twenty-first section of the act totally disregarded the added suffrage qualifications prescribed by the constitutional amendment of 1908, the legislative plan of referendum to the constitutionally qualified voters was defeated. (Ga.) Tolbert v. Long, 222.

2. ELECTIONS—Jurisdiction of Equity to Intervene by Injunction.—Equity will entertain jurisdiction of a petition by a citizen and taxpayer to enjoin against the declaration of the result of an election held under a special act establishing a board of commissioners for a named county, defining their duties, etc., which act provides that it shall not become operative in the county unless ratified by a vote of the people, where it is charged that the whole act is unconstitutional or infected with other illegality frustrating the legislative plan of ratification. (Ga.) Tolbert v. Long, 222.

3. ELECTIONS—Second Injunction Against Same Act.—Where an injunction against the calling of an election has been denied, an amendment or second petition to enjoin the declaration of the result of the election does not seek to restrain the same act, and may be granted. (Ga.) Tolbert v. Long, 222.

EMINENT DOMAIN.

1. EMINENT DOMAIN—Amount of Land Condemned.—A Corporation having the power to exercise the right of eminent domain must be permitted, in a modified degree, to determine for itself the

amount of land necessary for the use for which it is sought to be taken. But this right is subject to all statutory and constitutional restrictions on the subject, and the further limitation that the courts are clothed with power to prevent any abuse of the right. (Ill.) *Bell v. Mattoon Waterworks Co.*, 338.

2. **EMINENT DOMAIN—Taking More Land Than Necessary.**—The question whether the amount of land sought to be condemned is greatly in excess of what is necessary is for the court, and must in some manner be presented to it for decision before compensation is assessed by the jury. (Ill.) *Bell v. Mattoon Waterworks Co.*, 338.

3. **EMINENT DOMAIN—Taking More Land Than Necessary.**—A defendant in eminent domain proceedings who was defaulted cannot afterward try in ejectment the question whether more land than necessary was taken. (Ill.) *Bell v. Mattoon Waterworks Co.*, 338.

4. **EMINENT DOMAIN—Amount of Land That may be Taken.**—It is permissible for the condemner to take not only sufficient land for the present need, but he may anticipate the future increased needs and demands for the public use to which the land is to be devoted. (Ill.) *Bell v. Mattoon Waterworks Co.*, 338.

5. **EMINENT DOMAIN—Use of Land Impossible.**—A Land Owner who was defaulted in eminent domain proceedings may subsequently recover in ejectment a portion of the land rendered impossible for present or future use for the purpose for which it was condemned. (Ill.) *Bell v. Mattoon Waterworks Co.*, 338.

6. **EMINENT DOMAIN—Reverter—Use of Land Impossible.**—Where the Use of property for the purpose for which it was condemned becomes impossible, the effect is the same as an abandonment, and there is a reverter to the owner of the fee. (Ill.) *Bell v. Mattoon Waterworks Co.*, 338.

7. **EMINENT DOMAIN—Abuse of Power by Corporation.**—Corporations will not be permitted to abuse the power given them to condemn private property. (Ill.) *Bell v. Mattoon Waterworks Co.*, 338.

EMPLOYERS' LIABILITY.

See Master and Servant.

EQUITABLE MORTGAGE.

See Mortgages, 1.

EQUITY.

EQUITY.—The Findings of a Chancellor Stand, as regards their effect, the same as those of a special master, and cannot be set aside if there is evidence tending to support them. (Vt.) *Morgan v. Morgan*, 1006.

See Cancellation of Deeds.

ESCROW.

DEED.—An "Escrow" is a Deed Delivered to Some Third Person to be by him delivered to the grantee on the performance of some precedent condition by the grantee or another or the happening of some event. If the instrument remains in the dominion of the maker, it is not an escrow. To constitute an escrow the deed must be delivered to a third person, and not to the agent of the grantor. (Minn.) *Van Valkenburg v. Allen*, 561.

ESTATES OF DECEDENTS.

See Descent and Distribution; Executors and Administrators; Wills.

ESTOPPEL

ESTOPPEL—Common Source of Title.—Parties claiming title from the same source cannot question the title of the common grantor. (Vt.) *Sowles v. Minot*, 1010.

See Counties; Municipal Corporations, 3.

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 public government, early exclusion from doctrine of, 356.
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EVIDENCE.

In General.

1. **EVIDENCE—Judicial Notice of Telegraph Charges.**—A court in Alabama takes judicial knowledge of the fact that telegraph companies in that state make twenty-five cents a minimum charge for transmitting and delivering messages the distance from Birmingham to Fort Payne. (Ala.) *Western Union Tel. Co. v. Saunders*, 35.

2. **EVIDENCE—Lost Appeal Bond.**—Although It is Conceded that if an appeal bond in a case was given it has been lost, it is not competent for a witness to state as a conclusion that an appeal bond was given. But he may be allowed to state the contents of the paper, leaving it to the court to determine whether they constitute such a bond. (Ala.) *Lacey v. Hendricks*, 45.

3. **EVIDENCE—Ancient Document.**—A Lease Executed nearly forty years ago, and found among old papers in the office of a township clerk, may be treated as an ancient document and admitted in evidence without proof of its execution, there being no indicia of fraud. (Mich.) *Township of Jasper v. Martin*, 508.

4. **EVIDENCE—Conversation With Deceased.**—A Stockholder in a corporation, though acting in the capacity of manager or superintendent, cannot be heard to give in evidence a conversation with a deceased employé upon matters material to the issues in litigation against the corporation for wrongfully causing his death. (Minn.) *Peterson v. Merchants' Elevator Co.*, 537.

5, 6. **EVIDENCE—Qualification of Expert—Review.**—The finding of the trial court that a witness qualified as an expert is not revisable, if it is not arbitrary but is based on evidence and involves no erroneous conception of the law. (Vt.) *Lincoln v. Central Vermont Ry. Co.*, 998.

7. **EVIDENCE.—The Expression "Burden of Proof" has Been Used** in two senses, viz.: 1. The necessity which rests upon a party at any particular time during a trial to create a prima facie case in his favor, or overthrow one when created against him; 2. The necessity of establishing the existence of a fact, or state of facts, by evidence which preponderates to a legally required extent. (Ga.) *Mobley v. Lyon*, 213.

8. **EVIDENCE—Action Against Principal for Tort of Agent.**—In an action against a principal for the tort of his agent, transactions between the agent and a third person are res inter alios acta and inadmissible. (S. C.) *Rookard v. Atlantic etc. Ry. Co.*, 839.

Admissions and Declarations.

9. **EVIDENCE—Written Admission—Signature.**—Where a plaintiff has admitted his signature to a paper, and afterward questions but does not completely withdraw his admission, the writing should be submitted to the jury with an instruction to determine upon the evi-

dence whether he actually signed it, and the evidence of his genuine signature is admissible for comparison. (S. C.) *Lowe v. Southern Ry.*, 904.

10. **EVIDENCE.—Statements Against Interest** are presumptively true. (Mo.) *Chambers v. Chambers*, 567.

11. **EVIDENCE.—Admission by Lessee of Railroad.**—Where a driver and carriage were struck by a train operated by the lessee of the railroad, evidence that the lessee has paid the owner of the carriage for damages done to it is not admissible in an action against the lessor railroad company for the death of the driver. (S. C.) *Rookard v. Atlantic etc. Ry. Co.*, 839.

12. **EVIDENCE.—Declarations of Grantor.**—Evidence that one who has conveyed land gave a mortgage on it to secure attorney fees in an expected attack on his title, that he rented the land to a tenant, and that his tax returns show that he sold a part of the land, although incompetent as declarations in his own favor by a grantor, becomes competent to discredit his testimony that he procured his deed by fraud or theft. (S. C.) *Merck v. Merck*, 815.

Telephone Conversations.

13. **EVIDENCE.—One Who Answers a Telephone Call** from the place of business of the person called for, and undertakes to respond as the agent, is presumed to speak for him in respect to matters of the general business carried on by such person at that place. (S. C.) *Gilliland v. Southern Ry.*, 861.

14. **TELEGRAPH COMPANY.—Evidence of Telephone Conversation.**—In an action against a telegraph company by the sender of a message for its negligent delay, the plaintiff may testify that at his request a third person took up the receiver of a telephone, called a certain number which the plaintiff did not know was the office number of the defendant, and spoke into the telephone the message to be transmitted, if evidence has already been introduced of the delivery to the sendee of a similar message. (Ala.) *Western Union Tel. Co. v. Saunders*, 85.

See Criminal Law; Homicide; Trial, 4; Witnesses.

EXCHANGE.

See Landlord and Tenant, 4.

EXECUTION.

EXECUTION.—Deposit in Lieu of Appeal Bond.—The Successful Party on such an appeal is not required, as a matter of law, to resort to the fund; but if his judgment be not paid, he may proceed by execution to enforce it. (Minn.) *Spear v. Johnson*, 535.

See Judicial Sales.

EXECUTORS AND ADMINISTRATORS.

1. **ADMINISTRATOR.—Right of Foreign Consul to Appointment.** A treaty between the United States and a foreign nation giving the consul of such nation, in case of the death in this country of a citizen of that nation, "the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country," does not entitle him to an appointment as administrator in preference to the person designated by the local state laws. His right is to "intervene" in the proceeding, to appear as a party and represent the citizens of his country interested as heirs or creditors, and not a right to institute and carry on the proceeding himself. (Cal.) *Estate of Ghio*, 145.

2. ADMINISTRATOR—Right of Foreign Consul to Appointment. Where a citizen of Italy, being a resident of California, dies intestate, leaving property in this state, and his heirs all reside in Italy and are citizens of that country, the consul general of Italy is not entitled to letters of administration upon his estate, in preference to the public administrator of the county of his residence. (Cal.) Estate of Ghio, 145.

3. EXECUTOR—Suit Against by Legatee—Demand.—In a suit brought under Revised Statutes, section 6211, by a legatee or other distributee against an executor or administrator, it is necessary to allege and prove a demand upon, and neglect or refusal by, the defendant before the commencement of the action. (Ohio St.) Henry v. Doyle, 769.

4. EXECUTOR—Suit Against by Legatee—Amount Due.—In such an action a general finding of a balance in the hands of the executor or administrator and an order to distribute the same according to law is not a sufficient foundation for the action; but the specific amount, if any, due to the plaintiff must have been first fixed by a court of competent jurisdiction as provided by law. (Ohio St.) Henry v. Doyle, 769.

5. EXECUTOR—Approval of Account—Conclusiveness.—When an executor or administrator has filed in the probate court an account of final distribution, and the same has been approved and confirmed by the court and the executor or administrator discharged from the trust, such account is conclusive unless impeached for manifest error, or for fraud within four years after the discovery of the fraud. (Ohio St.) Henry v. Doyle, 769.

See Descent and Distribution; Partition.

EXEMPTIONS.

1. EXEMPTIONS—Liberal Interpretation of Statute.—Exemptions in favor of poor debtors are liberally construed. (Wash.) State ex rel. McKee v. McNeill, 1038.

2. EXEMPTIONS—Farmer—Abandonment of Occupation.—If a man has for years made farming his principal occupation, and intends to resume that calling in the near future, the mere fact that he is not presently so engaged, and his team, wagon and harness are not being used in farming, does not deprive him of his exemption as a farmer. (Wash.) State ex rel. McKee v. McNeill, 1038.

3. EXEMPTIONS—Value of Property—Waiver.—Where a claim of exemption is made, and the creditor expressly waives the right to the appraisal provided by statute, the court is not called upon to consider the question of the value of the property. (Wash.) State ex rel. McKee v. McNeill, 1038.

FELLOW-SERVANTS.

See Master and Servant, 21, 22.

FIDELITY INSURANCE.

See Insurance, 5-9.

FOOD.

1. MILK REGULATIONS—Constitutional Law.—A statute making it a crime to sell milk which is not of good standard quality, and providing that milk which "is shown to contain less than twelve and fifteen hundredths per cent of milk solids or less than three and thirty-five hundredths per cent of fat, shall not be considered of good

standard quality," is constitutional. (Mass.) Commonwealth v. Wheeler, 456.

2. **MILK REGULATIONS.**—In a Prosecution for Selling Milk containing less than the percentage of milk solids prescribed by statute, evidence that the defendant did not know and had no reason to know that the milk contained less than the prescribed quantity is immaterial. (Mass.) Commonwealth v. Wheeler, 456.

3. **MILK REGULATIONS.**—In a Prosecution for Selling Milk containing less than the percentage of milk solids prescribed by statute, evidence is immaterial that the milk was not deleterious or injurious to health and that it was nutritious and beneficial as an article of food. (Mass.) Commonwealth v. Wheeler, 456.

4. **MILK REGULATIONS.**—In a Prosecution for Selling Milk containing a less percentage of milk solids than that prescribed by statute, evidence is immaterial that the milk was without adulteration and just as it came from properly fed cows in sound health. (Mass.) Commonwealth v. Wheeler, 456.

FOREIGN CORPORATIONS.

See Corporations, 30-48; Insurance, 14.

FORGERY.

See Wills, 13, 14.

FORNICATION.

1. **FORNICATION.**—An Information in the Usual Form, which charges the defendant with being an unmarried male and the prosecuting witness as being an unmarried female, is not open to the objection that it does not allege that the defendant is a man and the prosecuting witness a woman. (Tex. Cr.) Townser v. State, 976.

2. **FORNICATION — Accomplice — Corroboration.**—A man cannot be convicted of fornication on the testimony of the alleged female, if the state offers no other evidence to show intercourse between them, or that he has ever been seen with her, or that they ever have lived together. (Tex. Cr.) Townser v. State, 976.

FRATERNAL ORDER.

See Associations.

FRAUD.

FRAUD—Evidence and Burden of Proof—Instructions.—Under the pleadings and evidence there was no error in failing to charge that fraud could not be presumed, but that slight circumstances might carry conviction of its existence, or in refusing to give to the jury a requested charge upon that subject. (Ga.) Mobley v. Lyon, 213.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCE—Relief to Grantor.**—Courts of Equity are chary of reaching out a helping hand to litigants who voluntarily put themselves in a predicament by a voluntary conveyance to hinder, delay or defraud creditors. (Mo.) Chambers v. Chambers, 567.

2. **FRAUDULENT CONVEYANCE—Delivery of Deed.**—A Bad Intent on the part of a grantor does not take the place of delivery. Although he intends a fraud, yet unless he delivers the deed, it remains inoperative. But if he starts out to permit a fraud, and noth-

ing is in the way to hinder the working of his will, he is likely to consummate the act by delivery. Where will and opportunity embrace, results are bred. (Mo.) *Chambers v. Chambers*, 567.

See Dower.

GIFT.

In General.

1. **GIFT FROM PARENT TO CHILD**—Conclusive Evidence of a Gift from parent to child is not necessary. It requires less positive testimony to establish the delivery of a gift from a parent to a child than between persons not related, and when there is no suggestion of fraud or undue influence, slight evidence will suffice. (Mich.) *Union Trust & Sav. Bank v. Tyler*, 523.

2. **GIFT—Confidential Relations.**—The Law Presumes the exercise of undue influence in transactions where confidential relations exist between the parties, and puts upon the donee, when shown to be the dominant party, the burden of repelling the presumption. The burden is usually discharged by showing that the donor had the benefit of competent and independent advice. (Ala.) *Nelson v. Brown*, 61.

Of Bank Deposit.

3. **GIFT OF BANK DEPOSIT.**—Where a Depositor in a Bank causes one of its officers to write upon her bankbook that in the event of her death the account is payable to her daughter, and afterward she sends for the daughter and tells her she has something to give her, and she states to others that she has fixed the matter so that her daughter can get the money, and the daughter has possession of the book after the death of the mother, this is sufficient to show a gift of the deposit. (Mich.) *Union Trust & Sav. Bank v. Tyler*, 523.

4. **GIFT OF BANK DEPOSIT.**—The Mere Possession by a Daughter of her mother's bankbook after the death of the latter raises no presumption of ownership. (Mich.) *Union Trust & Sav. Bank v. Tyler*, 523.

5. **GIFT OF BANK DEPOSIT—Delivery of Book.**—A valid gift of money in a savings bank may be effected by the delivery of the depositor's passbook to the donee, with intent to give the deposit. (Mich.) *Union Trust & Sav. Bank v. Tyler*, 523.

HIGHWAYS.

See Automobiles.

HOMESTEAD.

HOMESTEAD—Lease not Signed by Wife.—A lease of a part of the homestead of the lessor, without the signature of his wife, is void. (Mich.) *Township of Jasper v. Martin*, 508.

See Dedication.

HOMICIDE.

In General.

1. **HOMICIDE.**—The Violation of a Penal Ordinance of a municipality, as a result of which violation death ensues, is not an unlawful killing within the provisions of section 6811, Revised Statutes, which defines the crime of manslaughter. (Ohio St.) *State v. Collingsworth*, 775.

2. **HOMICIDE—Provocation.**—An Instruction in a homicide case to the effect that mere drunkenness or anger would not reduce the crime to manslaughter, and that the fact that the deceased cursed the

defendant and they had a fight would not constitute such legal provocation as to reduce the killing to manslaughter, is not error, where the homicide is admitted and the only possible questions are whether the defendant committed it while insane or in sudden heat and passion under such legal provocation as would reduce the crime to manslaughter. (S. C.) *State v. Driggers*, 855.

Dying Declarations.

3. **DYING DECLARATIONS—Rule of Admissibility.**—Before dying declarations can be admitted in evidence it is essential, and is a preliminary fact to be proved by the party offering them, that they were made under a sense of impending death. But it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of his mind. (Tex. Cr.) *Douglas v. State*, 930.

Trial and Sentence.

4. **HOMICIDE—Submitting Issue to Jury.**—An issue presented in a homicide case must be submitted with proper instructions to the jury, although the court may think it false. (Tex. Cr.) *Tilmyer v. State*, 982.

5. **HOMICIDE.—A Sentence That the Accused be Hanged** “at the usual place of execution,” which is fixed by statute within the county jail or the inclosure thereof, is not a sentence “to be publicly executed.” (S. C.) *State v. Anderson*, 887.

Justification.

6. **HOMICIDE — Justification — Threats — Instructions.**—While it is better always in a homicide case, in submitting a charge upon threats to take life, to include also serious bodily injury, it is not necessarily error in all cases to fail to do so. If the positions of the parties and conditions surrounding them are such that it could not possibly be anticipated that the preparation of one of them could be other than to take life, then the omission to say he would be justified if the threat was made to seriously inflict bodily injury would not be reversible error. (Tex. Cr.) *Tilmyer v. State*, 982.

7. **HOMICIDE—Justification—Instructions.**—Where the defendant in a homicide case interposes no plea of justification, it is not prejudicial error to charge that there is only one form of justifiable homicide. (S. C.) *State v. Anderson*, 887.

Self-defense.

8. **HOMICIDE—Self-defense—Threats.—One Who Arms Himself** with the intention of killing another when he meets him has a perfect right of self-defense, if the latter has previously threatened his life, and when they meet makes an attack or demonstration manifesting a purpose to put his threats into execution before the other has made any effort to carry out his intention. (Tex. Cr.) *Tilmyer v. State*, 982.

9. **HOMICIDE—Self-defense—Absence of Peril.**—Where a woman, who during the day has been guilty of misconduct and violence toward her brother, gets into a wagon to go away, and he, while in no peril, shoots her as she sits in the vehicle with a gun in her lap, which she makes no attempt to use, the law of self-defense has no application. (S. C.) *State v. Driggers*, 855.

10. **HOMICIDE—Self-defense.—The Fault in Bringing on a Difficulty** which will deprive one of the right of self-defense is not confined to the precise time of the fatal encounter which results, but may include fault so closely connected with the difficulty in time and circumstances as to be fairly regarded as operating to bring it on. (S. C.) *State v. Lee*, 869.

11. **HOMICIDE—Self-defense—Fault in Bringing on Difficulty.—**When a plea of self-defense is interposed in a homicide case, the jury may consider the acts and threats of the accused a short time before the fatal encounter, indicating that he was seeking the deceased with intent to injure him. (S. C.) *State v. Lee*, 869.

12. **HOMICIDE—Self-defense—Opprobrious Language.—**The plea of self-defense is not available to one who used language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which actually did contribute to bring it on. (S. C.) *State v. Lee*, 869.

Defense of Insanity.

13. **HOMICIDE—Evidence of Insanity.—On the Issue of Insanity** of one accused of murder, his entire conduct, including words spoken by him and the manner of his speech, is competent. But there should be some preliminary evidence of mental aberration indicating to the court that such testimony is tendered in support of a substantial plea of insanity, and not for the purpose of getting in evidence the declarations of the defendant in his own favor. (S. C.) *State v. Driggers*, 855.

14. **HOMICIDE—Remarks of Court Discrediting Plea of Insanity.** Statements by the court in a murder trial, in responding to objections to testimony, "I suppose he is leading up to brain-storm or something like that. Do you contend that a drunken debauch would excuse a homicide? Do you want a man to prove his own lunacy?" were better omitted, but they do not amount to such expressions of opinion on the merits of the defense of insanity as to indicate that the judge is a participant in the consideration of that question of fact. (S. C.) *State v. Driggers*, 855.

HUSBAND AND WIFE.

1. **DAMAGES.—The Measure of a Husband's Damages** for personal injuries to his wife is the loss of her services and society. (Ala.) *Birmingham Ry. etc. Co. v. Girod*, 17.

2. **DAMAGES—Pleading—Loss of Voice.—**In an action by a husband for personal injuries to his wife, wherein he alleges that she was caused to fall with violence, received internal injuries, had her nervous system shattered, and was permanently injured, recovery may be had for the loss of her voice, though not specifically alleged. (Ala.) *Birmingham Ry. etc. Co. v. Girod*, 17.

3. **DAMAGES.—The Loss of a Wife's Voice** through personal injuries is an element of damages suffered by her husband in consequence thereof. (Ala.) *Birmingham Ry. etc. Co. v. Girod*, 17.

4. **DAMAGES—Cost of Treatment for Wife.—**The measure of recovery, in an action by a husband for injury to his wife, for nursing and medical treatment, is the reasonable value of the cost thereof, and not what was actually paid. But if the amount paid does not appear unreasonable from the evidence, the court will not so presume it. (Ala.) *Birmingham Ry. etc. Co. v. Girod*, 17.

See Dower; Homestead; Marriage; Witnesses, 5-7.

ILLEGITIMATES.

See Bastards.

INOEST.

1. **INOEST—Illegitimate Daughter.**—Incest can be committed between a man and his illegitimate daughter. (Tex. Cr.) *Wadkins v. State*, 922.

2. **INOEST—Proof of Relationship of Parties.**—In a prosecution of a man for incest the relationship of the parties may be shown by his statements and recognition that the woman is his illegitimate daughter. (Tex. Cr.) *Wadkins v. State*, 922.

3. **INOEST—Woman as Accomplice.**—If sexual intercourse between a man and his illegitimate daughter is voluntarily entered into by her, she is his accomplice, and the jury should be in terms so instructed. (Tex. Cr.) *Wadkins v. State*, 922.

4. **INOEST—Accomplice.**—An Instruction in a prosecution for incest is erroneous which permits a conviction if there is evidence tending to corroborate the prosecuting witness, who is an accomplice, and establishing the fact that the defendant committed the offense, and which fails to state that before the jury can convict on the testimony of the prosecuting witness, they must believe that it is true and shows the defendant guilty. (Tex. Cr.) *Wadkins v. State*, 922.

INDIANS.

INDIANS—Liquors.—A State Statute Prohibiting the sale of intoxicating liquors to Indians is a valid exercise of the police power. It does not, as applied to Indian citizens of the United States, violate the fourteenth amendment; nor does it, in the case of Indian wards of the United States, violate section 8 of article 1 of the federal constitution conferring authority on the general government to regulate commerce with Indian tribes. (Wash.) *State v. Mamlock*, 1085.

INDICTMENT.

INDICTMENT—Election Between Counts by State.—Where an indictment charges both rape and incest, but the same act constitutes the offense in either case, the state is not required to elect between the counts. (Tex. Cr.) *Wadkins v. State*, 922.

INFANTS.

See Witnesses, 1-4.

INHERITANCE TAX.

See Taxation, 1.

INJUNCTION.

INJUNCTION—Second Application to Enjoin Same Act.—Under the facts of this case, the amendment and the second petition did not amount to a second application for injunction to restrain the performance of the same act. (Ga.) *Tolbert v. Long*, 222.

See Elections, 2, 3.

INSANITY.

See Homicide, 13, 14.

INSTRUCTIONS.

See Trial, 6-14.

INSURANCE.***Life Insurance.***

1. **LIFE INSURANCE—Waiver of False Representations.**—An insurance company which receives premiums on a life policy for more than two years, without questioning its validity, cannot, in an action on the policy, deny the truth of the statements of the insured in the application, whether they are representations or warranties, where the statutes provide that a life insurance company receiving premiums on a policy for two years shall be deemed to have waived the right to dispute the truth of the application, and that it may, within two years, sue to vacate policies for falsity of representations. (S. C.) *Owen v. Bankers' Life Ins. Co.*, 845.

2. **LIFE INSURANCE—Conflict of Laws.**—Where the Statutes provide that receiving premiums by a foreign corporation from a citizen of the state shall constitute the doing of business in the state, and that the place of the making and performance of the contract shall be deemed within the state, and that foreign corporations shall be subject to the laws of the state in like manner as domestic corporations, a policy of life insurance issued by a foreign company to a citizen of the state is a contract of this state, solvable according to its laws, although the contract provides that it is subject to the laws of another state. (S. C.) *Owen v. Bankers' Life Ins. Co.*, 845.

3. **LIFE INSURANCE—Killing of Insured by Beneficiary.**—The beneficiary in a life insurance policy cannot recover thereon where the death of the assured is caused by the intentional and felonious act of such beneficiary. (Ohio St.) *Filmore v. Metropolitan Life Ins. Co.*, 778.

4. **LIFE INSURANCE—Killing of Insured by Beneficiary.**—In an action to recover upon a policy of life insurance brought by the person named therein as the beneficiary, an answer by the insurance company alleging that the plaintiff murdered the assured states a defense, such an averment, in legal effect, being tantamount to the allegation that the killing charged was intentional and felonious. (Ohio St.) *Filmore v. Metropolitan Life Ins. Co.*, 778.

5. **LIFE INSURANCE—Voluntary Exposure to Danger.**—A miner does not, as a matter of law, expose himself to unnecessary danger so that a recovery cannot be had on his insurance policy where, finding a fellow-workman a few feet from the entrance of the drift overcome by gas he goes to his rescue and in dragging him out is himself overcome and killed by the gas. (Mont.) *Da Rin v. Casualty Co.*, 709.

6. **LIFE INSURANCE—Notice and Proof of Death.**—The giving of notice and the furnishing of proof of death are separate acts. But proof of death, seasonably made, may serve the purpose of both notice and proof, because the formal statement of facts made in the proof ordinarily includes all the information imparted by the notice. But a mere informal notice does not usually supply the place of formal proof. (Mont.) *Da Rin v. Casualty Co.*, 709.

7. **LIFE INSURANCE—Sufficiency of Notice of Proof of Death.**—The determination of the question whether sufficient proof of death has been given does not rest with the insurer alone. (Mont.) *Da Rin v. Casualty Co.*, 709.

8. **LIFE INSURANCE—Sufficiency of Notice of Proof of Death.**—Sufficient proof of death is made by evidence in any form which is substantial and trustworthy enough to enable the insurer to form an intelligent estimate of his rights and liabilities under his contract. Any succinct and intelligent statement, giving the information called for by the policy, whether verified or not or whether by eye-witnesses or not, is sufficient to put the insurer upon inquiry to determine whether he is liable. The proofs may be other than judicial evidence, such as the sworn testimony of witnesses delivered orally or by depo-

sition or by affidavit. They include evidence of any degree which would tend to establish a disputed fact. (Mont.) *Da Rin v. Casualty Co.*, 709.

9. LIFE INSURANCE—Proofs of Death—Waiver of Insufficiency. When notice and proof of death are incorporated in the same communication to the insurer, and the proof of the cause of death, with the attending facts, meets all the requirements of the policy, except that it is not so full and explicit as it might be, the silence of the insurer is a waiver of his right to object. (Mont.) *Da Rin v. Casualty Co.*, 709.

Fidelity Insurance.

10. FIDELITY INSURANCE—Warranties or Representations. Whether the answers made by the applicant for a policy of indemnity are warranties or mere representations must depend upon the character of the question and its answer, the opportunity of the insurer to guard against the representation in the light of its consequences, or whether it is material to the risk. (Wash.) *Poultry Producers' Union v. Williams*, 1041.

11. FIDELITY INSURANCE—Warranties or Representations. A warranty must be strictly true; a representation need only be substantially true. (Wash.) *Poultry Producers' Union v. Williams*, 1041.

12. FIDELITY INSURANCE—Condition of Books—Duty to Investigate.—Where an employer has notice that the books of his employé show that he has deposited in bank more money than has been taken in, the employer is charged with the duty of ascertaining the true state of the books, before making a statement in his application for indemnity insurance that on a certain date they were found correct. (Wash.) *Poultry Producers' Union v. Williams*, 1041.

13. FIDELITY INSURANCE—Truth of Statements—Knowledge of Employer.—It is the duty of an employer seeking indemnity insurance to use ordinary care to ascertain the truth of his statements before making them. And while he is not to be charged with a knowledge that could be discovered only by an expert, he is charged with such knowledge as a cursory examination would reveal. (Wash.) *Poultry Producers' Union v. Williams*, 1041.

14. FIDELITY INSURANCE—Representation That Books are Correct.—A statement by an employer in applying for indemnity insurance that the employé's books have been examined and found to balance is a warranty of a material fact. (Wash.) *Poultry Producers' Union v. Williams*, 1041.

Mutual Companies.

15. MUTUAL INSURANCE COMPANY—Insolvency—Policy-holders.—When a mutual insurance company becomes insolvent and a receiver is appointed, outstanding policies are canceled as to future losses, but the premiums that have been paid, for future as well as past protection, and premium notes, remain a fund for the payment of all liabilities of the company, including losses that have been incurred. (Mass.) *Hill v. Baker*, 440.

16. MUTUAL MARINE INSURANCE—Insolvency—Policy-holders.—When a mutual marine insurance company becomes insolvent and a receiver is appointed, policy-holders are liable to him on their promissory notes for their premiums, although the terms of the policies have not expired and the total amounts of the premiums have not been earned. (Mass.) *Hill v. Baker*, 440.

17. MUTUAL MARINE INSURANCE—Insolvency—Cancellation of Policies.—Where the president of a mutual marine insurance company writes a policy-holder on the 16th of the month that his policy has been canceled as requested, and on the 19th a receiver is ap-

pointed, the policy will be treated as canceled on the 16th, there being no intimation that this was not done in good faith on both sides in ignorance of the insolvency, and the policy-holder is entitled to a reduction on his premium note for the period after March 16th. The case is otherwise with a policy-holder who does not request cancellation until after the appointment of the receiver. (Mass.) *Hill v. Baker*, 440.

18. MUTUAL MARINE INSURANCE.—When a Mutual Marine Insurance company becomes insolvent, and a receiver is appointed and one of its policies provides that the premiums shall be returned for months not entered upon, with a warranty of twelve per cent, and the term of insurance has been entered upon and would run until stopped by written request, and there has been no request, the case is not like that of an ordinary open policy in which the insurer is held only for such risks as are subsequently assumed and indorsed on the policy. (Mass.) *Hill v. Baker*, 440.

Foreign Companies.

19. LIFE INSURANCE.—When a Foreign Insurance Company comes into a state to do business, it is bound to take notice of the laws of that state, and all business therein must be conclusively presumed to have been done subject to its laws. (S. C.) *Owen v. Bankers' Life Ins. Co.*, 845.

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- proof of death, by whom to be made, 726.
- proof of death, decedent, description of in, 726.
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- proof of death, description of decedent in, 726.
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- proof of death, waiver of, implied by attempted compromise, 732.
- proof of death, waiver of, implied by repudiation of liability, 732.
- proof of death, waiver of, implied by silence, 732.

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INTERSTATE COMMERCE.

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INTERVENTION.

INTERVENTION—Whether Known to Civil Law.—Intervention, as our law defines it, is not unknown in civil-law countries. (Cal.) Estate of Ghio, 145.

INTOXICATING LIQUORS.

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JOINT CONTRACT.

See Contracts, 2.

JOINT NOTE.

See Bills and Notes, 1, 5.

JUDGES.

1. JUDGES—Appointment of Registrar as Official Act.—The duty devolving upon the judge of a superior court under the Political Code, sections 50, 51, providing for the appointment of a board of county registrars, is an official act. (Ga.) Elliott v. Hipp, 272.

2. JUDGES—Disqualification Through Political Interest and Activity.—The allegation that a judge is active in aiding one faction of a political party in a county to gain control of the party and the politics of the county, in order to further his political purposes and interests and those of a faction with which he is in sympathy, does not disqualify him from passing on an application to enjoin the registrars from filing a registration list alleged to have been prepared by them with the names of certain persons opposing such faction illegally left off for the purpose of gaining such control, and to compel them by mandamus to place such names on the registration list. (Ga.) Elliott v. Hipp, 272.

3. JUDGES—Disqualification Through Political Interest and Activity.—While the petition and the amendment thereto aver political interest and activity on the part of the judge in whose jurisdiction the case falls, and an attempt and conspiracy on his part with others to dominate and control the politics of the county in his own interest and that of others, the allegations made do not show that he has any pecuniary interest in the result of the litigation, nor do they state any other facts sufficient to render him disqualified from presiding in the case. (Ga.) Elliott v. Hipp, 272.

See Justice of Peace.

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JUDGMENTS.

Validity and Relief.

1. **JUDGMENT—Admission of Validity.**—Where, in an Action of Trover for the conversion of a subtenant's crops, the defense set up is a judgment in attachment to enforce the landlord's lien, under which the subtenant's crop was levied upon and sold, a replication alleging that the defendant waived his lien as against the subtenant's part of the crop admits the validity of the judgment. (Ala.) *Hudson v. Wright*, 55.

2. **JUDGMENT—Admission of Validity in Pleading.**—Where the replication in trover admits the validity of a judgment against a subtenant in an action to enforce the landlord's lien, allegations of a waiver of the lien are not a defense against the judgment. (Ala.) *Hudson v. Wright*, 55.

3. **JUDGMENT—Relief in Equity for Fraud Extrinsic.**—The acts for which courts of equity will, for fraud, set aside a judgment have relation to fraud extrinsic or collateral to the matter on which the judgment was rendered, not intrinsic or direct fraud. (Vt.) *French v. Raymond*, 994.

Collateral Attack.

4. **JUDGMENT—Collateral Attack—Jurisdiction.**—The judgment of a court of competent jurisdiction cannot be collaterally attacked, unless the record affirmatively shows lack of jurisdiction. (Tex. Cr.) *Douglas v. State*, 930.

5. **JUDGMENT—Collateral Attack—Recital of Service.**—A recital in a judgment of service of citation on the defendant involves absolute verity in a collateral proceeding. (Tex. Cr.) *Douglas v. State*, 930.

6. **JUDGMENT—Collateral Attack.—An Attack upon a Judicial Sale** on the ground that the judgment on which it is based has been paid is not a collateral attack on the judgment. (Wash.) *McLiesh v. Ball*, 1087.

Conclusiveness—Res Judicata—Estoppel.

7. **RES JUDICATA.**—The Rule That as Between the Same Parties a judgment on the merits in an earlier suit is a bar to a later suit as to every issue that in fact was, or in law might have been, litigated, is limited to a suit for the same cause of action. (Mass.) *Newhall v. Enterprise Mining Co.*, 461.

8. **RES JUDICATA.**—It Does not Follow That Causes of Action in two cases are the same because they originated in the same series of transactions, and in the conversations and communications which took place between the parties concerning them. Nor does it follow that they are not the same because there is a difference in the form of stating them, or an omission in the statement of one to include one or more of the matters that are merely incidental or in aggrava-

tion of damages. The question is whether the substantive causes of action relied on are essentially the same, not whether they grew out of transactions which occurred at the same time and had a close relation to one another. (Mass.) *Newhall v. Enterprise Mining Co.*, 461.

9. **RES JUDICATA**.—A Judgment for the Defendant in a suit in equity by the purchaser of stock to rescind on the ground of false and fraudulent representations is not a bar to his subsequent action at law against the corporation to recover what he paid for the stock, on the ground that he purchased treasury stock but the agent of the corporation delivered his own stock instead. (Mass.) *Newhall v. Enterprise Mining Co.*, 461.

10. **JUDGMENT**—*Res Judicata*—*Probate Proceedings*.—The approval by the probate court of such dispositions as the executor and devisee of an estate for life has made is not *res judicata* in a subsequent suit in equity upon the question of the construction of the will. (Mich.) *Farlin v. Sanborn*, 525.

11. **JUDGMENT**—*Res Judicata*—*Principal and Agent*.—A judgment on the merits in favor of an agent is a bar to an action against the principal for the same cause, but a judgment against the agent is not conclusive in an action against the principal, nor will a judgment against the principal conclude the agent unless the latter has been vouched or given notice and opportunity to defend. (S. C.) *Bookard v. Atlantic etc. Ry. Co.*, 839.

12. **JUDGMENT**—*Res Judicata*—*Matters Concluded*.—A verdict and judgment is conclusive evidence, between the same parties in a subsequent suit, of whatever it was necessary for the jury to find in order to warrant the verdict. It is not necessary that the issue should have been taken in the former action upon the precise point controverted in the subsequent suit. But every point that was expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment, is concluded. (Vt.) *Wells v. Boston & Maine R. R.*, 987.

13. **JUDGMENT**—*Res Judicata*—*Matters Concluded*.—A judgment is not evidence in a subsequent suit of any matter which came collaterally in question merely, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument upon the judgment. (Vt.) *Wells v. Boston & Maine R. R.*, 987.

14. **JUDGMENT**—*Estoppel*—*Right of Defendant*.—Where the plaintiffs have introduced a former judgment in evidence, the defendant cannot take advantage of it by way of estoppel if he has not pleaded it as such. (Vt.) *Wells v. Boston & Maine R. R.*, 987.

15. **JUDGMENT**—*Res Judicata*—*Who Treated as Parties*.—A court, upon proper invocation, will look beyond the record and treat as parties all who in fact are found to have acted a part, and this whether their interference was irregular or not. (Ala.) *Hudson v. Wright*, 55.

16. **JUDGMENT**—*Conclusiveness*.—A Judgment is the Law's Last Word in a judicial controversy, and if valid, no issue of fact can be tendered thereon. (Ala.) *Hudson v. Wright*, 55.

See *Judicial Sales*.

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JUDICIAL NOTICE.

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JUDICIAL SALES.

Validity—Confirmation.

1. **JUDICIAL SALE.**—After a Judgment has Been Paid it ceases to be operative, and no sale based upon it can confer title. (Wash.) *McLiesh v. Ball*, 1087.

2. **JUDICIAL SALE—Confirmation Where Judgment was Paid.**—A judicial sale based on a judgment which had been paid is not cured by confirmation. (Wash.) *McLiesh v. Ball*, 1087.

Contract for Redemption.

3. **JUDICIAL SALE—Contract for Redemption—Deed Absolute.**—When a purchase is made, not from the owner, but at a judicial or execution sale under an agreement that the owner may redeem, this agreement, although not in writing, is enforceable, though the result will be to change a conveyance absolute on its face into a mortgage or deed of trust. (Ky.) *McKibben v. Diltz*, 408.

4. **JUDICIAL SALE—Contract for Redemption—Statute of Frauds.**—When one purchases land at a judicial sale under an agreement with the owner to allow him to redeem, the agreement is enforceable although not in writing. The purchaser holds the land in trust for the former owner, and the statute of frauds presents no obstacle to a recovery. (Ky.) *McKibben v. Diltz*, 408.

5. **JUDICIAL SALE—Contract for Redemption—Time Limited.**—Although an agreement by a purchaser at a judicial sale with the owner to allow him to redeem limits the time for the redemption, he will be allowed to redeem after the expiration of the time. (Ky.) *McKibben v. Diltz*, 408.

6. **JUDICIAL SALE—Contract for Redemption—Costs and Purchase Price.**—When one purchases at a judicial sale under an oral agreement with the owners to allow them to redeem, they will be required, in enforcing the contract, to pay the purchase price with interest and the costs incurred. (Ky.) *McKibben v. Diltz*, 408.

JURISDICTION.

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JURY.

In General.

1. **JURY TRIAL.**—The Constitutional Right of Trial by Jury is not a right to command the services of a jury without cost, but is

of the same nature as the right to have official services performed by public officers, and a requirement for the payment of a reasonable amount for jury fees, such as will necessarily be required in every jury trial, is not a denial or encroachment upon the right. (Ill.) *Morrison Hotel etc. Co. v. Kirsner*, 335.

2. **JURY TRIAL—Statute Requiring Payment of Fees.**—The provisions of the municipal court act requiring a party who desires a jury to file a demand therefor with the clerk and pay six dollars for jury fees, at the time of entering his appearance, are valid. But the statute should be liberally construed in favor of the right, and the inclination of the court should be to protect and enforce it. (Ill.) *Morrison Hotel etc. Co. v. Kirsner*, 335.

3. **JURY TRIAL—Confession of Judgment.**—A Statute Providing that a cause shall be tried by the court unless a demand for a jury trial is filed at the time the defendant enters his appearance and pays the jury fees can have no application to the confession of a judgment. (Ill.) *Morrison Hotel etc. Co. v. Kirsner*, 335.

4. **JURY TRIAL—Demand for After Vacation of Judgment by Confession.**—When a judgment by confession under power of attorney has been vacated on motion, because the power was not sufficient to authorize the attorney to appear for all the defendants, a demand by them for a jury trial, with a tender of fees therefor, is in apt time if made immediately upon the vacation of judgment. It need not be made at the time the court is asked to set aside the judgment. (Ill.) *Morrison Hotel etc. Co. v. Kirsner*, 335.

Misconduct.

5. **JURY—Misconduct in Criminal Case—Review.**—Matters regarding the misconduct of the jury in reaching a verdict in a criminal case are particularly cognizable by the trial court, and unless the conclusion reached thereon by it on the hearing is clearly wrong and unsupported by the testimony, an appellate court will not interfere. (Tex. Cr.) *Douglas v. State*, 930.

6. **TRIAL—Counsel Conversing With Juror.**—The court has a discretion to deny a new trial on the ground that counsel conversed with a juror, the conversation being in a public place, in the presence of the opposing counsel, and no reference being made to the case. (Wash.) *Deighton v. Hover*, 1035.

JUSTICE OF PEACE.

1. **JUSTICE OF THE PEACE—Civil Liability.**—No Action can be supported against a justice of the peace, acting judicially, who has not exceeded his jurisdiction, however erroneous his decision or malicious his motive. (Ala.) *Lacey v. Hendricks*, 45.

2. **JUSTICE OF THE PEACE—Civil Liability—Pleading.**—Where it cannot be determined from the complaint, in an action against a justice of the peace for malicious prosecution and false imprisonment, that he was not acting judicially and that the act complained of was not within his jurisdiction, the complaint is open to demurrer. (Ala.) *Lacey v. Hendricks*, 45.

3. **JUSTICE OF THE PEACE—Power to Impose Sentence.**—A justice of the peace is without jurisdiction to sentence a person to hard labor because in default in payment of a fine assessed against him two months before upon his conviction. (Ala.) *Lacey v. Hendricks*, 45.

4. **JUSTICE OF THE PEACE—Jurisdiction After Appeal.**—After an appeal has been perfected from a judgment of a justice of the peace in a criminal case, he has no power to take any further steps than to certify the papers to the criminal court. His issuance of a mittimus on the sentence is without his jurisdiction. (Ala.) *Lacey v. Hendricks*, 45.

Note.

Justices of the Peace, personal liability, are exempt from, where there is jurisdiction of the subject matter, 49.

personal liability for ministerial acts in cases of intentional or gross negligence, 49.

Laches, doctrine of as applied to vendor's lien, 205, 206.

LANDLORD AND TENANT.

1. LEASE—Rent After Destruction of Premises.—Where a lot with the building thereon is leased for saloon purposes, the lessor covenanting for a quiet enjoyment and the lessee to keep the premises in repair, and the building is destroyed by fire before the expiration of the term, the lessor may recover the insurance and the stipulated rent for the period after the fire, the lot being larger than the building and it being possible for the lessee to rebuild without trespassing. (Mich.) *Bowen v. Clemens*, 521.

2. LEASE—Construction by Parties—License to Sell.—Where the terms of a lease of personalty do not authorize the lessee to sell the property, evidence is admissible that, after conferring with the draftsman, the parties adopted his view and construed the lease otherwise, in an action of trover by the lessor against one who subsequently purchased the chattels from the lessee, as tending to show a license to sell. (Vt.) *Prouty v. Nichols*, 996.

3. LEASE—Varying Terms by Showing License to Sell.—Where a lessee of chattels sells them under a verbal license from the lessor, when the lease, which is under seal, does not permit the sale, the lessor cannot maintain trover against the purchaser. (Vt.) *Prouty v. Nichols*, 996.

4. LEASE—License to Lessee to Exchange Property.—A license to a lessee of personal property to make an exchange does not authorize him to sell it. (Vt.) *Prouty v. Nichols*, 996.

See **Adverse Possession**, 1.

LARCENY.

1. THEFT—False Pretexts.—Under an Ordinary Indictment for theft, charging a fraudulent taking without the consent of the owner, it is competent to prove that the taking was with the owner's consent but obtained by false pretexts. (Tex. Cr.) *Hawkins v. State*, 970.

2. THEFT—False Pretexts.—Where an Information contains three counts, first, swindling by false pretexts, second, ordinary theft, and third, theft by conversion as bailee, and the case is submitted to the jury on the second count, with evidence that the accused took money from the owner with his consent but by false pretexts, a conviction will be sustained. (Tex. Cr.) *Hawkins v. State*, 970.

3. THEFT—False Pretexts.—One Who Obtains Money from another under the false pretext that he will obtain alcohol with it for the latter and return in a moment with it, but never returns, may be convicted of theft. (Tex. Cr.) *Hawkins v. State*, 970.

4. THEFT—False Pretexts—Demand for Return.—In a prosecution for theft by obtaining money by false pretexts, it is not necessary to prove that demand by the prosecuting witness has been made for the return of the money. (Tex. Cr.) *Hawkins v. State*, 970.

5. THEFT—False Pretext—Evidence.—In a Prosecution for theft in obtaining money by false pretexts, evidence is admissible that after procuring the money the defendant, on meeting the prosecuting witness in the street, ran. (Tex. Cr.) *Hawkins v. State*, 970.

6. **THEFT—Instruction Singling Out Fact.**—A court is not required in a trial for theft to single out a particular fact and eliminate it from the consideration of the jury. (Tex. Cr.) *Hawkins v. State*, 970.

LEASES.

See Landlord and Tenant.

LEGACIES.

See Wills.

LESSEE RAILWAY.

See Railroads, 1.

LIBEL AND SLANDER.

1. **LIBEL—Words Libelous Per Se.**—A Discommendatory Statement, general in its terms, which charges neither the commission of crime nor the possession of specific offensive characteristics, may or may not be libelous per se, depending upon the circumstances and conditions under which the statement is made. (Minn.) *Cole v. Millspaugh*, 546.

2. **LIBEL—Clergyman.**—It is Libelous Per Se to write of a clergyman, an applicant for a pulpit, "I would not have anything to do with him or touch him with a ten foot pole," if under all the circumstances the words used would expose the person written of to hatred or contempt, or injury in his business or occupation. (Minn.) *Cole v. Millspaugh*, 546.

3. **LIBEL—Sufficiency of Complaint Against Demurrer.**—Complaint held to state a cause of action, and presenting the question of fact whether the words used were intended to and might be understood to charge conduct or characteristics inconsistent with good character or plaintiff's profession. (Minn.) *Cole v. Millspaugh*, 546.

4. **SLANDER OF WOMAN—Privileged Communication.**—Where one, in conversing with a father about matters not at all relating to his daughter, makes statements imputing to her a want of chastity, the communication is not privileged. (Tex. Cr.) *Richmond v. State*, 973.

5. **SLANDER OF WOMAN—Inquiry into Reputation.**—In a prosecution for slander in charging a woman with being unchaste, any inquiry into her reputation for chastity should be limited to the time of uttering the words, or at least to a time reasonably approximating thereto. (Tex. Cr.) *Richmond v. State*, 973.

6. **SLANDER OF WOMAN—Evidence of Reputation.**—In a prosecution for slander in charging a woman with being unchaste and with going to a certain place to be delivered of a child, it is error to permit a witness to testify that while the prosecutrix stayed at her house at that place she saw nothing in the conduct of the prosecutrix indicating that she was not a virtuous woman. (Tex. Cr.) *Richmond v. State*, 973.

LICENSE.

Creation and Revocation.

1. **PAROL LICENSE—Right to Revoke After Improvements Made.**—A parol license, not coupled with an interest nor based on any consideration, to construct a dam and irrigating ditch is revocable at the pleasure of the licensor, although the licensee has made the improvements and expended money in so doing. (Mont.) *Archer v. Chicago etc. Ry. Co.*, 692.

2. **PAROL LICENSE—What Constitutes Revocation.**—An appropriation of lands to a use inconsistent with the enjoyment thereon

of a parol license works a revocation of it. (Mont.) *Archer v. Chicago etc. Ry. Co.*, 692.

3. PAROL LICENSE.—Notice of the Revocation of a parol license is unnecessary where the licensee has no removable property on the premises. (Mont.) *Archer v. Chicago etc. Ry. Co.*, 692.

4. PAROL LICENSE—Revocation by Grant for Railroad Right of Way.—A parol license to construct a dam and irrigation ditch is revoked by the licensor granting a right of way to a railroad company for a grade embankment, the natural consequence of which will be to injure the dam and ditch at seasons of high water. Any resulting injuries to the dam and ditch from the construction of the railroad embankment are *damnum absque injuria*. (Mont.) *Archer v. Chicago etc. Ry. Co.*, 692.

5. LICENSE—Declarations of Licensee to Establish.—A license or agency cannot be proved by the declarations of the licensee or agent. (Vt.) *Prouty v. Nichols*, 996.

Tax on Occupation.

6. LICENSE TAX—Power to Impose on Occupation.—It is an attribute of sovereignty to tax occupations for the purpose of raising revenue, and the tax may be imposed in the form of a license fee. (Wash.) *Seattle v. Dencker*, 1076.

7. LICENSE TAX—Limitation of Power to Impose.—While the policy of an enactment imposing a license tax upon an occupation may not be questioned by the courts, the discretion exercised by the law-making power must be natural and reasonable, and consistent with the fundamental principles of law. When they are violated to the extent of depriving a citizen of his constitutional rights, it is the duty of a court to intervene in his behalf. (Wash.) *Seattle v. Dencker*, 1076.

8. LICENSE TAX—Automatic Selling Machine.—An Ordinance imposing a license tax for revenue purposes on the operation of automatic vending machines, when no tax is imposed upon merchants for selling articles like those sold by the machines, is an unconstitutional discrimination against that mode of doing business, if it is conceded to be lawful and fair and in no way involving the police power. (Wash.) *Seattle v. Dencker*, 1076.

See *Automobile; Landlord and Tenant*, 2-4.

LIFE INSURANCE.

See *Insurance*.

LIFE TENANT.

1. LIFE TENANT—Purchase at Foreclosure—Contribution.—The purchase of land at a foreclosure sale under a mortgage or deed of trust by a life tenant will be deemed to have been made for the benefit of the remaindermen, if they contribute their portion of the purchase money within a reasonable time. (Mo.) *Peak v. Peak*, 638.

2. LIFE TENANT—Purchase at Foreclosure—Contribution.—Where a life tenant, at a sale of the land under a deed of trust, obtains title by having a third person purchase and then convey to him, the remaindermen are entitled to redeem on making contribution within a reasonable time. (Mo.) *Peak v. Peak*, 638.

3. LIFE TENANT—Purchase at Foreclosure—Redemption by Remaindermen.—Where a life tenant, at a sale of the land under a deed of trust, obtains title by having a third person purchase and then convey to him, the remaindermen are not barred from redeeming and recovering the land in equity because they do not actually tender to the life tenant the amounts due by them on the

notes which the trust deed secured, if their bill contains a general offer to do equity in conformity with the decree of the chancellor. (Mo.) *Peak v. Peak*, 638.

See Deeds, 2; Wills, 1-3.

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LIMITATION OF ACTIONS.

1. LIMITATION OF ACTIONS—Note and Mortgage—Remote Vendees.—The commencement of an action by the holder of a note secured by mortgage to enforce the debt and lien does not stop the running of the statute of limitations as against remote vendees of the land, although they are afterward brought in by amendment, but not until the statute has run its course. (Ky.) *Walker v. Luxon*, 344.

2. LIMITATION OF ACTIONS—Extinction of Cross-demands.—A mutual agreement between two persons that cross-demands shall extinguish each other is valid, although one of them is barred by the statute of limitations. The agreement constitutes a waiver of the statute. (Ark.) *Grubbs v. Nixon*, 78.

3. LIMITATION OF ACTIONS—Quasi Contract.—Where, pending negotiations for the purchase of real estate, the vendee pays part of the purchase price to the vendor's agent, who has no authority to accept it, and the negotiations fail before any contract is entered into, and the agent returns part of the money thus advanced, an action to

recover the balance is not upon a "contract" but upon an "obligation," within the meaning of statutes providing that an action on a contract must be begun within five years, but "an action upon an obligation or liability, not founded upon an instrument in writing, other than a contract, account or promise," must be commenced within three years. (Mont.) *Schaeffer v. Miller*, 746.

See Adverse Possession.

LIVERY-STABLE KEEPER.

See Master and Servant, 4.

LOST INSTRUMENTS.

1. **LOST CHECK.**—A Suit in Equity will lie to recover upon a lost check. In decreeing a recovery the court will protect the defendant by a provision for indemnity. (S. C.) *Smith v. Nelson*, 808.

2. **LOST CHECK.**—Where the Payee of a Check Indorses and mails it to a third person in payment of a debt, but the check is lost and is never delivered to such person, and the drawer of the check withdraws all his funds from the bank, the payee may sue the drawer as upon a lost check. (S. C.) *Smith v. Nelson*, 808.

See Evidence, 2.

MANDAMUS.

1. **MANDAMUS**—Issuance by One Judge Against Another.—When duties are imposed on a judge of a superior court as an officer, another judge of the superior court has no power to issue a mandamus to compel the performance of such duties. (Ga.) *Elliott v. Hipp*, 272.

2. **MANDAMUS**—Issuance by One Judge Against Another.—Where the judge of another circuit to whom such application was presented refused a mandamus nisi against the judge named in the petition, and granted a restraining order and mandamus nisi against the registrars, it was proper for the judge granting the order and mandamus nisi to subsequently revoke the same and refuse to take further action on such application, for the reason that the same should be presented to the judge referred to in the application, who had jurisdiction to act thereon and who was not disqualified from so doing. (Ga.) *Elliott v. Hipp*, 272.

See Dower; Husband and Wife.

MASTER AND SERVANT.

Employer's Liability, Generally.

1. **EMPLOYERS' LIABILITY**—Obeying Dangerous Orders.—An instruction is erroneous which in effect authorizes the jury to acquit an employé of contributory negligence, even though they should conclude that in obedience to an order of his superior he exposed himself to a danger so obvious that no reasonably prudent man would have done it. (S. C.) *Lowe v. Southern Ry.*, 904.

2. **EMPLOYERS' LIABILITY**—Obeying Dangerous Orders.—If there is ground for reasonable difference of opinion as to the danger, an employé is not bound to set up his judgment against that of his superior whose orders he is required to obey, and he may rely on the judgment of his superior, but he cannot recklessly or carelessly obey orders requiring him to do an obviously dangerous act. (S. C.) *Lowe v. Southern Ry.*, 904.

3. **EMPLOYERS' LIABILITY**—Insufficient Number of Men.—Under the North Carolina statute providing that an employé of a railroad company who suffers injury by the negligence of another employé or by defects in the machinery or appliances, shall be entitled to maintain an action against the company, a member of a bridge gang in-

jured while obeying the foreman's orders, and while the number of hands furnished is insufficient to do the work with safety, may recover from the company. Assumption of risk is not a defense. (S. C.) *Lowe v. Southern Ry.*, 904.

4. MASTER AND SERVANT.—Where a Stable-keeper Lets a Hack with the horse and driver for an afternoon to another stable-keeper, and the latter sends the hack and driver to an undertaker in charge of a funeral procession, who exercises no control over the driver beyond indicating to him his place in the procession, the first stable-keeper is liable for injuries suffered by a third person in consequence of the driver's negligence. The driver is not the servant either of the second stable-keeper or the undertaker. (Mass.) *Hussey v. Franey*, 460.

5. EMPLOYERS' LIABILITY.—The Youth and Inexperience of an employé should be considered in determining whether he should have declined to obey a foreman's order to handle heavy timbers, on account of the risk in so doing. (S. C.) *Lowe v. Southern Ry.*, 904.

6. EMPLOYERS' LIABILITY—Contributory Negligence of Boy. Where an inexperienced youth of nineteen years was ordered by his foreman to hand up a block of timber which it is usual for two men to handle, and the timber crushes him down to his injury, the issue of contributory negligence is properly submitted to the jury. (S. C.) *Lowe v. Southern Ry.*, 904.

7. EMPLOYERS' LIABILITY—Contributory Negligence.—The North Carolina statute providing that an employé of a railroad company who suffers injury by the negligence of another employé or by defects in the machinery or appliances, may maintain an action against the company, does not render the defense of contributory negligence inapplicable to an action by an injured employé. (S. C.) *Lowe v. Southern Ry.*, 904.

8. MASTER AND SERVANT—Statute for Protection of Miners. Code, section 1019, is intended only for the protection of employés engaged at a mine. And a complaint, relying on a failure to keep the supplies specified therein, which merely avers that the plaintiff's intestate was working in the mine, without showing that he was an employé, is subject to demurrer. (Ala.) *Whitmore v. Alabama Consol. Coal etc. Co.*, 31.

Safe Place to Work.

9. MASTER AND SERVANT—Safe Place.—A Complaint in an action for injury to an employé from a defect in the ways, works or plant is subject to demurrer if it does not specify the defect relied upon. (Ala.) *Whitmore v. Alabama Consol. Coal etc. Co.*, 31.

10. MASTER AND SERVANT—Duty to Maintain Safe Place.—A master is under the duty of using ordinary care to furnish his employés with place, ways and appliances reasonably safe for use, but this duty may be discharged by committing its performance to agents carefully selected for competency and fitness. (Ala.) *Whitmore v. Alabama Consol. Coal etc. Co.*, 31.

11. MASTER AND SERVANT—Duty to Maintain Safe Mine.—Where a mine was reasonably safe when an employé started to work, but a defect arose subsequently and after the control of the mine had been delegated to an agent, recovery cannot be had for the death of an employé for failure to furnish a reasonably safe place. (Ala.) *Whitmore v. Alabama Consol. Coal etc. Co.*, 31.

12. MASTER AND SERVANT.—The Placing of Caps of Dynamite in a Mine is not negligence as a matter of law, and recovery cannot be had for the death of an employé resulting from an explosion thereof, in the absence of evidence that they were negligently placed

where they were. (Ala.) *Whitmore v. Alabama Consol. Coal etc. Co.*, 31.

Condition of Railroad Track.

13. **RAILROAD—Condition of Track—Opinion Evidence.**—In an action by a brakeman for injuries received through his car leaving the track while rounding a curve, a nonexpert, after the jury has viewed the track, may testify as to the comparative height of the outer rail shortly before the accident and at the time of the trial. (Vt.) *Lincoln v. Central Vermont Ry. Co.*, 998.

14. **RAILROAD—Duty to Employés to Maintain Safe Track.**—The duty of a railroad corporation to properly inspect and maintain its track is only a continuance of the duty of proper construction; and the agent, whatever he may be called, to whom that duty is assigned, represents the principal, and his negligence in the discharge of the duty is the negligence of the principal, for the duty cannot be delegated so as to relieve the principal from liability. (Vt.) *Lincoln v. Central Vermont Ry. Co.*, 998.

15. **RAILROAD—Condition of Track at Curve.**—In an Action by a brakeman for injuries received through his car leaving the track while rounding a curve, evidence that the outer rail was lower than the inner one and had been in that condition for considerable time, tends to show that the track was unsuitable and the railroad company negligent. (Vt.) *Lincoln v. Central Vermont Ry. Co.*, 998.

Felling Trees—Warning.

16. **MASTER AND SERVANT—Danger in Felling Trees—Warning.** When a servant is engaged with others in pulling down, by means of a rope attached thereto, a tree being felled in an open space, the danger of his being injured by the fall thereof is an obvious one, and known, or should be known, to the servant; and in the absence of an express contract on the part of the master to give warning when the tree begins to fall and in what direction it will fall, there is no duty on him to do so. (Ga.) *Hagins v. Southern Bell Tel. Co.*, 270.

17. **MASTER AND SERVANT—Felling Trees—Warning—Fellow-servant.**—The failure of foremen in charge of the details of such work (who at the time of the injury, because of the absence of other employés, are engaged with the servant who is injured in pulling on a rope to guide the direction of the fall of the tree) to warn the servant when it begins to fall and in what direction it will fall, or to station themselves or others elsewhere to give such warning, cannot be charged against the master as negligence entitling the servant to recover damages for injuries received by reason of the tree falling on him. There being no nondelegable duty resting on the master to thus warn the servant, the negligence of the foreman, if any, is that of a fellow-servant. (Ga.) *Hagins v. Southern Bell Tel. Co.*, 270.

Guarding Machinery.

18. **MASTER AND SERVANT—Removal of Cover from Dangerous Machine.**—If, while the cover provided for a dangerous machine has been removed for the purpose of discovering defects in the machinery, an employé is injured by coming in contact with the machine, the question whether the machine has been left uncovered on unreasonable length of time is for the jury. (Minn.) *Peterson v. Merchants' Elevator Co.*, 537.

19. **MASTER AND SERVANT—Presumption of Due Care.**—In an action against an employer for the death of his employé by coming in contact with dangerous machinery, it will be presumed that the

employé exercised due care for his own protection. (Minn.) *Peterson v. Merchants' Elevator Co.*, 537.

20. MASTER AND SERVANT—Unguarded Machinery.—In an Action for the death of one of defendant's employés by coming in contact with uncovered and dangerous machinery, it is held that the questions of defendant's negligence, the employé's contributory negligence, and assumption of risk were properly submitted to the jury. (Minn.) *Peterson v. Merchants' Elevator Co.*, 537.

Fellow-servants.

21. RAILROAD—Fellow-servants—Trackmen and Brakemen.—A section foreman may be a fellow-servant with the sectionmen under him, while as to brakemen he represents the railroad company. (Vt.) *Lincoln v. Central Vermont Ry. Co.*, 998.

22. MASTER AND SERVANT—Concurring Negligence of Fellow-servant.—Where an employé is injured through the concurring negligence of the master and a fellow-servant, the negligence of the latter does not defeat a recovery. (Vt.) *Lincoln v. Central Vermont Ry. Co.*, 998.

See Railroads, 6-10.

MECHANICS' LIENS.

1. MECHANIC'S LIEN—Notice and Account—Items and Classification.—One who files a mechanic's lien on mining claims is not required to classify the character of the work done or set out the items of it in the account filed with the notice. All that is required is a just and true account, an honest statement, from which may be understood what amount is claimed. (Mont.) *McIntyre v. MacGinniss*, 701.

2. MECHANIC'S LIEN—Mining Claim.—The Limitations Prescribed in section 7293 of the Revised Codes do not apply to mining claims, but a lien upon such property extends to the whole claim, because it cannot be divided and the improvements or structures put upon it often cannot be removed. (Mont.) *McIntyre v. MacGinniss*, 701.

3. MECHANIC'S LIEN—Description of Mining Claim.—A notice of a mechanic's lien upon a group of several mining claims is not insufficient because it does not specifically mention one lode claim which falls within the boundaries of a described placer claim. (Mont.) *McIntyre v. MacGinniss*, 701.

4. MECHANIC'S LIEN—Group of Mining Claims.—Notice of mechanics' liens for work done in the exploitation of a group of contiguous mining claims may be prepared upon the theory that the group constitutes a single consolidated claim. (Mont.) *McIntyre v. MacGinniss*, 701.

5. MECHANIC'S LIEN—Work Done in Exploiting Mining Claims. Mechanics' liens may properly be filed for labor performed in making repairs and alterations, building roads, cutting wood for fuel, keeping machinery in order, and clearing away debris, in the exploitation and sampling of mining claims. (Mont.) *McIntyre v. MacGinniss*, 701.

6. MECHANIC'S LIEN—Group of Mining Claims.—One Entitled to a lien on the whole of a group of seven contiguous mining claims does not lose his right altogether by asserting a lien on only three of the claims. (Mont.) *McIntyre v. MacGinniss*, 701.

7. MECHANIC'S LIEN.—Where Work is Done on Mining Claims at the instance of two lessees who in part pay for it, they are personally liable for the unpaid amount, whether or not they are technically partners. (Mont.) *McIntyre v. MacGinniss*, 701.

MERCHANTS.

See Negligence, 1.

MILK REGULATIONS.

See Food.

MINES AND MINERALS.***Mining Companies—Mortgages.***

1. **MINING CORPORATION—Ratification of Mortgage by Stockholders.**—At a meeting of stockholders under the act of 1880 to ratify a mortgage of mining properties of the corporation, the right to vote resides in every bona fide stockholder having stock in his own name on the stock-books of the corporation ten days prior to the meeting. (Cal.) Royal Consolidated Min. Co. v. Royal Consolidated Mines, 165.

2. **MINING CORPORATION—Ratification of Mortgage by Stockholders.**—The act of 1880, requiring ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of its mining ground, governs foreign as well as domestic corporations in their dealings with property in California. (Cal.) Royal Consolidated Min. Co. v. Royal Consolidated Mines, 165.

3. **MINING CORPORATION—Ratification of Mortgage by Stockholders.**—Under the act of 1880, requiring ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of its mining ground, the ratification need not necessarily be made by the persons having the ultimate beneficial ownership in two-thirds of the stock. (Cal.) Royal Consolidated Min. Co. v. Royal Consolidated Mines, 165.

4. **MINING CORPORATION—Ratification of Mortgage by Stockholders.**—Under the act of 1880, requiring ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of its mining ground, the stockholders and corporation are bound by the ratification of those whom they have invested with the actual legal title to the stock. The latter are authorized under the statute to act in the matter, although, in favor of parties claiming under the corporate conveyance, courts may look behind the apparent ownership and sustain a ratification made by the beneficial owners. (Cal.) Royal Consolidated Min. Co. v. Royal Consolidated Mines, 165.

5. **MINING CORPORATION—Ratification of Mortgage by Stockholders.**—Estoppel of stockholders to rely on a want of ratification of a mortgage of properties of a mining corporation cannot be predicated upon the acts of the corporation or the directors alone. (Cal.) Royal Consolidated Min. Co. v. Royal Consolidated Mines, 165.

6. **MINING CORPORATION—Ratification of Mortgage by Stockholders.**—The act of 1880, requiring ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of its mining ground, has been less strictly interpreted by later than by the earlier decisions, and should be construed as only illustrative and not as exhaustive of the manner of ratification. (Cal.) Royal Consolidated Min. Co. v. Royal Consolidated Mines, 165.

7. **MINING CORPORATION—Ratification of Mortgage by Stockholders.**—The act of 1880, requiring ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of its mining ground, is designed for the protection of stockholders, and where persons holding the required two-thirds of the stock have in a formal and unequivocal way announced their assent to the proposed transaction, their rights are as fully safeguarded as if they had ratified the transfer or mortgage by subsequent writing or at a meeting. (Cal.) Royal Consolidated Min. Co. v. Royal Consolidated Mines, 165.

8. MINING CORPORATION—Ratification of Mortgage by Stockholders.—The act of a director of a mining corporation, who is the holder of two-thirds of the stock, in authorizing, executing and acknowledging a mortgage of the corporation's properties, answers the demands of the act of 1880, which requires ratification of such mortgages by the holders of two-thirds of the stock in the corporation. (Cal.) *Royal Consolidated Min. Co. v. Royal Consolidated Mines*, 165.

Mining Claims—Location—Title—Work—Forfeiture.

9. MINING CLAIMS—Forfeiture—Sufficiency of Evidence.—While it is said that a forfeiture can be shown only upon clear and convincing evidence, the requisite proof is made whenever it is shown by a preponderance of evidence that the full amount of work or improvements was not made or expended within the given year. (Cal.) *Big Three Mining and Mill Co. v. Hamilton*, 118.

10. MINING CLAIMS.—To Acquire Title by Prescription to a mining claim, the possession must not only be hostile, but exclusive and uninterrupted for the period of five years. If possession is neither exclusive nor uninterrupted during that period, the statute vests no title in the claimant. (Cal.) *Big Three Mining and Mill Co. v. Hamilton*, 118.

11. MINING CLAIM.—A General Verdict in Favor of a Defendant who asserts title to a mine both by prescription and by priority of location, imports findings in his favor upon both issues. And if either defense is sustained by the evidence and is not affected by error, the want of evidence to sustain the finding on the other defense, or error committed in regard to it, is not prejudicial. (Cal.) *Big Three Mining & Mill Co. v. Hamilton*, 118.

12. MINING CLAIMS—Statute of 1897.—Mining Locations made while the law of 1897 was in force, but invalid by reason of noncompliance therewith, will be valid after the repeal of that law, if the provisions of the mining laws of the United States have been complied with and there are no intervening rights before the repeal, and if the claim has been occupied and worked up to the time of and after the repeal. (Cal.) *Big Three Mining & Mill Co. v. Hamilton*, 118.

13. MINING CLAIMS—Extent of Possession.—Evidence Tending to show that a claimant had continuously, up to and after the repeal of the law of 1897, prosecuted work under a system tending to the development of a group of three claims, and that a part of this work had been done within the boundaries of one of them, is enough to constitute possession of that entire claim to the extent of the visible boundaries. (Cal.) *Big Three Mining & Mill Co. v. Hamilton*, 118.

14. MINING CLAIM—Delay in Recording Claim.—Within the twenty days allowed for recordation after posting notice, the claim of a locator in possession, although he does not record the notice, is valid, and no other entry can be made as a foundation of a claim of title. (Cal.) *Big Three Mining & Mill Co. v. Hamilton*, 118.

15. MINING CLAIM.—Whether or not Assessment Work on a Claim was Actually paid for is not material. (Cal.) *Big Three Mining & Mill Co. v. Hamilton*, 118.

16. MINING CLAIM—Erection of Mill—Good Faith.—Evidence is admissible that a mill erected on a mining claim is of no value for the purpose of reducing the ore there found, as this has a bearing upon the question of good faith in making the expenditure. (Cal.) *Big Three Mining & Mill Co. v. Hamilton*, 118.

17. MINING CLAIM.—Affidavit or Proofs of Labor duly recorded are by statute prima facie evidence of facts therein stated, but no substantial injury results from their exclusion if the affiants fully testify to the material facts therein stated. (Cal.) *Big Three Mining & Mill Co. v. Hamilton*, 118.

18. MINING CLAIMS.—Where the Testimony of a Witness, if true, establishes the paramount right of one of the parties to a mining claim in controversy, it is prejudicial error to permit his impeachment by proof of contrary statements made by him for which no proper foundation has been laid. (Cal.) Big Three Mining & Mill Co. v. Hamilton, 118.

Work Done Outside of Claim.

19. MINING CLAIMS—Work on One for Benefit of Others.—Where mining claims are held in common, the expenditure required by the laws of the United States may be made upon any one of the claims. The work done, however, must be done in good faith for the benefit of all the claims, and have a tendency to benefit or develop the claims other than the one upon which it is done. (Cal.) Big Three Mining & Mill Co. v. Hamilton, 118.

20. MINING CLAIMS—Work on One for Benefit of Others.—Whether the work done on one of several claims held in common is done in good faith for the benefit of all of them, and has a tendency to benefit or develop them, is a question of fact for the jury. (Cal.) Big Three Mining & Mill Co. v. Hamilton, 118.

21. MINING CLAIMS—Work on One for Benefit of Others.—Assessment work done upon one of group of claims owned in common may inure to the benefit of all, even though the claims are not adjoining. (Cal.) Big Three Mining & Mill Co. v. Hamilton, 118.

22. MINING CLAIMS—Work Done Outside of Claim.—Under the rule that instructions are to be read together and harmonized if possible, there is no necessary conflict between an instruction that a locator has the burden to show that work done outside of a mining claim must have a "tendency to" benefit or develop the claim, and an instruction that it must be shown that such work "did actually benefit" the claim. (Cal.) Big Three Mining & Mill Co. v. Hamilton, 118.

See Mechanics' Liens.

MISCONDUCT OF COUNSEL.

See Criminal Law, 5; Trial, 5.

MISCONDUCT OF JURY.

See Jury, 5, 6.

MISTAKE.

See Adverse Possession, 6.

MONOPOLY.

1. MONOPOLY—Amalgamation of Ice Plants.—When One Corporation purchases some fifteen ice plants which manufacture all but five or ten per cent of the ice made in the city of Louisville, the contract of purchase providing that the vendors shall not engage in that business in the city for ten years, and then, as part of the scheme to control the ice trade, another corporation is organized and a conveyance of the properties is made to it, the contract is illegal and cannot be enforced by the last-named corporation, because in unreasonable restraint of trade, and opposed to the act of 1906 relating to trusts and combines, although the price of ice has not been raised above its fair value, nor has the control of the output or price of the independent companies been attempted. (Ky.) Merchants' Ice etc. Co. v. Rohrman, 390.

2. MONOPOLY.—The Validity of a Contract in Restraint of Trade depends upon whether the restraint is reasonable. If it is, the con-

tract is legal; if it is not, the contract is illegal. (Ky.) *Merchants' Ice etc. Co. v. Rohrman*, 390.

3. **MONOPOLY—Opposition to Constitutional Rights.**—Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the state and federal constitutions. (Ky.) *Merchants' Ice etc. Co. v. Rohrman*, 390.

4. **MONOPOLY—Destruction of Individual Rights.**—Monopoly is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment against it. (Ky.) *Merchants' Ice etc. Co. v. Rohrman*, 390.

5. **MONOPOLY.**—A Contract for the Consolidation of the Ice Plants in a city will not be upheld because the avowed purpose of the consolidation is to economize the cost of production and sale and prevent competition that was destructive to the business, and not to fix or regulate the price of the article. (Ky.) *Merchants' Ice etc. Co. v. Rohrman*, 390.

6. **MONOPOLY.**—Ice in Large Cities is one of the common necessities of life. (Ky.) *Merchants' Ice etc. Co. v. Rohrman*, 390.

MORTGAGES.

1. **EQUITABLE MORTGAGE.**—An Instrument Styled a Title Bond, by the terms of which a vendee of land acknowledges himself indebted to the vendor in a certain sum to be due in case of his failure to construct a partition wall, and agrees that the vendor shall have a lien for the amount thereof, is an equitable mortgage. (Ark.) *Cox v. Smith*, 89.

2. **MORTGAGE—Transaction Considered as Security, not as Sale.** Where an agreement between the heirs and the purchaser at a judicial sale of the estate of a decedent, together with the surrounding facts and circumstances, shows that he takes the land in trust for them with the privilege of redeeming, and that he only obtains a lien in the nature of a mortgage, the court will so declare, although a writing executed after the sale expressly declares the sale absolute. (Ky.) *McKibben v. Diltz*, 408.

3. **MORTGAGE—Form or Name of Instrument.**—The Mere Form of an instrument, or the name the parties have given it, does not determine whether or not it is enforceable as a mortgage. If its purpose is security, it will be given that effect. (Ky.) *McKibben v. Diltz*, 408.

4. **MORTGAGE—Presumption of Payment.**—There is no presumption that a mortgage note was paid at maturity. (Vt.) *Sowles v. Minot*, 1010.

5. **MORTGAGEE—Rights After Condition Broken.**—The legal title to land passes to the mortgagee on condition broken, but he holds the title only for the purpose of security, and the burden is on him and those claiming in his right to show anything done in enlargement of the title. (Vt.) *Sowles v. Minot*, 1010.

6. **MORTGAGE—Presumption of Relinquishment by Mortgagor.**—It is only in support of an actual possession by a mortgagee that the

law will presume a conveyance or other relinquishment of the mortgagor's interest to him. (Vt.) *Sowles v. Minot*, 1010.

7. MORTGAGE.—The Lapse of Fifteen Years without payment or other recognition, and without an enforcement of the security in any manner, will defeat a mortgagee's right. (Vt.) *Sowles v. Minot*, 1010.

See Chattel Mortgages; Life Tenants; Limitation of Actions, 1; Mines and Mining, 1-8.

Note.

Mortgages, description of land by political subdivision, illustrations of sufficient, 262, 263.

description of land by political subdivision, illustrations of insufficient, 263, 264, 265.

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description of land by political subdivision, rule for, 260.

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MUNICIPAL CORPORATIONS.

Bonds—Elections.

1. MUNICIPAL BONDS—Submitting Propositions Separately to Voters.—In submitting to the voters the question of issuing bonds for three different purposes, the failure to specify the amount to be used for each purpose and to submit the different propositions separately, renders the election illegal and the bonds invalid. (S. C.) *Ross v. Lipscomb*, 794.

2. MUNICIPAL BONDS—Money in Which Payable.—Section 2008 of the Code of Laws provides that municipal bonds may be made payable in any legal tender money of the United States. (S. C.) *Ross v. Lipscomb*, 794.

Estoppel to Open Street.

3. MUNICIPAL CORPORATION—Estoppel to Open Street.—Where a city has, without objection, permitted a person to occupy land for twenty years and place permanent improvements thereon, it will be estopped to assert that a portion of the land has been dedicated for a street and to open the alleged street through the tract to his great injury. (Mont.) *Von Tobel v. City of Lewistown*, 733.

Liability for Enforcement of Void Ordinance.

4. MUNICIPALITY—Liability for Enforcement of Void Ordinance.—A municipal corporation is not liable for the acts of its mayor and marshal in enforcing by unlawful imprisonment a void ordinance,

since they are acting in a public and governmental capacity. (Ark.) *Franks v. Holly Grove*, 86.

Liability for Acts of Officers and for Riots.

5. **MUNICIPAL CORPORATION—Liability for Act of Police Officer.**—A city is not liable to a person assaulted and robbed by its police officers. (Mass.) *Hathaway v. City of Everett*, 436.

6. **MUNICIPAL CORPORATION—Liability for Acts of Assessor.** A city is not liable in tort to a person compelled to pay excessive taxes fraudulently assessed by its assessors. (Mass.) *Hathaway v. City of Everett*, 436.

7. **MUNICIPAL CORPORATION—Liability for Injury from Riot.** If, in an action of tort against a city for injury to property by persons riotously assembled, the declaration contains no count under Revised Laws, chapter 211, section 8, a verdict will be ordered for the defendant. (Mass.) *Hathaway v. City of Everett*, 436.

Liability for Condition of Streets.

8. **MUNICIPALITY—Liability for Streets in Hands of Contractor.** Under a statute requiring a city to keep its streets reasonably safe and fit for public travel, a city cannot relieve itself of the liability by turning over a street to a paving contractor. (Mich.) *Hughes v. City of Detroit*, 504.

9. **MUNICIPALITY—Notice of Defects When Street is Being Paved.**—Where, in an action against a city by a pedestrian for injuries received from walking on planks placed by a contractor at a crossing while he is paving the street, there is evidence tending to show that the planks had been in the condition they were at the time of the accident for several days prior, and the paving has been under the supervision of the department of public works, and the city has authority to have an inspector in charge of the street, the question of notice of the condition of the planks to the city is properly submitted to the jury. (Mich.) *Hughes v. City of Detroit*, 504.

10. **MUNICIPALITY—Planks for Use While Street is Being Paved.** In an action against a city by a pedestrian for injuries received from walking on planks placed at a crossing by a contractor while he is paving the street, the fact that plaintiff had crossed over there in the morning of the day of the accident may be considered as bearing upon the question of the use of the crossing in its then condition by the public. (Mich.) *Hughes v. City of Detroit*, 504.

11. **MUNICIPALITY—Planks for Use While Street is Being Paved.** Where a pedestrian is injured while walking over planks placed at a crossing by a contractor while he is paving the street, the contributory negligence of the pedestrian and the condition of the planks are ordinarily questions for the jury. (Mich.) *Hughes v. City of Detroit*, 504.

12. **TRIAL—Misconduct in Cross-examination and Argument.**—In an action against a city for injuries received by a pedestrian walking on planks at a crossing which a contractor supplied for the use of the public while he was paving the street, it is reversible error to permit, over objection, plaintiff's counsel on cross-examination to question a witness in regard to the contractor's bond, and on argument to remark, "Why does the city take this bond from the contractor if it is not to cover just such cases as this?" (Mich.) *Hughes v. City of Detroit*, 504.

13. **TRIAL—Misconduct of Counsel in Argument.**—It is cause for reversal for plaintiff's counsel in a personal injury case to state in his argument to the jury: "Would you take all the money in the city of Detroit and have your sister go through with what this young woman has gone through with? You have anybody crippled in the family, or where their usefulness is gone, and see how they stand

the care, and wear away whatever affection there may be. . . . As my associate said, you would not take that injury for all the money that could be piled up in front of us." (Mich.) *Hughes v. City of Detroit*, 504.

14. PUBLIC STREETS—Liability of Town for Defects.—A town is charged with the duty of keeping its streets in order, and is liable to travelers for street defects negligently permitted. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

15. PUBLIC STREETS—Reconstruction—Interruption of Travel.—A town has the inherent right to reconstruct and repair its streets, and for the purposes of repair or reconstruction may totally or partially interrupt their present use by the public. And it may do this through a contractor. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

16. PUBLIC STREETS—Reconstruction.—A Contractor, With His Men, Material, Steam Roller and other appliances, with usual, non-negligent noises, engaged in reconstructing a street, is there for a lawful purpose. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

17. PUBLIC STREET—Closing One-half for Reconstruction.—It is proper to close one-half of a street while it is being reconstructed, and throw open the other half for use. But when this is done, the public is not thereby invited to use the open half as in all respects entirely safe and convenient—that is, as free from dangers as an ordinary public street. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

18. PUBLIC STREETS—Reconstruction of One-half—Use of Other Half.—Where one-half of a street is closed for reconstruction but the other half is left open for use, the work of reconstruction, with its ordinary attendant noises, need not be stopped every time a traveler drives along the open half of the street. The invitation for him to use the street has its limitations and warnings of danger based on physical facts apparent to him. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

19. PUBLIC STREETS—Reconstruction of One-half—Use of Other Half.—Where one-half of a street is closed for reconstruction but the other half is left open for use, one who drives along the open half with a horse having impaired eyesight must bear the burden not only incident to the street reconstruction and chance of the usual attendant noises and dangers of a steam roller used therein, but also of knowing that the horse is more likely to be disturbed than if he had good sight. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

20. PUBLIC STREETS—Steam Roller Frightening Horses.—Where one-half of a street is closed for reconstruction but the other half is left open for use, a person who drives on the open side of the street with a horse having impaired eyesight assumes the risk of the horse becoming frightened at the sight of, or at a necessary and ordinary noise from operating a steam roller in the reconstruction work. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

21. PUBLIC STREETS—Reconstruction—Duty of Contractor to Travelers.—Simply because a contractor reconstructing one-half of a street is lawfully therein and rightly using a steam roller with its attendant noises does not exempt him from liability for injuries suffered, as a result of his negligent performance of his work, by travelers on the other side of the street left open for use. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

22. PUBLIC STREETS—Reconstruction—Duty of Contractor to Travelers.—Where one-half of a street is closed for reconstruction but the other half is left open for use, a traveler on the latter half assumes certain risks, but he is still a traveler on a public street, and

~~The contractor~~ doing the reconstruction, though rightfully at work ~~these cases are due care.~~ (Mo.) Phelan v. Granite Bituminous Pav. Co., 582.

23. PUBLIC STREETS—Steam Roller Frightening Horses.—Where one half of a street is closed for reconstruction and the other half is left open for use, the contractors are not required to stop work when they see a person first drive upon the open side of the street, but when their engineer in charge of a steam roller notices that the usual noises thereof cause the traveler's horse to act as if becoming unmanageable, he must not voluntarily continue the noises, and thereby cause the horse to run away and injure the driver. (Mo.) Phelan v. Granite Bituminous Pav. Co., 582.

24. PUBLIC STREETS.—The Unnecessary Use of a Steam Whistle in running a steam roller in a street in doing reconstruction work, whereby horses are frightened and human beings injured, is actionable negligence. (Mo.) Phelan v. Granite Bituminous Pav. Co., 582.

25. PUBLIC STREETS.—The Use of a Steam Roller in a Street in doing reconstruction work, if it makes extraordinary puffing noises, is negligence, when travelers in vehicles are journeying hard by on the other half of the highway. (Mo.) Phelan v. Granite Bituminous Co., 582.

26. PUBLIC STREETS—Noises of Steam Roller—Evidence.—When witnesses for the plaintiff, in an action for injuries sustained from his horse running away, testify that the noises made by a steam roller used in reconstructing the street were unusual and extraordinary, and the defendant does not object to the testimony or attempt to break its force by cross-examination, the testimony is in for what it is worth, and a court of review will not rule that there is no evidence at all. (Mo.) Phelan v. Granite Bituminous Pav. Co., 582.

27. PUBLIC STREETS—Steam Roller Frightening Horse.—If an engineer in charge of a steam roller used in reconstructing one side of a street notices that the usual noises thereof are frightening a horse on the other side of the street, which is open for use, and nevertheless continues such noises until the horse breaks away from the driver's control, the contractor is liable for the driver's injuries. (Mo.) Phelan v. Granite Bituminous Pav. Co., 582.

28. PUBLIC STREETS—Driver Violating Ordinance.—The fact that a person in driving on a street in course of reconstruction violates the law does not bar his action against the contractor for causing his horse to run away, since the violation of the law is not the proximate cause of the injury. (Mo.) Phelan v. Granite Bituminous Pav. Co., 582.

29. PUBLIC STREETS—Choice of Dangerous Way by Driver.—A person who drives on a street in which reconstruction work is being done, when there is another street, safe and convenient, which he might take, nevertheless has a cause of action against the contractor in charge if he negligently frightens the horse after it enters the street. (Mo.) Phelan v. Granite Bituminous Pav. Co., 582.

30. PUBLIC STREETS—Steam Roller Frightening Horse.—Where one-half of a street is closed for reconstruction but the other half is left open for use, and the contractor negligently operates therein a steam roller by emitting unusually loud and frightening noises, not necessary or incidental to the operation of the roller, which frighten a horse on the other side of the street, the driver, in the absence of contributory negligence, may recover from the contractor. (Mo.) Phelan v. Granite Bituminous Pav. Co., 582.

31. PUBLIC STREETS—Steam Roller Frightening Horse.—Where one-half of a street is closed for reconstruction but the other half is left open for use, and the contractor's engineer operating therein

a steam roller sees that the usual puffing noise thereof is causing a horse on the other side of the street to become unmanageable, it is his duty to stop the roller and cease the noises. If he does not and the horse runs away, the driver, in the absence of contributory negligence, may recover from the contractor. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

See Automobiles; Constitutional Law, 9-11; Counties.

MUNICIPAL PLANS COMMISSION.

See Constitutional Law, 9-11.

MUTUAL INSURANCE COMPANIES.

See Insurance, 10-13.

NEGLIGENCE.

In General.

1. **MERCHANT'S LIABILITY for Injury to Person in Rush at Bargain Counter.**—Where a merchant attracts a large crowd to his store by advertising, and then announces bargains at a particular counter near a stairway, and the people, rushing in that direction, cause a girl on the stairs to fall, he is not liable for her injuries. (Mass.) *Lord v. Sherer Dry-goods Co.*, 420.

2. **NEGLIGENCE—Conduct of Person in Danger.**—There is No Rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances. (Ill.) *Stack v. East St. Louis Ry. Co.*, 318.

3. **NEGLIGENCE—Rescue of Person in Peril.**—One who, observing another in peril, voluntarily exposes himself to the same danger in order to protect him or save his life, may recover for any injury sustained in effecting the rescue, against the person through whose negligence the perilous condition has been brought about, provided the exposure is not made under such circumstances as to constitute rashness in the judgment of prudent persons. (Mont.) *Bracey v. Northwestern Improvement Co.*, 738.

4. **NEGLIGENCE—Rescue of Person in Peril.**—Where one voluntarily exposes himself to danger to save the life of another, the incurring of the danger is not per se negligence. The question of his negligence is ordinarily to be answered by the jury, upon proof of the circumstances surrounding the attempt to rescue, such as the alarm, excitement and confusion usually present, and the uncertainty as to the means to be employed, the promptness required, and the liability to err in the exercise of judgment as to the best course to pursue. Great latitude of judgment must be allowed to one who is impelled by the dictates of humanity to decide and act in the face of emergencies. (Mont.) *Bracey v. Northwestern Improvement Co.*, 738.

5. **NEGLIGENCE—Rescue of Person in Peril.**—To warrant a recovery where one voluntarily exposes himself to danger to save human life, negligence toward the person rescued, or the person making the rescue after the attempt has been made, is essential. (Mont.) *Bracey v. Northwestern Improvement Co.*, 738.

6. **NEGLIGENCE—Rescue of Person in Peril.**—Where one sues for injuries sustained while voluntarily exposing himself to danger to save human life, the presumption that he was impelled by the dictates of humanity is of itself sufficient to send the case to the jury, unless it is apparent that when he encountered the danger, he ought, as a

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prudent person under the circumstances, to have known that he could not escape injury or death. (Mont.) *Bracey v. Northwestern Improvement Co.*, 738.

7. NEGLIGENCE—Rescue of Person in Peril.—Where the complaint in an action to recover for the death of a coal miner, who was overcome by gases while rescuing a fellow-workman, alleges that the death was due to the accumulation of gases spontaneously generated in unused workings which he entered, while the evidence discloses that the gases which caused his death were generated by a fire in the mine, the variance is such as amounts to a failure of proof, and brings the case within the rule that unless the evidence furnishes substantial support for the cause of action alleged, the plaintiff has failed to make out his case, even though the evidence shows negligence in other respects. (Mont.) *Bracey v. Northwestern Improvement Co.*, 738.

7a. NEGLIGENCE—Attempt to Save Human Life.—The law has so high a regard for human life that it will not impute negligence to one who attempts to save it, unless the attempt is made under such circumstances as to constitute it rashness in the estimate of prudent persons. (Mont.) *Da Rin v. Casualty Co.*, 709.

Pleading—Evidence—Trial.

8. NEGLIGENCE—Allegation in General Terms.—The duty of exercising due care being shown, the failure to perform that duty, the negligence causing the injuries complained of, may be averred in the most general terms, little if at all short of the mere conclusions of the pleader, since if the defendant has been guilty of negligence he knows as well or better than the plaintiff in what it consists. (Ala.) *Western Union Tel. Co. v. Saunders*, 35.

9. NEGLIGENCE—Necessity of Specific Allegations.—A complaint in an action for personal injuries need not set out in detail the specific acts constituting negligence. (Ala.) *Louisville & Nashville R. R. Co. v. Holland*, 25.

10. NEGLIGENCE—Sufficiency of Allegations in Complaint.—While a complaint in an action for personal injuries need not specify the particular acts of diligence omitted, yet when simple negligence constitutes the cause of action, it is incumbent upon the plaintiff to bring himself within the protection of negligence averred by such a relationship as will enable him to recover for simple negligence. (Ala.) *Louisville & Nashville R. R. Co. v. Holland*, 25.

11. NEGLIGENCE—Pleading and Evidence.—In an action for personal injuries the evidence must tend not only to show the negligence alleged, but also the causal connection between it and the injury. (Mont.) *Bracey v. Northwestern Improvement Co.*, 738.

12. NEGLIGENCE—When a Question for Jury.—Where more than one inference may be drawn from testimony by fair-minded men, the court may submit issues of negligence with an instruction that it is the province of the jury to say whether the party whose conduct is in question has met the test rule of the prudent man. (S. C.) *Lowe v. Southern Ry.*, 904.

13. NEGLIGENCE—A General Verdict for the Plaintiff in an action against a street railway company for injuries to one attempting to board a car will not be sustained, if there are two counts, both good, in the declaration, one charging simple and the other gross negligence, and the court, notwithstanding its attention was called to the matter, failed to point out the proof required to sustain the allegations of the latter count. (Mass.) *Yancey v. Boston Elevated Ry.*, 431.

See Death.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.*Grounds for Granting.*

1. **NEW TRIAL**—Grounds not Requiring Reversal.—None of the other grounds of the motion for new trial require a reversal. (Ga.) *Mobley v. Lyon*, 213.

2. **A NEW TRIAL** for After-discovered Evidence Should be Denied when the evidence is merely cumulative and there is no showing that it could not by due diligence have been secured in time for the trial. (S. C.) *State v. Anderson*, 887.

3. **NEW TRIAL**—Review on Appeal.—The Decision of the circuit court on motions for new trials for after-discovered evidence in a law case cannot be reviewed by the supreme court except for errors of law. (S. C.) *State v. Anderson*, 887.

Notice.

4. **NEW TRIAL**—Premature Notice of Intention to Move.—Notice of an intention to move for a new trial cannot be served before notice of the entry of judgment. (Mont.) *McIntyre v. MacGinniss*, 701.

5. **NEW TRIAL**—Waiver of Notice of Entry of Judgment.—Although formal notice of the entry of judgment may be waived by the party moving for a new trial by instituting proceedings in support of his motion without it, such waiver is not properly imputable to one who inadvertently institutes his proceedings before the time at which he may do so. (Mont.) *McIntyre v. MacGinniss*, 701.

6. **NEW TRIAL**—Service of Notice on Adverse Party.—Where both the notice of the intention to move for a new trial and the notice of appeal are served upon the only party who appears from the record to have any interest in opposing the purpose sought by the motion and appeal, the service is not open to the objection that all the adverse parties have not been served. (Mont.) *McIntyre v. MacGinniss*, 701.

NONSUIT.

See Trial, 3.

NOTICES.

NOTICES—Service on Attorney or Client.—Although the statute provides that all notices shall be served upon the attorney, not upon the party, the service of notice of the dismissal of an action by the plaintiff personally upon the defendant is not a nullity. (Minn.) *Gibson v. Nelson*, 549.

Note.

Novation, doctrine of as applied to vendor's lien, 201.

OFFICERS.

OFFICER—Whether can Employ Himself.—The idea that a public official cannot employ himself to do work for the public is the common-law view of the implied limitations on the powers of a trustee, but where a statute expressly authorizes the act in question, the common law on that point stands repealed. (Ky.) *Flowers v. Logan County*, 347.

See Counties; Municipal Corporations.

PARENT AND CHILD.

See Gift, 1.

PARTIES.

PARTIES.—One Tenant in Common may Sue for the Benefit of all the tenants, in an action against a stranger to recover land, when the cotenants are very numerous and it is impracticable to bring them all before the court, where the statutes provide that "when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole"; and that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein and any person claiming title or right of possession to real estate may be made parties, plaintiff or defendant, as the case may require, to any such actions." (S. C.) *Whitaker v. Manson*, 835.

PARTITION.

1. **PARTITION**—Right of Trustee in Bankruptcy to Maintain.—A trustee of the estate of a bankrupt selected or appointed under the provisions of the national bankruptcy act is without legal capacity under the statutes of Ohio to bring and maintain a suit for the partition of real estate in which such bankrupt is a tenant in common with others. (Ohio St.) *Lindsay v. Runkle*, 781.

2. **PARTITION**—Estate of Decedent.—The Administrator is ordinarily not a proper party in a partition suit brought by heirs. (Ohio St.) *Stout v. Stout*, 785.

3. **PARTITION**—Estate of Decedent—Payment of Debts.—The right of an administrator to subject the lands of his intestate to the payment of the debts of the estate is superior to the right of the heirs at law to have partition of such lands. (Ohio St.) *Stout v. Stout*, 785.

4. **PARTITION**—Estate of Decedent—Sale for Debts.—So soon as the administrator has ascertained that the personal estate in his hands will be insufficient to pay all the debts, etc., of the estate, it is his duty to forthwith apply to the probate or common pleas court for authority to sell the lands for the payment of such debts, and in such case the heirs at law can prevent a sale and have partition of the lands only by giving bond for the payment of debts, etc., as provided by section 6146, Revised Statutes. (Ohio St.) *Stout v. Stout*, 785.

PARTNERSHIP.

1. **PARTNERSHIP**—Certificate Showing Names of Partners.—Where two persons enter into a contract as individuals, and before suing thereon file a certificate under Remington and Ballinger's Code, section 8369 et seq., showing that they are the only partners doing business under an assumed name, it cannot be contended that they are not entitled to maintain the action because they have not complied with such statute. (Wash.) *Church v. Wilkeson-Tripp Co.*, 1059.

2. **PARTNERSHIP**.—When a Firm Note Comes into the Hands of an Individual Partner by assignment, this operates as an extinguishment of the note. He cannot sue upon the note, and can pass no such right to another. His remedy is to be credited upon the partnership books with the amount paid. (Ky.) *Deavenport v. Green River Deposit Bank*, 386.

3. **PARTNERSHIP**—Purchase of Firm Note by Partner.—A partner will not be permitted to purchase a partnership note and thereby profit at the expense of the firm. The firm will be given the benefit of any discount from the face of the note which he obtains. (Ky.) *Deavenport v. Green River Deposit Bank*, 386.

4. PARTNERSHIP—Purchase of Firm Note by Partner.—A partner who purchases a firm note cannot sue his copartners and obtain judgment in an action at law. His remedy is an action for the settlement of the partnership, wherein the rights of all the parties may be adjudged. (Ky.) *Deavenport v. Green River Deposit Bank*, 386.

5. PARTNERSHIP—Purchase of Firm Note by Partner.—If a bank discounts a partnership note, and sells a one-half interest in it to one of the partners, he and his comakers are still liable to the bank for the other half of the note. (Ky.) *Deavenport v. Green River Deposit Bank*, 386.

PARTY-WALLS.

1. PARTY-WALL—Statute of Frauds.—An Oral Contract whereby an owner of land agrees to permit coterminous proprietors to join and use his wall in the construction of their building, upon their promise to pay one-half of the cost of the wall, is, after they make such use of the wall, taken out of the statute of frauds, and enforceable against them. (Ark.) *Salyers v. Legate*, 107.

2. PARTY-WALL—Structure not Built for That Purpose.—A wall that has already been constructed by one proprietor may become a party-wall by force of an agreement whereby an adjoining proprietor promises to pay one-half of the cost of the wall if permitted to join and use it in the construction of his building. (Ark.) *Salyers v. Legate*, 107.

3. PARTY-WALL—Enforcement of Cost—Existence of Lien.—Land owners, who, in constructing a building, use the wall of an adjoining proprietor under an agreement to pay one-half of its cost, cannot, in his action to recover the agreed amount, plead an outstanding mortgage lien on his land. (Ark.) *Salyers v. Legate*, 107.

See Accord and Satisfaction; Tender.

PERJURY.

See Arbitration and Award.

PLEADING.

1. PLEADING—Complaint not Subject to Demurrer.—If a cause of action can be reasonably inferred from the allegations of a complaint, it is not subject to a general demurrer. (Ark.) *Cox v. Smith*, 89.

2. PLEADING.—Where a Plea is Double, and One Defense set up is good and the other bad, the plea is not subject to demurrer on account of the bad defense. A motion to strike out the imperfect part is the proper practice. (Ala.) *Western Union Tel. Co. v. Saunders*, 35.

3. PLEADING.—Where a Plea is Double and Each Several Defense set up is imperfect, and the ground of demurrer is directed to only one of the defenses, it is proper to sustain the demurrer. (Ala.) *Western Union Tel. Co. v. Saunders*, 35.

4. PLEADING—Showing Payments Under General Denial.—Where the complaint in an action on a note alleges credits and that there is a specified balance due, the defendant may show other payments under a general denial. (S. C.) *Parker v. Mayes*, 912.

5. PLEADING.—A Motion to Amend an Answer is Addressed to the discretion of the trial judge, and his action is not subject to review unless there has been an abuse of discretion. (S. C.) *Parker v. Mayes*, 912.

POLICE OFFICERS.

See Municipal Corporations, 5.

POWER.

1. **POWER—Revocation by Death of One Party.**—A naked power committed to several persons is determined by the death of one, but if coupled with an interest the power, even though discretionary, pass to the survivor. (Ill.) *Babcock v. Farwell*, 284.

2. **POWER—When not Terminated by Death of One Party.**—A contract by which a syndicate is entitled to the exclusive use and possession of the real and personal property of a corporation for a term of years as security and in compromise of a claim of members of the syndicate creates a power coupled with an interest which is not terminated by the death of one or two of the members. (Ill.) *Babcock v. Farwell*, 284.

PRINCIPAL AND AGENT.

See Brokers. *

PROBATE LAW.

See Descent and Distribution; Executors and Administrators; Wills.

PROCESS.*Service and Return.*

1. **PROCESS.**—It is the Service of a Writ and Petition upon the defendant, not the return, that gives the court jurisdiction over his person. The return is merely evidence by which the court is informed that the defendant has been served. (Mo.) *Kahn v. Mercantile Town Mutual Ins. Co.*, 665.

2. **SHERIFF'S RETURN.**—Courts will Permit Amendments to be made to a sheriff's return of a writ to correspond with the facts, even at a subsequent term, and the return will relate to the proper return day. (Mo.) *Kahn v. Mercantile Town Mutual Ins. Co.*, 665.

3. **SHERIFF'S RETURN—Time Within Which Amendment may be Made.**—There is no specific limitation of time within which an amendment to a sheriff's return of service of a writ of summons must be made. (Mo.) *Kahn v. Mercantile Town Mutual Ins. Co.*, 665.

4. **SHERIFF'S RETURN—Discretion in Allowing Amendment.**—The allowing of an amendment to a sheriff's return of service of a writ of summons is within the jurisdiction of the court. (Mo.) *Kahn v. Mercantile Town Mutual Ins. Co.*, 665.

5. **SHERIFF'S RETURN—Amendment—Notice to Defendant.**—The defendant is not entitled to notice before the court permits the sheriff to amend his return of service of a writ of summons. (Mo.) *Kahn v. Mercantile Town Ins. Co.*, 665.

Constructive Service.

6. **PROCESS—Constructive Service—Strict Compliance.**—A party claiming the benefits of a decree upon constructive service must show a strict compliance with every requirement of the statute. Nothing less will invest the court with jurisdiction or give validity to the decree when it is called into question in a direct proceeding. (Ill.) *Correll v. Greider*, 327.

7. **PROCESS—Constructive Service.**—The Affidavit upon which service by publication is had under section 12 of the chancery act is jurisdictional, and the statute must be strictly complied with. (Ill.) *Correll v. Greider*, 327.

8. **PROCESS—Constructive Service.**—An Affidavit for service by publication under section 12 of the chancery act is insufficient, which states that the defendant, if living, is a nonresident, and "that he (affiant) has made diligent inquiry to ascertain his residence, as also the names and addresses of his bodily heirs, if any, but without success." The words "without success" are not equivalent to a statement that upon such diligent inquiry the place of residence of the defendant could not be ascertained. (Ill.) *Correll v. Greider*, 327.

9. **PROCESS—Service by Publication on Nonresident.**—Proceedings for the service of summons by publication on a nonresident before attachment of his property are void. (S. C.) *Breon v. Miller Lumber Co.*, 803.

Exemption from Service.

10. **PROCESS—Exemption of Nonresident Attending Suit.**—A nonresident who comes into the state for the sole purpose of attending, as a party defendant and a witness, a reference in a pending suit, is exempt from service of summons in another action. (S. C.) *Breon v. Miller Lumber Co.*, 803.

11. **PROCESS—Service on Nonresident Officer of Corporation.**—Service of summons on a domestic corporation may be effected by serving its president, a nonresident, while he is temporarily within the state for the purpose of attending as a party defendant and a witness in a reference being held in another suit. (S. C.) *Breon v. Miller Lumber Co.*, 803.

See Convicts, 1-5; Corporations, 48.

PROMISSORY NOTES.

See Bills and Notes.

PROTEST.

See Banks and Banking, 3; Bills and Notes, 2.

PUBLIC STREETS.

See Municipal Corporations, 8-31.

PULLMAN CARS.

See Carriers, 10-16.

QUASI CONTRACTS.

See Contracts, 4-6.

QUIETING TITLE.

1. **QUIETING TITLE—Cancellation of Void Judgment.**—Where the plaintiffs in an action under section 785 et seq., Remington and Ballinger's Code, set forth that they are the owners and entitled to possession of certain land, and the defendant denies the allegation of ownership and alleges ownership in himself, the question for determination is, who has the superior title, whether legal or equitable, and the defendant, maintaining that the plaintiffs' execution sale was void because the judgment had been paid, is not required to first institute a direct proceeding to cancel the judgment before answering the complaint. (Wash.) *McLiesh v. Ball*, 1087.

2. **QUIETING TITLE—Void Judgment.**—In an Action under section 650, Revised Statutes of 1899, to ascertain and determine title, if a judgment conveying title is void upon its face, the court should so declare, and not sustain a demurrer on the ground that a bill in equity to cancel the judgment is unnecessary. (Mo.) *McLaughlin v. McLaughlin*, 680.

3. QUIETING TITLE—Void Judgment.—Where the Fact Making a judgment void does not appear upon the face of the record, the judgment casts a cloud and equity will remove the same upon proper proof. (Mo.) *McLaughlin v. McLaughlin*, 680.

4. QUIETING TITLE—Void Judgment—Matter of Doubt.—Where it is a matter of grave doubt whether a judgment affecting land is void on its face, the judgment casts such a cloud as justifies equitable relief. (Mo.) *McLaughlin v. McLaughlin*, 680.

RAILROADS.

Liability for Torts of Lessee.

1. RAILROAD—Liability for Torts of Lessee.—The lessor and lessee of a railroad are both liable for the torts of the lessee committed in the operation of the road. The liability of the lessor is predicated upon the fact that the lessee is its agent for the purpose of operating the road. But while both are liable, and while they may be sued jointly or severally, still there is no such privity between them as makes their interests, in actions arising out of the torts of the agent, identical. (S. C.) *Rookard v. Atlantic etc. Ry. Co.*, 839.

Automatic Couplers—Interstate Commerce.

2. RAILROADS—Automatic Couplers—Interstate Commerce.—Section 3365-27b, Revised Statutes of Ohio (98 Ohio Laws, 76), making it unlawful for any common carrier engaged in moving traffic by railroad between points within this state to haul, or permit to be handled or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, is a valid and reasonable exercise of the police power of the state; it does not directly regulate interstate commerce or conflict with regulations thereof enacted by Congress, but requires the use of the same kind of automatic couplers required by the act of Congress, and therefore is not void on the ground that it is in contravention of the exclusive power of Congress to regulate commerce among the states. (Ohio St.) *Detroit etc. Ry. Co. v. State*, 758.

3. RAILROADS—Automatic Couplers—Interstate Commerce.—A common carrier using a car in violation of the statute is not immune from the penalty therein provided because the car, or the railroad on which it was being hauled, is commonly used in interstate traffic, or because it was in a train containing cars loaded with interstate traffic. (Ohio St.) *Detroit etc. Ry. Co. v. State*, 758.

Injury to Persons and Employés on Track.

4. RAILROAD—Violation of Ordinance—Injury to Employé.—The running of a train in violation of an ordinance cannot be made the basis of an action by an employé of the railroad for injuries resulting therefrom. The ordinance is for the protection of the public, and not the railway employés. (Ala.) *Louisville & Nashville R. R. Co. v. Holland*, 25.

5. RAILROAD—Trespasser on Track.—Code, Section 5476, does not mean to render the obligations to trespassers on a railroad track any greater nor to permit them to recover for any less degree of negligence than they could have done previous to the adoption of the statute. (Ala.) *Louisville & Nashville R. R. Co. v. Holland*, 25.

6. RAILROAD—Lookout for Flagman on Track.—While it may be the duty of an engineer to keep a lookout at the place where a flagman is, the railway company is not liable to the flagman, if struck

by a train, for failure to keep a lookout for trains himself. (Ala.) Louisville & Nashville R. R. Co. v. Holland, 25.

7. **RAILROAD.—A Flagman Who Goes to Sleep on the Track** is guilty of contributory negligence and in effect a trespasser, and the railroad company owes him no duty other than not to run over him after discovering his peril. (Ala.) Louisville & Nashville R. R. Co. v. Holland, 25.

8. **RAILROAD—Employé on Track.**—When a Complaint, in an action against a railroad company for running over a flagman, shows on its face that he was guilty of contributory negligence or was a trespasser, it is defective unless it goes further and avers negligence subsequent to a discovery of his peril. (Ala.) Louisville & Nashville R. R. Co. v. Holland, 25.

9. **RAILROAD—Flagman Asleep on Track.**—Where a flagman who is in good health and has nothing the matter with him falls asleep on the track and is there run over by an engine, the only theory upon which a recovery can be had against the railroad company is that negligence, subsequent to a discovery of his peril, was the proximate cause of his death, that is, that the engineer not only discovered him, but discovered him in a perilous position, and negligently omitted to discharge some duty which, if discharged, would have saved him. (Ala.) Louisville & Nashville R. R. Co. v. Holland, 25.

10. **RAILROAD—Flagman Asleep on Track.**—In an Action against a railroad company for running over a flagman while asleep on the track, wherein the engineer testifies that he was less than two hundred feet from the flagman when he discovered him and did all things to arouse him and stop the train, but another witness gives evidence tending to show that the engineer discovered the flagman in time to have stopped the train before it struck him, the question of the engineer's negligence is for the jury. (Ala.) Louisville & Nashville R. R. Co. v. Holland, 25.

Killing Dogs.

11. **DOGS.—The Killing of a Dog by the Running of a Train** is prima facie evidence of negligence on the part of the railroad company. (Ark.) St. Louis etc. Ry. Co. v. Rhoden, 73.

12. **DOGS.—A Railroad Company Owes to the Owner of Dogs** on its tracks the duty to keep a constant lookout for the protection of that character of property, which is required by section 6607 of Kirby's Digest. (Ark.) St. Louis etc. Ry. Co. v. Rhoden, 73.

13. **DOGS.—It is the Duty of a Railroad Company** to give a dog on the track the same care that is due to other species of property under similar circumstances. In this respect there is no distinction between a dog and other animals. (Ark.) St. Louis etc. Ry. Co. v. Rhoden, 73.

14. **DOGS—Duty of Railroad.**—The Fact That a Dog may be more alert and intelligent than other animals does not absolve a railroad company from using that care for its protection that an ordinarily prudent man would use in regard to other animals. (Ark.) St. Louis etc. Ry. Co. v. Rhoden, 73.

15. **DOGS—Negligent Killing by Railway.**—Where the engineer of a locomotive testifies that he first discovered a dog on the track when it was only one hundred feet in front of his engine, and that he could not stop the train in time to avoid killing the animal, but other witnesses testify that the dog ran in front of the engine for half a mile before being struck, there is sufficient testimony upon which to submit to the jury the question whether the engineer was keeping a constant lookout. (Ark.) St. Louis etc. Ry. Co. v. Rhoden, 73.

See Carriers; Master and Servant, 13-21; Street Railways.

RAPE.

1. **RAPE.**—It must be Alleged in an Indictment for rape that the act was committed "against the will" of the female. But the facts constituting the crime need not be charged in the precise words of the statute. (Ark.) *State v. Peyton*, 93.

2. **RAPE**—Indictment—"Against Her Will."—An indictment for rape which charges that the accused did "unlawfully" and "forcibly ravish and carnally know" a certain female, alleges that the act was done "against her will." (Ark.) *State v. Peyton*, 93.

3. **RAPE.**—Testimony of the Statement of the Prosecutrix that the defendant assaulted her is admissible in a rape case, although it was not made by her until ten days after the alleged offense, it appearing that she is the wife of the stepson of the defendant, that he threatened to kill her if she complained, and that she is not permitted to state any of the details of the occurrence, but only the substantial fact of the assault. (Tex. Cr.) *Pettus v. State*, 978.

4. **RAPE**—Instruction—Use of Word "Crime."—In defining the offense in instructions in a rape case, the court should not use the word "crime," in a connection that may convey an impression that the court believes an offense has been committed. (Tex. Cr.) *Pettus v. State*, 978.

5. **RAPE**—Consent.—In Instructing the Jury in a rape case, the court should not assume to decide what is the main issue and state that it is consent. (Tex. Cr.) *Pettus v. State*, 978.

6. **RAPE**—Consent—Instructions.—Where There is Evidence in a rape case that the intercourse was consented to, an instruction is erroneous which does not affirmatively submit the issue of consent and advise an acquittal if the prosecutrix consented. (Tex. Cr.) *Pettus v. State*, 978.

RECORDS.

1. **RECORDING LAWS**—Defective Registration.—One who seeks to benefit from the recording laws incurs all risks of the failure to put his papers duly upon record, whether the fault is his own or that of an officer. (Mich.) *People v. Burns*, 466.

2. **RECORDING LAWS**—Paper not Entitled to Record.—An instrument which conforms to the recording laws is, when recorded, notice to everyone, but an instrument which does not comply with the statutes on which it is based is notice to no one, even if recorded. (Mich.) *People v. Burns*, 466.

3. **RECORDS.**—Contracts for the Sale of Real Estate, though not expressly mentioned in the recording statutes, are included within the meaning of the words "deeds, grants and transfers of real property," and their proper registration imparts constructive notice. (Wash.) *Bernard v. Benson*, 1051.

4. **RECORDS**—Contract to Sell Land—Judicial Notice.—Courts may properly take judicial notice of the fact that it has been the custom in Washington to record executory contracts for the sale of real estate. (Wash.) *Bernard v. Benson*, 1051.

5. **RECORDS**—Contract to Sell Land—Place to Record.—The recording of an executory contract for the sale of real estate in "Miscellaneous Records" does not impart notice. (Wash.) *Bernard v. Benson*, 1051.

6. **RECORDS**—Contract to Sell Land—Place to Record.—The custom to record all instruments affecting the title to real estate in "Deed Records" has been so general in Washington, and has existed for so long a time, that it is the duty of courts not only to judicially notice it, but to apply it as well. (Wash.) *Bernard v. Benson*, 1051.

See Chattel Mortgages, 4, 5; Deeds, 10-25.

REDEMPTION.

See Judicial Sales, 3, 4.

REFERENCE.

REFERENCE—Long or Complicated Account.—Where a case involves the examination of a long or complicated account, the court has a discretion to send it to a referee to determine the facts. The right of trial by jury is not thereby denied. (Wash.) Poultry Producers' Union v. Williams, 1041.

RELEASE.

RELEASE—Rescission for Fraud—Return of Consideration.—The rule that a release procured by actual fraud may be avoided without a return of the consideration does not apply when there was fraud only in the consideration, as where the party knew he was executing a release but was induced to do so by false representations of the other party as to matters other than the character of the instrument. In such a case the release is voidable only, and is binding until set aside in equity. (Ill.) Babcock v. Farwell, 284.

See Accord and Satisfaction.

REMAINDERS.

See Life Tenants.

REPLEVIN.

1. REPLEVIN—Nature of Action.—Replevin is an Action for the wrongful detention of possession, and the primary object is to recover the thing and not its value. (Minn.) O'Brien v. Curry & Whyte, 563.

2. REPLEVIN—Return of Property in Good Order.—Upon the rendition of a judgment in replevin for a return, it is the duty of the plaintiff to see that the property is restored to the defendant in like good order and condition as when taken. (Mass.) Maguire v. Pan-American Amusement Co., 422.

3. REPLEVIN.—A Redelivery Bond is a Substitute for the property only in those cases where a delivery of the property cannot be had on final judgment. (Minn.) O'Brien v. Curry & Whyte, 563.

4. REPLEVIN.—The Rebonding of the Property, in Replevin actions, does not vest absolute title in the defendant, but he holds it subject to the final determination of the action, and a purchaser of the property from such rebonding defendant acquires no better title than the defendant had: Katz v. Hlavac, 88 Minn. 56, distinguished. (Minn.) O'Brien v. Curry & Whyte, 563.

5. REPLEVIN BOND—Recovery of Costs and Counsel Fees.—In an action on a replevin bond, wherein the condition is that the principal obligor shall pay such damages and costs as the defendant in replevin shall recover against it, and also return the property if such is the final judgment, there can be no recovery for expenses, including counsel fees, incurred in defending the replevin suit and in prosecuting the action on the bond, since the bond includes no provision for such payment, and the taxable costs in each case are in contemplation of the law a full indemnity for all expenses incurred in defense or prosecution. (Mass.) Maguire v. Pan-American Amusement Co., 422.

6. REPLEVIN BOND—Interest on Value of Property Detained.—In an action on a replevin bond the plaintiff can have interest on the damages and costs recovered and on the value of the property only

from the date of the judgment in the replevin suit. (Mass.) *Maguire v. Pan-American Amusement Co.*, 422.

7. **REPLEVIN BOND—Damages—Interest on Value of Property.** The damages for the taking and retention of property in replevin, to the time of judgment in the replevin suit, including interest upon the value of the property if that is taken to be the damages for its detention, can be recovered only in the replevin suit. This applies to the interest allowed by statute in case the goods replevied were under attachment and service of execution was delayed by the replevin. (Mass.) *Maguire v. Pan-American Amusement Co.*, 422.

8. **REPLEVIN BOND—Conclusiveness of Recital of Value.**—The sum named in a replevin bond as the value of the property is competent, but not conclusive, evidence of that value against the obligors in an action on the bond. (Mass.) *Maguire v. Pan-American Amusement Co.*, 422.

9. **REPLEVIN BOND—Damages When Property not Returned.**—In an action on a replevin bond, when there has been judgment in the replevin suit for the return of the property, but there has been a failure to make such return, the plaintiff is entitled to the market value of the property in as good order and condition as it was on the date of the final judgment in the replevin suit. (Mass.) *Maguire v. Pan-American Amusement Co.*, 422.

RESCISSION.

See Contracts, 7-9; Sales, 4.

RESCUE FROM PERIL.

See Negligence, 3-6.

RES JUDICATA.

See Judgments, 7-15.

RESTRAINT OF TRADE.

See Monopoly.

RETROSPECTIVE STATUTE.

See Constitutional Law, 6-8.

RETURN OF SERVICE.

See Process, 1-5.

ROBBERY.

ROBBERY—Assault With Violence—Variance.—Evidence in a robbery case that the accused struck his victim over the head with a revolver, using the weapon only as a bludgeon, will sustain an allegation in the indictment of robbery by means of an assault and violence. The accused cannot complain that the state should have charged robbery by means of firearms or deadly weapons. (Tex. Cr.) *Wyatt v. State*, 926.

SALES.

1. **SALE—Breach of Warranty—Rescission.**—In the absence of fraud or an agreement to rescind, a contract of sale cannot be rescinded for a mere breach of warranty. (Ark.) *Gay Oil Co. v. Roach*, 95.

2. **SALE.**—A Warranty is an Undertaking Collateral to the express object of the contract, and in effect is an agreement to pay the

damages sustained by reason of the article not being as represented. (Ark.) Gay Oil Co. v. Roach, 95.

3. **SALE—Breach of Warranty—Remedy of Buyer.**—A buyer of oil under a contract which guarantees the barrels in which it is shipped against leakage cannot reject the oil because several barrels leaked. His remedy is to recoup or sue for damages. (Ark.) Gay Oil Co. v. Roach, 95.

4. **SALES—Rescission by Seller—Restoring Consideration.**—It is the duty of the seller of a chattel to tender back the note or money received, as a condition to the right to recover the property, except when the paper is worthless or the tender impossible. (Mich.) American Trust & Sav. Bank v. Moore, 518.

5. **SALES—Recaption by Vendor—Suit for Purchase Price.**—Where the vendor of an automobile receives a certificate of deposit in payment, but, on being informed by the bank that the certificate is not good, takes and retains possession of the machine, he cannot recover on the certificate of deposit. (Mich.) American Trust & Sav. Bank v. Moore, 518.

SALOONS.

See Disorderly Houses.

SCHOOLS.

1. **SCHOOLS—Limit of Indebtedness—Teachers.**—A contract by a school district to employ a teacher is unenforceable, if it creates an indebtedness against the district in excess of the amount permitted by statute. (Wash.) Wolfe v. School District No. 2, 1057.

2. **SCHOOLS—Limit of Indebtedness.—The Maintenance of a public school throughout the school year is not such a necessity as to warrant the directors in overriding statutory and constitutional limitations on the amount of indebtedness a school district may lawfully incur.** (Wash.) Wolfe v. School District No. 2, 1057.

SEDUCTION.

1. **SEDUCTION—Impeachment of Prosecutrix.**—Where the prosecutrix in seduction testifies in her examination in chief that she has never had intercourse with anyone but the defendant, the testimony of another man that he has had intercourse with her since the time of the alleged seduction is admissible to contradict or impeach her. (Ark.) Adams v. State, 87.

2. **SEDUCTION—Resemblance of Child to Defendant.**—The prosecuting witness in seduction may testify that her child resembles the defendant. (Ark.) Adams v. State, 87.

SELF-DEFENSE.

See Homicide, 8-12.

SETOFF.

See Account Stated, 3.

SHERIFF'S RETURN.

See Process, 1-5.

SHOPKEEPERS.

See Negligence, 1.

SLANDER.

See Libel and Slander.

SLEEPING-CAR COMPANIES.

See Carriers, 10-16.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE—Innocent Third Persons.—Specific performance will be denied when rights of innocent third persons have intervened so that the enforcement of the contract would be harsh, oppressive, or unjust to them. (Wash.) *Bernard v. Benson*, 1051.

STAMP TAX.

See Taxation, 2-7.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.*Title of Act.*

1. **STATUTE—Title of Act.**—The Purposes of the Constitutional provision that no bill shall contain more than one subject, which shall be clearly expressed in its title, are to prevent incongruous, disconnected matters which have no relation to each other being joined in one bill. (Mo.) *State v. Brodnax*, 613.

2. **STATUTE—Title of Act.**—Where All the Provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title, the statute is valid. (Mo.) *State v. Brodnax*, 613.

3. **STATUTE—Title of Act.**—Constitutional Provision that no bill shall contain more than one subject, which shall be clearly expressed in its title, should be reasonably and liberally construed and applied, due regard being had to its object and purpose. (Mo.) *State v. Brodnax*, 613.

4. **STATUTE—Title of Act.**—All Matters That are Germane to the principal subject and have a natural connection with it may properly be incorporated in the same bill. Hence a title, "An act making it unlawful to buy or sell" certain articles except upon the payment of a stamp tax, is not insufficient because the body of the statute makes it unlawful "to keep or cause to be kept any office, store or other place wherein is permitted the buying or selling" of such articles. (Mo.) *State v. Brodnax*, 613.

Construction and Interpretation.

5. **STATUTES.**—In Construing a Statute All Acts in *Pari Materia* will be read together. (Wash.) *Bernard v. Benson*, 1051.

6. **STATUTES—Contemporaneous Construction.**—When the meaning of a statute is ambiguous, obscure, or indefinite in any respect, contemporaneous construction may be resorted to in arriving at the intention of the lawmakers. (Wash.) *Bernard v. Benson*, 1051.

7. **STATUTE.**—In Construing Statutes the Rules of the Common Law are not to be changed by doubtful implication nor overturned except by clear and unambiguous language. (Vt.) *State v. Hildreth*, 1022.

STEAM ROLLER.

See Municipal Corporations, 23-31.

STOCK AND STOCKHOLDERS.

See Corporations.

STREET RAILWAYS.

1. **STREET RAILWAY—Person Stepping Around One Car in Front of Another.**—Courts can lay down no precise rule of action to be observed by a man who, passing behind a street-car, finds himself suddenly confronted, without warning, by a rapidly moving car or other vehicle. If, momentarily paralyzed or confused by the imminent danger, he does nothing, or takes a step or two in the wrong direction, and a collision results, it cannot be said, as a matter of law, that he acted in a manner different from which might have been expected from a man of ordinary prudence. (Ill.) *Stack v. East St. Louis Ry. Co.*, 318.

2. **STREET RAILWAY—Persons Stepping Around One Car in Front of Another.**—A person who alights from a street-car, passes behind it, and is struck by another car going in an opposite direction, has a right to rely upon his sense of hearing as well as of sight, and to expect the railway company, in running its car past another car stopped for the discharge of passengers, to give warning and observe ordinances in respect to speed. But while such negligence on the part of the company does not relieve such person from the necessity of exercising care for his own safety, it is to be considered in determining whether his conduct was such as an ordinarily prudent man might have adopted under the circumstances, which question may properly be submitted to the jury. (Ill.) *Stack v. East St. Louis Ry. Co.*, 318.

3. **STREET RAILWAY—Person Stepping Around One Car in Front of Another.**—Where a person alights from a street-car, passes behind it, and steps in front of another car going in an opposite direction, an instruction is objectionable which authorizes the jury to find that the decedent must not only use reasonable care, but must, at his peril, ascertain whether the track is clear or a car approaching. Ordinary care to ascertain the fact is all that is required. (Ill.) *Stack v. East St. Louis Ry. Co.*, 318.

See Carriers.

SUMMONS.

See Process.

TAXATION.

Inheritance Tax.

1. **INHERITANCE TAX—Transfer to Take Effect After Death.**—Where a person places money with a trust company under agreement that the income is to be paid to a beneficiary as often as dividends should become payable, that at the end of five years the settler may withdraw the whole fund by giving the trustee six months' notice and the trustee may pay off the trust fund by giving like notice to the settler, that if no such notices are given, the fund is to remain for another period of five years, and the right of withdrawing or paying off may be exercised at intervals of five years from the date of the agreement, and that in case of the death of the settler before the termination of the trust or any agreed extension thereof the principal and unpaid income are to be paid to the beneficiary in sixty days after the expiration of the five year period, the gift is "made or intended to take effect in possession or enjoyment after the death of the grantor," and on his death the property is subject to the inheritance tax, to be assessed as of a time thirty days after the expiration of the period of five years referred to in the agreement. (Mass.) *New England Trust Company v. Abbott*, 437.

Sales on Board of Trade.

2. **TAXATION—Sales on Board of Trade—Constitutional Law.**—A statute making it unlawful to sell stocks, bonds, grains or other

commodities which are not at the time actually paid for and delivered, without the seller keeping a record thereof and furnishing the buyer a memorandum on which is a stamp of the value of twenty-five cents, purchased from the auditor of the state, the proceeds arising therefrom to constitute a road fund, is not a revenue measure whose validity must be tested by the constitutional principles applicable to direct taxes on property, but it imposes an excise or stamp tax on such transfers or on the privilege of making them. (Mo.) *State v. Brodnax*, 613.

3. TAXATION—Sales of Stocks and Commodities on Board of Trade.—A statute making it unlawful for a corporation, association, partnership or person, engaged in selling stocks, bonds, grain or other commodities which are not at the time actually paid for and delivered, without keeping a record thereof furnishing the buyer a memorandum on which is a stamp purchased from the state auditor, embraces the entire class to which it is applicable, and is not objectionable in singling out a part of a legal class and exempting others of the same class. Nor is it unconstitutional in selecting this particular business calling. (Mo.) *State v. Brodnax*, 613.

4. TAXATION—Classification and Discrimination.—In levying taxes the legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others. The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs. (Mo.) *State v. Brodnax*, 613.

5. TAXATION—Sales of Stocks and Commodities on Board of Trade.—A statute making it unlawful to sell stocks, bonds, grains or other commodities which are not at the time actually paid for and delivered, without the seller keeping a record thereof and furnishing the buyer a memorandum on which is a stamp of the value of twenty-five cents, purchased from the state auditor, is not unconstitutional because of the inequality of the value of the properties sold. The tax is on the transfer, or privilege of making it, and not on the property. (Mo.) *State v. Brodnax*, 613.

6. TAXATION—Sales on Board of Trade—Interstate Commerce.—A statute making it unlawful to sell stocks, bonds, grains or other commodities which are not at the time actually paid for and delivered, without the seller keeping a record thereof and furnishing the buyer a memorandum on which is a stamp purchased from the state auditor, in no way interferes with interstate commerce. (Mo.) *State v. Brodnax*, 613.

7. TAXATION—Sales on Board of Trade—Constitutional Law.—A statute making it unlawful to sell stocks, bonds, grains or other commodities which are not at the time actually paid for and delivered, without the seller keeping a record thereof and furnishing the buyer a memorandum on which is a stamp of the value of twenty-five cents, purchased from the auditor of the state, the proceeds arising therefrom to constitute a road fund, is constitutional. (Mo.) *State v. Brodnax*, 613.

See Licenses, 6, 7; Municipal Corporations, 6.

TEACHERS.

See Schools.

TELEGRAPH AND TELEPHONES.

Discrimination Between Telephone Subscribers.

1. TELEPHONE—Discrimination Against New Subscribers.—For a telephone company to charge new subscribers a higher rate than it

Does old subscribers for the same service is discrimination in violation of section 5270, 2 Compiled Laws. (Mich.) *Bradford v. Citizens' Tel. Co.*, 513.

Office Hours.

2. **TELEGRAPH COMPANY.**—The Reasonableness of the Office Hours of a telegraph company is properly referred to the jury when there is a dispute as to the facts. (S. C.) *Ogilvie v. Western Union Tel. Co.*, 790.

Free Delivery Limits.

3. **TELEGRAPH COMPANY — Delivery Limits.**—An Instruction that where a telegraph company receives a message for transmission and afterward discovers that the person to whom it is sent lives beyond its free delivery limits, it is the duty of the company to notify the sender that additional charges are demanded for the delivery, and if its failure to do so is negligent, and the proximate cause of injury to the sender, the company is liable, is correct as a general proposition; and if the telegraph company desires a modification on the theory that the sender knew that the sendee lived beyond the free delivery limits a request to that effect should be made. (S. C.) *Lyles v. Western Union Tel. Co.*, 829.

4. **TELEGRAPH COMPANY — Delivery Limits.**—One Expecting an early telegram may name to the company any person or any place within the free delivery limits as a place of delivery, and require it to be delivered or tendered to such person or at such place. (S. C.) *Lyles v. Western Union Tel. Co.*, 829.

5. **TELEGRAPH COMPANY — Delivery Limits.**—An Instruction to the effect that a telegraph company cannot avail itself of its rules as to free delivery limits, unless it imparts to the sender a knowledge of such limits, is erroneous, but it may be cured by another instruction covering the general principles applicable to the case and making it clear that the company is entitled to the benefit of such rules, and has a right to extra compensation for delivery beyond the limits fixed. (S. C.) *Lyles v. Western Union Tel. Co.*, 829.

Notice of Terms of Contract.

6. **TELEGRAPH COMPANY—Notice of Contents of Contract.**—Where a message and the contract for sending it are in writing, the sender is charged with notice of what the contract contains. (Ala.) *Western Union Tel. Co. v. Saunders*, 35.

Conflict of Laws.

See post, 31, 32.

7. **CONTRACTS.**—The Law of the State Where a Contract to transmit a telegraphic message is made, and is to be performed, either in whole or in part, governs as to its nature, validity and interpretation. (S. C.) *Brown v. Western Union Tel. Co.*, 914.

8. **TELEGRAPH COMPANY — Conflict of Laws.**—It is Against Public Policy to require the plaintiff, in an action against a telegraph company for negligence in the transmission of an interstate message, to prove at what point on the line the failure occurred, or to permit the defendant to show that the message was delayed at some specific place, thus making the plaintiff's right of recovery dependent upon the laws of that place. (S. C.) *Brown v. Western Union Tel. Co.*, 914.

Negligence in Transmission and Delivery—Actions Therefor.

9. **TELEGRAPH COMPANY.**—A Negligent Delay in the Transmission and delivery of a telegram for two hours may work damages

for which the company is liable, and a plea, in an action for delayed delivery, is insufficient if it simply alleges that the telegram was delivered in less than two hours after receipted for transmission. (Ala.) *Western Union Tel. Co. v. Saunders*, 35.

10. **TELEGRAPH COMPANY—Delay Delivered.—**A Plea in an Action for negligent delay in the delivery of a telegram, averring that the message was not ordered repeated and was not insured within the meaning of provisions therefor in the written contract, is insufficient in failing to negative negligence of the defendant alleged in the complaint. (Ala.) *Western Union Tel. Co. v. Saunders*, 35.

11. **TELEGRAPH COMPANY—Delayed Delivery of Message.—**One may recover damages for undue delay in transmitting and delivering a telegram, caused by the negligence of the company, although the message may, after the damage has been sustained, be delivered. (Ala.) *Western Union Tel. Co. v. Saunders*, 35.

12. **TELEGRAPH COMPANY—Delayed Delivery of Message.—**The delivery of a telegram after undue delay is not a compliance with the contract or the law requiring prompt delivery. And if the delay is caused by the negligence of the company, and damage to the person, reputation or estate of the party contracting with the company follows as a proximate result thereof, he may recover for such actual injury, and also in a proper case for injury to feelings. (Ala.) *Western Union Tel. Co. v. Saunders*, 35.

13. **TELEGRAPH COMPANY—Presumption of Negligence.—**Although in an action against a telegraph company for damages resulting from an inaccuracy in the transmission of a message, the inaccuracy having been shown, the burden is upon the company to show that it was not due to its fault, no presumption can be indulged to sustain an allegation of the company's failure to make timely delivery of a message, when it does not appear that the addressee, or some one representing him, was at the place designated for delivery. *Telegraph Co. v. Griswold*, 37 Ohio St. 301, distinguished. (Ohio St.) *Western Union Tel. Co. v. Sullivan*, 754.

14. **TELEGRAPH COMPANY—Delay in Delivering Message—Evidence.—**In an action against a telegraph company for delay in transmitting a telegram, evidence as to the receipts of the railroad and express companies at the delivery station, where the agent attends to the business of the railroad, express, and telegraph companies, and that his work was too much for one man, is not wholly irrelevant. (S. C.) *Ogilvie v. Western Union Tel. Co.*, 790.

15. **TELEGRAPH COMPANY—Delay in Delivery—Condition of Wires.—**It is competent to explain a delay in the transmission of a telegram, by showing that any trouble with the wires between the sending and delivery offices was not due to the negligence of the telegraph company, but evidence of the condition of a wire is not admissible, if there is no showing of a necessity of the message going over it. (S. C.) *Baker v. Western Union Tel. Co.*, 848.

16. **TELEGRAPH COMPANY.—Delay in the Transmission and delivery of a telegram is evidence of negligence on the part of the telegraph company.** (S. C.) *Baker v. Western Union Tel. Co.*, 848.

17. **TELEGRAPH COMPANY.—Evidence of Long Delay in Delivering a telegram, without an affirmative showing by the company of an effort to deliver, is sufficient to carry the issue of willfulness to the jury.** (S. C.) *Baker v. Western Union Tel. Co.*, 848.

18. **TELEGRAPH COMPANY.—Where a Telegraph Company Neglects to transmit a message promptly, the failure to convey the information from the sender to the addressee, and not the wrongful act of an agent at any particular point prior to the delivery, constitutes the delict.** (S. C.) *Brown v. Western Union Tel. Co.*, 914.

19. **TELEGRAPH COMPANY.—A Telegram is in Transit** not only while it is being sent over the wires, but during the time it is in the hands of a messenger for delivery after it reaches the place where the addressee resides. (S. C.) *Brown v. Western Union Tel. Co.*, 914.

20. **TELEGRAPH COMPANY—Delay in Delivery.**—Where a Complaint alleges that a telegram was not delivered until "after banking hours and too late for" the sender's agent to pay a note referred to in the message, evidence is not fatally variant that by reason of failure to get the telegram promptly the agent used funds in the bank to pay another debt just before the bank closed, and so was unable to prevent the protest of the note. (S. C.) *Baker v. Western Union Tel. Co.*, 848.

21. **TELEGRAPH COMPANY—Allegation That Plaintiff was Party to Telegram.**—Where the complaint in an action against a telegraph company for undue delay in delivering a message does not state whether the telegram was verbal or in writing, but does state that the plaintiff sent it, and the plea states that the message was in writing, the plea must be read in the light of the complaint, and thus the allegations are sufficient to show that the plaintiff was a party to the written telegram. (Ala.) *Western Union Tel. Co. v. Saunders*, 35

Wantonness and Recklessness—Exemplary Damages.

22. **TELEGRAPH COMPANY—Reckless Disregard of Rights.**—A telegraph company is liable in exemplary damages for a reckless or willful disregard of the rights of a party to a telegram in failing to deliver it at the destination without the state. (S. C.) *Brown v. Western Union Tel. Co.*, 914.

23. **TELEGRAPH COMPANY—Wantonness in Failure to Deliver Message.**—Where an operator, on receiving a telegram, notifies the sending office that there is no way to get it to the sendee, who lives out in the country, and, receiving no answer, fails to mail the telegram to the sendee as directed by the rules of the company in such cases, and the sending office fails to notify the sender of the non-delivery of the telegram until twenty-four hours afterward, and the message is not delivered until some twenty-eight hours after it reaches the receiving operator, it is not error to submit to the jury the issue of wantonness or recklessness, as well as negligence. (S. C.) *Lyles v. Western Union Tel. Co.*, 829.

24. **TELEGRAPH COMPANY.—A Delay of Four or Five Hours in Delivering a telegram,** without proof of a direct line between the initial and terminal offices, or other supporting circumstances, is not evidence of willful disregard of duty. (S. C.) *Baker v. Western Union Tel. Co.*, 848.

25. **TELEGRAPH COMPANY—Punitive Damages for Delay.**—The unexplained delay of a telegram at a relay office from 4 o'clock in the afternoon to 10 o'clock the next morning, affords sufficient evidence to take the question of punitive damages to the jury. (S. C.) *Ogilvie v. Western Union Tel. Co.*, 790.

Notice of Contents of Telegram.

26. **TELEGRAPH COMPANY—Notice of Importance of Message.** Where a telegram reads: "Pay note bank of Charleston to-day," and the sender informs the operator that he has a note due in Charleston and that the message is important, this puts the telegraph company on notice that the probable consequences of failure to deliver will be the dishonor of the note and injury to the sender's credit. (S. C.) *Baker v. Western Union Tel. Co.*, 848.

27. **TELEGRAPH COMPANY—Notice of Contents of Message.**—A telegram reading "Charlie died to-day. Meet at Bookman to-morrow," is itself notice that delay in delivery will probably result in some

want of care of the body and some delay in the burial. (S. C.) *Lyles v. Western Union Tel. Co.*, 829.

Damages for Failure to Deliver—Injury to Credit.

28. **TELEGRAPH COMPANY—Damages for Failure to Deliver.**—Since a telegraph company for failure to deliver a message is liable only for such damages as naturally result from the breach of its contract, special damages cannot be recovered unless for injuries of such a nature as the terms of the message, or some circumstances attending its transmission, would suggest as likely to result from such failure. *Bank v. Telegraph Co.*, 30 Ohio St. 555, approved and followed. (Ohio St.) *Western Union Tel. Co. v. Sullivan*, 754.

29. **TELEGRAPH COMPANY—Delay in Delivery—Injury to Credit.**—Where delay in the transmission of a telegram results in the dishonor and protest of a note given by the sender, and he sues for injury to his credit, he may testify to circumstances indicating that his credit was not injured by protest of other notes. (S. C.) *Baker v. Western Union Tel. Co.*, 848.

30. **TELEGRAPH COMPANY—Delay in Delivery—Injury to Credit.**—A telegraph company is liable to a merchant for injuries resulting to him from his note being protested when he had funds with which to pay it and which would have been so used but for negligence in not delivering the message promptly. (S. C.) *Baker v. Western Union Tel. Co.*, 848.

Damages—Mental Anguish.

31. **TELEGRAPH COMPANY—Mental Anguish—Conflict of Laws.** A telegraph company undertaking to transmit a message from a point in South Carolina to a place in the District of Columbia is liable in South Carolina for mental anguish for failure to deliver promptly at the destination, although the law in the District of Columbia does not permit such a recovery except accompanied by bodily injury. (S. C.) *Brown v. Western Union Tel. Co.*, 914.

32. **TELEGRAPH COMPANY—Mental Anguish—Conflict of Laws.** Where a telegraph company delays the transmission and delivery of a message sent from a point in South Carolina to a place without the state, and part of the delay takes place within the state, the company is liable for mental anguish under the law of that state. (S. C.) *Brown v. Western Union Tel. Co.*, 914.

33. **TELEGRAPH COMPANY—Mental Anguish.**—Where Negligence in delivering a telegram of the shipment of the body of the sender's deceased husband resulted in the body lying at a railway station several hours exposed to the sun, and in being interred at night without the usual burial rites, the sender may recover for mental anguish suffered after these facts came to her knowledge. (S. C.) *Lyles v. Western Union Tel. Co.*, 829.

34. **TELEGRAPH COMPANY—Evidence of Mental Anguish.**—In an action by a mother for the negligent delay of a telegram that her son has been injured, her testimony that her "suspense was terrible," and her husband's testimony that "it was pretty bad; she was all to pieces; I never saw her like that before in my life," does not show that her suffering was beyond what the average mother would feel in her situation, and its admission does not violate the rule excluding testimony as to the plaintiff's peculiar or abnormal fears and apprehensions. (S. C.) *Ogilvie v. Western Union Tel. Co.*, 790.

35. **TELEGRAPH COMPANY—Mental Anguish of Mother.**—The regret or disappointment of a mother in being delayed, through negligence in the transmission of a telegram, in reaching and ministering to her son who has been injured, may be so keen or intense as to be properly charged as mental anguish. (S. C.) *Ogilvie v. Western Union Tel. Co.*, 790.

36. TELEGRAPH COMPANY—Mental Pain.—Where a Child is ill and the father telegraphs to his wife's mother of the illness and for her to come, the relation between the sender, the sendee, and the child is such as to entitle the sender to damages for mental anguish in case the delivery of the message is negligently delayed. (Ala.) *Western Union Tel. Co. v. Saunders*, 35.

Damages for Opening Telegram.

37. TELEGRAM—Damages for Opening and Using Information.—Where one wrongfully opens a telegram containing an offer to the addressee to purchase his land, and, with the information thus acquired, himself exchanges property of less value for the land, the loss sustained by the addressee is the difference in the values of the two properties, irrespective of the tentative offer in the telegram. And an action for treble damages lies. (Wash.) *Deighton v. Hover*, 1035.

See Evidence, 13, 14.

TENANTS IN COMMON.

See Parties.

TENDER.

TENDER—Necessity of Actually Making in Equity.—If a bill in equity contains a general offer to do equity in conformity with the decree of the chancellor, this will suffice without making an actual tender. (Mo.) *Peak v. Peak*, 638.

THEFT,

See Larceny.

TITLE OF ACT.

See Statutes, 1-4.

TREATIES.

TREATIES—Rules of Construction.—In the construction of treaties, words are to be taken as understood in the public law of nations, and not in any artificial or special sense impressed by local law, unless the restricted sense is clearly intended. (Cal.) *Estate of Ghio*, 145.

TRIAL.

In General.

1. TRIAL—Sufficiency of Evidence to Support Verdict.—There was sufficient evidence to support the verdict, which is approved by the trial judge. No substantial error of law was committed requiring a new trial. (Ga.) *Jones v. McElroy*, 276.

2. TRIAL.—In Disposing of a Demurrer to the Evidence it is an unending rule that the defendant's evidence contradicting the plaintiff's, fills no office; that the plaintiff is entitled to have his evidence taken as true and the contradictory evidence of defendant as untrue; and is allowed every reasonable and favorable inference of fact naturally deducible from his own or the uncontradicted testimony of the defendant. Measured by this rule, if there is found any substantial evidence sustaining the essential averments of the petition, the demurrer will be overruled. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

3. TRIAL.—On Motion for Nonsuit or Its Counterpart, the direction of a verdict, the evidence for the plaintiff must be accepted as true and construed in the light most favorable for him. (S. C.) *Lowe v. Southern Ry.*, 904.

Effect of Admitting Incompetent Evidence.

4. **TRIAL—Effect of Admitting Incompetent Evidence.**—Parties may try their cases on immaterial evidence if they desire, but they will not be allowed to admit evidence without objection, and then have the court charge the jury that they cannot find a verdict on it because not competent or relevant. (Ala.) *Birmingham Ry. etc. Co. v. Girod*, 17.

Misconduct in Argument.

See Criminal Law, 5.

5. **TRIAL—Misconduct in Argument—Withdrawal of Statements.** In an action against a railroad company to recover damages for the destruction of plaintiff's property by fire, alleged to have been communicated thereto by sparks emitted from one of the defendant's locomotives, plaintiff's counsel in argument to the jury stated that "within thirty days after the occurrence of this fire counsel for the defendant made an offer of settlement, and that offer was repeated as late as the day of the commencement of this trial," which statement, upon objection being made thereto, counsel for plaintiff stated he would withdraw, and the court directed the jury to disregard the same. When it appears from the record that under all the evidence adduced in the case the question of defendant's negligence and consequent liability is a very close question of fact, a judgment entered upon a verdict in favor of the plaintiff should be reversed notwithstanding counsel's attempted withdrawal of his improper statements and the admonition of the court to the jury to disregard them, unless it clearly appears from the record that such improper statements did not influence the verdict rendered. (Ohio St.) *Toledo etc. R. R. Co. v. Burr*, 771.

Instructions to Jury.

6. **TRIAL—Instruction Stating Facts.**—The Constitutional requirement that the judge shall not state the facts in charging the jury does not prohibit such reference to the undisputed evidence as is necessary to enable the jury to apprehend the law applicable to the concrete issues of fact which they are to decide. (S. C.) *State v. Driggers*, 855.

7. **TRIAL—Instructions Singling Out Evidence.**—The court is not required to single out and emphasize any of the evidence bearing on the issues. A request for an instruction that it would be proper for the jury on the issue of insanity "to consider the general conduct, condition, appearance and language of the defendant," is properly refused. (S. C.) *State v. Driggers*, 855.

8. **TRIAL—Instructions—Minor Errors.**—Where a general charge covers substantially the law applicable to an issue, an appellate court should not grant a new trial on the supposition that the jury were influenced by minor errors or inconsistencies in granting or refusing requests discernible only on careful analysis. (S. C.) *Lyles v. Western Union Tel. Co.*, 829.

9. **TRIAL—Instructions—Precision in Drawing.**—An instruction intended to outline the plaintiff's whole case should be drawn with precision, simplicity and circumspection, keeping in mind the several and varying phases of the case and grounds of recovery. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

10. **TRIAL—Confusing and Complicated Instruction.**—It is reversible error to give an instruction in an unfair, complicated and confusing form. (Mo.) *Phelan v. Granite Bituminous Pav. Co.*, 582.

11. **TRIAL—To Refuse an Instruction is not Error** if those given contain the whole law of the case. (Ky.) *Madisonville etc. R. R. Co. v. Cates*, 379.

12. **TRIAL—Duty of Judge in Giving Instructions.**—While it is the duty of a judge to state the contentions of the litigants, an instruction that the jury will find the contentions of the parties in the petition and answer, which are so clearly set out and so frequently referred to by counsel that the court does not deem it necessary to again state them, sufficiently meets the requirement, unless the special facts of the case demand a more formal summary to prevent possible misapprehension. (Ga.) *Jones v. McElroy*, 276.

13. **TRIAL—Inaccurate but not Misleading Instruction.**—In view of its context and the general charge, an instruction that the evidence "should be stronger to show the plaintiff is correct in her contentions than it is going to show that the defendant's contentions are correct; but if it be but slightly so, that would be sufficient," though inaccurate, is not so misleading as to require a new trial. (Ga.) *Jones v. McElroy*, 276.

14. **TRIAL—Instruction in Regard to Documentary Evidence.**—In a case where documentary evidence is submitted, an instruction that "you take the law from the court and the facts from the witnesses, and apply the one to the other and make your verdict," is technically inaccurate. But from the general structure of the charge and the scope of the evidence it is apparent in this case that the jury could not have been misled by the inaccurate expression, as excluding the documentary evidence from their consideration. (Ga.) *Jones v. McElroy*, 276.

Setting Aside Verdict.

15. **TRIAL—Claims That a Verdict is Against the Evidence and against the weight of evidence are one and the same.** (Vt.) *Lincoln v. Central Vermont Ry. Co.*, 998.

16. **TRIAL—A Motion to Set Aside a Verdict on the ground that it is against the weight of evidence and excessive is addressed to the sound judicial discretion of the court, and the decision thereon is not reviewable unless the court failed or refused to exercise its discretion or abused it.** (Vt.) *Lincoln v. Central Vermont Ry. Co.*, 998.

17. **TRIAL—A Verdict may be Set Aside by the Trial Court if it appears to have resulted from passion, prejudice, corruption or disregard of the evidence.** (Vt.) *Lincoln v. Central Vermont Ry. Co.*, 998.

See Jury; New Trial.

TROVER.

See Chattel Mortgages; Landlord and Tenant, 2-4.

TRUSTS.

1. **TRUST FUND—Right of Beneficiary to Follow.**—When a trustee deposits in a bank in one fund, without any earmark, money of his own and money which he holds in trust, the beneficiary, though wholly unable to identify his money in the bank, may yet at his election follow the mixed fund thus created and enforce a charge thereon for his indemnity. (Mass.) *Hewitt v. Hayes*, 448.

2. **TRUST FUND—Right of Beneficiary to Follow.**—Where a trustee deposits in a bank in one fund, without any earmark, money of his own and money which he holds in trust, it will be presumed, for the protection of the beneficiaries, that withdrawals made by the trustee by check from the mixed fund were made from his own part of the fund, and not from that part consisting of the trust money, so long as there remains in the fund available for use any part of his own money. (Mass.) *Hewitt v. Hayes*, 448.

3. TRUST FUND—Right of Beneficiary to Follow.—Where a trustee mingles trust funds in bank with his own, the beneficiary is not allowed a charge upon the entire fund, regardless of deposits and withdrawals made after the deposit of his own money, but only upon what is left in the fund after the proper application of whatever withdrawals have been made by the trustee. (Mass.) *Hewitt v. Hayes*, 448.

4. TRUST FUND—Right of Beneficiary to Follow.—Where a trustee mingles trust funds in a bank with his own, the beneficiary is not given a charge upon the general estate of the trustee, on the ground that that estate has been enriched at his expense, but is merely allowed to hold a charge upon the specific account or fund into which his money has gone and in which equity can presume that it still remains. (Mass.) *Hewitt v. Hayes*, 448.

5. TRUST FUND—Right of Beneficiary to Follow.—Where a trustee, who deposits in a bank in one fund trust funds with his own, overdraws the fund, the amount for which any of the beneficiaries is entitled to a charge is determined by taking the deposit first thereafter made of his money and adding thereto the amount of any such later deposits. But this will be reduced by withdrawals made by the trustee. And when such withdrawals cannot be treated as made from his part of the fund, they must, as among those claimants entitled to a charge upon the fund, be charged against the deposits in the order of their respective dates, the doctrine that the first withdrawal will be applied to the first deposit being followed among the claimants, though not followed between them and the trustee. And when the amount subject to a charge in favor of a claimant has been diminished by the application against it of such withdrawals, it is never increased by any subsequent deposit by the trustee not shown to have been the money of that particular claimant. If the total amount that can be held by all the claimants who are entitled to a charge upon the fund thus determined exceeds the amount of the fund, then that amount is to be divided among them in proportion to the amounts of their respective charges. If the total amount of their charges is less than the amount of this fund, then they are to receive the amount of their respective charges in full. (Mass.) *Hewitt v. Hayes*, 448.

6. TRUST FUND—Remedies Against Bankrupt Trustee.—Where a trustee mingles trust funds in bank with his own and is then adjudged bankrupt, the beneficiaries may by suit in equity charge the specific fund into which they can trace their money, or they may prove their claims in bankruptcy as creditors. But these remedies are inconsistent, and an election to pursue one is a bar to the other. (Mass.) *Hewitt v. Hayes*, 448.

VAGRANCY.

VAGRANCY—Constitutionality of Statute Defining.—A statute is constitutional which provides that all able-bodied persons who habitually loaf, loiter and idle in any city, town, railroad station, or other public place for the larger portion of their time, without any regular employment and without any visible means of support, are vagrants. (Tex. Cr.) *Ex parte Strittmatter*, 937.

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VENDOR AND VENDEE.

In General.

1. **VENDOR—Necessity of Title at Time of Contract.**—One may contract to sell land to which he has no title, and the contract will be valid and enforceable if at the time of performance by him he is able to convey good title. (Cal.) *Backman v. Park*, 153.

2. **VENDOR—Necessity of Title at Time of Contract.**—In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will convey to the

purchaser a title without defect. But the vendor sufficiently complies with this obligation if he is able to give a good title at the time when, by the terms of the contract, he is required to make the conveyance. And if the vendee refuses such title thus tendered, he is liable in damages for a breach of contract. (Cal.) *Backman v. Park*, 153.

3. VENDOR—Tender of Title not Deraigned Through Himself.—Where a vendor tenders full and complete title, not his own, but that of the owner, and the vendee refuses to accept the deed, but makes no objection that the title is not deraigned through the vendor, he waives that irregularity, and becomes answerable for a breach of the contract. (Cal.) *Backman v. Park*, 153.

4. VENDOR AND VENDEE—Taking Possession by Grantee.—Grantees will be treated as having received possession with their deed, although there is no evidence that they ever went upon the land. (Vt.) *Sowles v. Minot*, 1010.

5. VENDOR AND VENDEE—Fraud in Procuring Deed—Bona Fide Purchaser.—Where a deed is duly executed, but is fraudulently procured by the grantee, a subsequent purchaser for value without notice will be protected against the grantor and his heirs. (S. C.) *Merck v. Merck*, 815.

6. VENDOR AND VENDEE—Facts Putting on Inquiry.—What makes inquiry a duty to a prospective purchaser of land is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. (Wash.) *Bernard v. Benson*, 1051.

7. VENDOR AND VENDEE.—A Bona Fide Purchaser's Grantee takes the property free of the rights of persons under an executory contract of sale, regardless of notice to him. (Wash.) *Bernard v. Benson*, 1051.

Lien of Vendor.

8. VENDOR'S LIEN—Origin in Chancery.—The lien of a vendor does not have its origin in statutory enactment; it has been generally recognized by courts of chancery. (Cal.) *Royal Consolidated Min. Co. v. Royal Consolidated Mines*, 165.

9. VENDOR'S LIEN.—A Vendor's Lien is not the Result of any agreement or intention of the vendor or vendee, but is a simple equity raised by courts for the benefit of vendors of real estate. (Cal.) *Royal Consolidated Min. Co. v. Royal Consolidated Mines*, 165.

10. VENDOR'S LIEN—Presumption of Existence.—A vendor's lien is presumed to exist in case of a sale of real estate, and as an incident of the transaction. (Cal.) *Royal Consolidated Min. Co. v. Royal Consolidated Mines*, 165.

11. VENDOR'S LIEN—Waiver or Relinquishment.—The right afforded by a vendor's lien of enforcing payment of the consideration against the property conveyed is a personal one, and it may be waived and relinquished without consideration or writing, and once waived is gone forever. (Cal.) *Royal Consolidated Min. Co. v. Royal Consolidated Mines*, 165.

12. VENDOR'S LIEN—Waiver or Relinquishment.—If a vendor does any act manifesting an intention not to rely on the lien given him by law for the payment of the purchase money, without an express agreement that he may still have his lien, it ceases to exist. (Cal.) *Royal Consolidated Min. Co. v. Royal Consolidated Mines*, 165.

13. VENDOR'S LIEN—Contract Inconsistent With Existence.—Where a corporation conveys mines free of encumbrance to an individual to form a corporation and transfer the properties unencumbered to it, and the latter corporation is to issue and sell its shares in an amount above three times what the selling corporation is will-

ing to take for the properties, and ninety per cent of the shares are to be deposited in a bank to be dealt with in a specified manner, and a stated proportion of the sum realized on the sale of shares, and from the operation of the mines, is to go in satisfaction of the consideration stated in the agreement, the transaction is inconsistent with the existence of a vendor's lien. (Cal.) *Royal Consolidated Min. Co. v. Royal Consolidated Mines*, 165.

14. **VENDOR'S LIEN.**—Failure to Pay the Purchase Price cannot of itself create a vendor's lien where none has theretofore existed. (Cal.) *Royal Consolidated Min. Co. v. Royal Consolidated Mines*, 165.

15. **A VENDOR'S LIEN will not Arise to Secure the Performance** of an act the nonperformance of which would make a claim for unliquidated damages. (Ark.) *Cox v. Smith*, 89.

16. **VENDOR'S LIEN.**—Where the Vendee of Land Pays Part of the consideration in cash, and agrees to pay the balance, which is a definite sum, by building a partition wall, but in case of his failure to build the wall he agrees to pay such sum in cash, the vendor has a lien for the unpaid portion if the vendee fails to construct the wall. (Ark.) *Cox v. Smith*, 89.

17. **VENDOR'S LIEN—Necessity of Definite Debt.**—One essential condition to the creation of a vendor's lien is a definite, ascertained debt owing for the purchase price of the land. (Ala.) *Burroughs v. Burroughs*, 59.

18. **VENDOR'S LIEN—Agreement to Support Grantor.**—A grantor has no lien upon the subject of conveyance when the sole consideration therefor is an agreement by the grantees to support him during life. There is no ascertained and definite debt. (Ala.) *Burroughs v. Burroughs*, 59.

See Deeds; Limitation of Actions, 1; Records.

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WARRANTIES.

See Insurance; Sales.

WATER COMPANIES.

See Waters and Watercourses, 6-8.

WATERS AND WATERCOURSES.

Prescriptive Rights—Appurtenance.

1. **WATERS**—Prescriptive Right to Use from Spring.—One may acquire a prescriptive right to take water for use on his premises from a spring located on another's land, by taking water in pails from a roadside watering-trough fed by the spring. (Vt.) *Corevo v. Holman*, 985.

2. **WATERS**—Right to Take, Whether Passes as Appurtenance.—A prescriptive right to take water from a roadside watering-trough fed by a neighboring spring passes as an appurtenance in a deed conveying the premises with which the right is connected. And it is not necessary that the water should be running in or on such premises; it is enough if it is carried in pails thereon. (Vt.) *Corevo v. Holman*, 985.

Water-Power.

3. **WATER-POWER**—Loss by Nonuser.—The right to a water-power is not lost by nonuser. (Vt.) *Sowles v. Minot*, 1010.

4. **WATER-POWER**—Nonuser and Abandonment.—There cannot be an abandonment of the right to a water-power without an intention to abandon. And an intention to abandon will not be inferred from mere nonuser or nonpayment of taxes. (Vt.) *Sowles v. Minot*, 1010.

5. **WATER-POWER**—Grant of Privilege.—In a deed of land the words "with the privilege of taking and using from the flume now occupied by said Crane, or any other flume which may be there erected, sufficient water to carry two tub bellowses for a blast furnace," should be construed to be a measure of the power granted and not a restriction of its use. (Vt.) *Sowles v. Minot*, 1010.

Water Companies.

6. WATER COMPANIES—Service Without Discrimination.—The business of a water company, invested with the power of eminent domain, is affected with a public use, and it must serve all with equal facilities and without discrimination. (Ala.) *State v. Birmingham Waterworks Co.*, 69.

7. WATER COMPANIES—Discrimination in Rates.—When a water company grants to one or more consumers a rate less than the legally fixed maximum, and less also than the reasonable rate which it might exact, all other consumers are not entitled to the rate as of right. (Ala.) *State v. Birmingham Waterworks Co.*, 69.

8. WATER COMPANIES—Discrimination in Rates.—A water company, whenever it makes a concession to a consumer, does not thereby fix a new schedule of rates for all its consumers to be observed in all cases. (Ala.) *State v. Birmingham Waterworks Co.*, 69.

Surface Waters.

9. SURFACE WATER—Right to Accelerate or Retard Flow.—Where two estates, one lower than the other, join, the lower is subject to the easement or servitude of receiving the natural flow of surface water from the upper one. Therefore the owner has no right to create obstructions causing such water to back upon or overflow the upper ground. And the owner of the upper estate must not, by operations on his land, divert the water from its natural channel and thereby make a new channel on the lower ground, nor collect in one channel waters usually flowing off on his neighbor's land by several channels and thereby increase the flow upon the lower ground. (Ky.) *Madisonville H. & E. R. R. Co. v. Cates*, 379.

10. SURFACE WATER—Right to Accelerate or Retard Flow.—Where a railroad company negligently diverts surface water from its natural channel, or obstructs its usual course, and causes it to overflow an adjoining estate in greater and unusual quantities than was its wont, to the injury of crops thereon, the company will not be heard to complain that the owner does not minimize his damages. He is under no duty to relieve the company from the consequences of its negligence. (Ky.) *Madisonville H. & E. R. R. Co. v. Cates*, 379.

11. SURFACE WATER—Damages for Flooding Crops.—The measure of damages for injury to growing crops by causing surface water to overflow the land is the value while standing, of so much of them as are wholly destroyed, and the depreciation in the value of the remainder. (Ky.) *Madisonville H. & E. R. R. Co. v. Cates*, 379.

WILLS.*Construction—Estate Created.*

1. WILL—Life Estate With Power of Disposal.—Where a man devises all his property to his wife for life, with power to convey, and in the clause following devises, upon her death, the estate that may be remaining to his heirs living at the time of his decease, the will creates a life estate in the wife with a vested remainder over to such heirs. (Mich.) *Farlin v. Sanborn*, 525.

2. WILL—Power of Disposal—Life Estate.—Where an estate is given generally or indefinitely, with a power of disposition, it carries the fee, except when the testator gives the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. (Mich.) *Farlin v. Sanborn*, 525.

3. WILL—Life Estate With Power of Disposal.—Where a man devises all his property to his wife for life, with power to use and dispose of it for her use, support and comfort, this does not give her

a right to dispose of the property by will or gift inter vivos. (Mich.) *Farlin v. Sanborn*, 525.

4. **WILLS—Construction—Vesting and Devesting of Estate.**—It appears from the petition that item 3 of a will was as follows: "I hereby give and bequeath unto my well-beloved nephew, Thomas Bird Parks, all the remainder or remainders of my property of every description, both real and personal, to him and his heirs forever, on this express condition and limitation, to wit: if the said Thomas Bird Parks shall survive the present war, and after my decease, my house his home and usual dwelling-place, then and in that case he is to have all the property named in this 3rd item, and not otherwise," and that "Item 4 of said will provides that on failure of the said Thomas Bird Parks to comply with item 3, then all property therein mentioned is to go to Joseph C. Parks and Dudley Parks." Held, that if the devisee named in the third item survived the war referred to in the will, and after the death of the testator made the house referred to in the will "his home and usual dwelling-place," title to the property devised in the third item vested in such devisee, and his subsequent removal from the house and abandonment thereof as "his home and usual dwelling-place" would not divest him of such title. (Ga.) *Parks v. Wilkinson*, 209.

Gift to Class.

5. **WILL—Gift to Class.**—The Death of One of the class to which a testamentary devise is made, prior to the death of the testator, does not cause the legacy to lapse, but those of the class who survive the testator take the whole devise. (Cal.) *Estate of Murphy*, 110.

6. **WILL.—A Gift to a Class is a Gift of an Aggregate Sum** to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number. (Cal.) *Estate of Murphy*, 110.

7. **WILL—Gift to Class.**—In Determining Whether a devise is to a class or to individuals, importance is attached to the fact that the gift is to the devisees nominatim, and that the particular share they shall each receive is mentioned. When this appears the bequest constitutes a gift and devise, individually as tenants in common, and not as a devise to a class. (Cal.) *Estate of Murphy*, 110.

8. **WILL—Gift to Class.**—If Words Which, Standing Alone would be effectual to create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers from the designation by name and mention of the share each is to take that the devisees are to take individually and as tenants in common, and that the descriptive statement is intended merely as matter of identification. (Cal.) *Estate of Murphy*, 110.

9. **WILL—Gift to Class.**—The Rules of Construction for determining whether a gift is to a class are not absolute, but give way to the intention of the testator as gathered from the consideration of all the provisions of the will, or, if they are not clear, by a consideration of the circumstances surrounding the making of it. (Cal.) *Estate of Murphy*, 110.

10. **WILL—Gift to Class—Circumstances Showing Intention.**—Where a testator gives the residue of his estate equally to four named children of his sister, the fact that he lived with her from the childhood of the children up to her death, had a deep affection for the children, took great interest in their welfare, and had other nieces and nephews whom he did not mention in his will, does not aid the construction of the will as to whether the gift is to the individuals or the class. (Cal.) *Estate of Murphy*, 110.

11. WILL—Gift to Class—Prevention of Intestacy.—The canon of interpretation applicable to prevent intestacy cannot be invoked to establish a gift to a class against the rules of law declaring the legal meaning of the language in a will. (Cal.) Estate of Murphy, 110.

12. WILL—Gift to Class, What is not.—A Residuary Clause, "all the rest of my property both real estate and personal property shall go to, and be equally divided among the four children of my late sister Catherine F. Flynn, deceased; that is to say: I give, devise and bequeath all the rest of my personal property and all my real estate of whatsoever kind and wheresoever situate, share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast"—does not constitute a gift to a class, and upon the death of one of the children without lineal descendants before the testator, the share devised to him lapses and goes to the heirs of the testator. (Cal.) Estate of Murphy, 110.

Will Contest—Forgery.

13. WILL CONTEST—Forgery—Burden of Proof.—Where a will was offered for probate in solemn form, and a caveat was filed, raising only contentions that the will was not signed by the purported testatrix and executed as provided by law, but was a forgery, and that if she signed it she had no knowledge of its contents, and where the evidence was conflicting as to whether she signed the instrument and whether the attesting witnesses whose names appear on it in fact signed it, two of them being dead, and testimony being introduced as to their handwriting, it was error for the presiding judge, after instructing the jury that before they could set up the will and before a case was made out on the part of the propounders, it must be shown to their satisfaction that the alleged testatrix signed the instrument in the presence of all three of the witnesses whose names appeared thereon, to add that when this was done the burden of proving that the instrument was a forgery or was not the last will and testament of the alleged testatrix and that it had not been proved as the law required was shifted to the caveator, and that in order to carry this burden it was upon him "to satisfy the jury of the truth of his contentions" before they would be authorized to find in his favor. (Ga.) Mobley v. Lyon, 213.

14. WILL CONTEST—Forgery—Attesting Witnesses.—Where a will was offered for probate in solemn form, and was caveated as being a forgery, and it appeared that two of the three attesting witnesses were dead at the time of the trial, and evidence was introduced to prove their handwriting, and evidence was offered pro and con as to the genuineness of the signatures of such witnesses, especially as to one of them, it was competent, in resistance of the implication arising from his signature if it were genuine, to show that after the date of the instrument he had made statements tending to show that the alleged testatrix had not made any will. (Ga.) Mobley v. Lyon, 213.

15. WILL—Gift Void for Uncertainty.—A provision in a will bequeathing a sum of money to the executors "to use as they see proper" is void for uncertainty. (Minn.) Casey v. Brabec, 531.

See Executors and Administrators; Witnesses, 7.

WITNESS.

Infants as Witnesses.

1. WITNESS.—An Infant Under the Age of Fourteen is not presumed to have capacity to testify, and inquiry will be made on that point. (Ark.) Crosby v. State, 80.

2. **WITNESS.**—The Competency of an Infant Under the age of fourteen to testify is left to the legal discretion of the trial judge, and in the absence of a clear abuse or manifest error the judicial discretion is not reviewable. (Ark.) Crosby v. State, 80.

3. **WITNESS.**—A Child Ten Years Old, in Order to be a Competent witness, must not only have intelligence enough to understand what he is called upon to testify about and the capacity to state what he knows, but he must have a due sense of the obligation of an oath, by which is meant that the promise to tell the truth must be under "an immediate sense of the witness' responsibility to God, and with a conscientious sense of the wickedness of falsehood." (Ark.) Crosby v. State, 80.

4. **WITNESS—Competency of Infant.**—It is Reversible Error to hold a boy ten years old competent to testify in a homicide case, if in answer to a direct question he states that it is wrong not to tell the truth, but that he does not know what will be done to him if he does not tell the truth, the examination proceeding no further, and he not stating anything from which it can be inferred that he has a sufficient sense of the danger and wickedness of false swearing or comprehends the sanctity and obligation of an oath. (Ark.) Crosby v. State, 80.

Husband and Wife.

5. **WITNESS.**—A Husband Could not at Common Law be a witness for or against his wife as to any matter, nor could he, either during the marriage or after its termination by death or divorce, be called as a witness to testify to communications between them, or to any fact or transaction the knowledge of which was obtained by means of the marriage relation. (Ill.) Schreffler v. Chase, 330.

6. **WITNESS.**—The Common-law Rule Prohibiting a Husband from testifying for or against his wife has been modified by sections 1 and 5 of the evidence act of Illinois, but neither of these sections renders him a competent witness except in the cases enumerated in the exceptions in section 5, which apply only where the husband or wife of the witness is a party to the suit. (Ill.) Schreffler v. Chase, 330.

7. **WITNESS—Divorced Husband.**—In a Will Contest on the ground of mental incapacity the divorced husband of the testatrix cannot testify of facts which came to his knowledge by reason of the marriage relation and which tend to show that she was of unsound mind. (Ill.) Schreffler v. Chase, 330.

Examination by Judge.

8. **WITNESSES—Examination by Judge.**—A Judge may Propound to witnesses such questions as he thinks proper and necessary to ascertain the truth of the matter under investigation, but he should do so in a fair and impartial manner, and not by the manner of his questions indicate to the jury his opinion as to the facts or as to the weight or sufficiency of the evidence. (S. C.) State v. Anderson, 887.

9. **WITNESS—Questioning by Judge.**—It is Within the Province of the trial judge to elicit from witnesses any evidence tending to show the truth of the matter in issue. (S. C.) State v. Driggers, 855.

Incriminating Answers.

10. **WITNESS — Privilege — Incriminating Testimony.**—The privilege of a witness to decline to answer a question because the answer will tend to incriminate him is strictly personal; and although the court may properly instruct him as to his privilege, it cannot exclude material evidence for his protection unless he claims his privilege. (Vt.) State v. Andrews, 1008.

Cross-examination and Impeachment.

11. WITNESS—Cross-examination—Collateral Matter.—A recognized rule, or rather qualification of the rule, governing the impeachment of a witness by proof of contradictory statements elsewhere made by him, is that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relative to the issue being tried. (Cal.) Estate of Gird, 131.

12. WITNESS—Impeachment by Showing Immorality.—Questions on cross-examination, tending to show the general immorality of the witness or specific acts of immorality, should never be allowed in any case for the mere purpose of discrediting or impeaching the witness. (Cal.) Estate of Gird, 131.

13. WITNESS—Method of Impeachment.—The Code of Civil Procedure prescribes the method of impeaching witnesses, and they can be impeached in no other way than therein prescribed. (Cal.) Estate of Gird, 131.

14. WITNESS—Contradicting One's Own Witness.—The fact that a plaintiff reads to the jury testimony of one of the defendant's witnesses, an engineer, taken at a former trial, does not bind him to the witness' judgment and conclusions or all his statements of fact. But having used the testimony as his own, the plaintiff is precluded from impeaching the witness. Yet a plaintiff may show the facts by other witnesses, although such facts contradict his own witness and incidentally or indirectly hurt his credibility. (Mo.) Phelan v. Granite Bituminous Pav. Co., 582.

15. WITNESS—Discrediting—Showing Relation to Defendant.—Permitting the solicitor to show that a witness for the state is the putative father of the defendant is not within the rule that a party cannot discredit his own witness. (S. C.) State v. Lee, 869.

See Evidence.

WORDS AND PHRASES.

1. WORDS AND PHRASES.—"A Family" is a Collective Body of persons living together under one head or manager. A bachelor may have a family. (Cal.) Estate of Gird, 131.

2. WORDS AND PHRASES.—The Word "Payable," as commonly employed in paper or contracts in stating the time or manner of payment, does not give the debtor an option or privilege of paying at such time or in such manner, but signifies that payment is to be thus made. A direction in a check to the drawee bank that it is "payable" through another named bank means that it is to be paid in that way. (Ga.) Farmers' Bank of Nashville v. Johnson, 242.

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